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**UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA**

14 **Stanley William Paher, Terresa Monroe-Hamilton,**
 and **Garry Hamilton, Daryl Byron DeShaw, Jeff**
 15 **Ecker, Gary Gladwill, Linda Barnett, and Nevada**
Right to Life, Plaintiffs

Case No.: 3:20-cv-00243

16 v.

**Plaintiffs’ Second Preliminary-
 Injunction Motion**

17 **Barbara Cegavske**, in her official capacity as Nevada
 Secretary of State, **Deanna Spikula**, in her official
 18 capacity as Registrar of Voters for Washoe County,
 and **Joseph P. Gloria**, in his official capacity as Reg-
 19 istrar of Voters for Clark County, *Defendants*

20 Based on their Amended Complaint, Plaintiffs move for a preliminary injunction on four
 21 claims. (I) Violation of their right to vote by *direct* disenfranchisement; (II) violation of their
 22 right to vote by *vote-dilution* disenfranchisement; (III) violation of their right to vote in, and
 23 have, an election in a manner prescribed by the legislature, U.S. Const. art. I, § 4, cl.1; and (IV)
 24 violation by Clark County of right to vote and equal protection under the one-person-one-vote
 25 mandate of the First and Fourteenth Amendments. Fed. R. Civ. P. 65(a).

26 At issue are the State Plan (implemented by Washoe County) and the Clark County Plan.
 27 Under the *State Plan*, the Nevada Secretary of State (“Secretary”) and Nevada county clerks and
 28 registrars of voters (“County Administrators”) intend to conduct the June 9, 2020, Nevada pri-

1 mary election under an “all-mail election” plan (“State Plan”).¹ Under the State Plan, the Secre-
 2 tary and County Administrators intend to mail unrequested absentee ballots (herein “mail-in bal-
 3 lots”) to *active* registered voters, but qualified voters who are not active must request an absentee
 4 ballot. The *Clark County Plan* enhances the voting power of Clark County voters over voters in
 5 other counties. *See* Am. Compl. ¶¶ 33-47.

6 As the issues involve fundamental First Amendment rights, Plaintiffs ask the Court to waive
 7 security, Fed. R. Civ. P. 65(c), or require \$1 to the Clerk. This Motion is based on the following
 8 Memorandum, pleadings and papers on record herein, and argument at the hearing on this matter.
 9 Expedition is requested due to the nearness of the June 9 primary and the need for the plans to be
 10 enjoined well before then to allow the Secretary and County Administrators to do what they law-
 11 fully may under the controlling statutes enacted by the Legislature.

12 May 13, 2020

Respectfully submitted,

/s/ Amanda L. Narog

Amanda L. Narog (Ind. bar #35118-84)*

Lead Counsel for Plaintiffs

*Appearing Pro Hac Vice

16 Memorandum of Points and Authorities

17 Factual Background

18 A. COVID-10 risk is subsiding

19 Amid COVID-19 concerns, policymakers adopted measures to protect public health. Those
 20 are being adjusted as old models predicting a high death rate and massive deaths proved inaccu-
 21 rate. Public officials are beginning to “re-open” the country as concerns decrease. Individuals
 22 remain free to engage in “essential activities,” including governmental activities like in-person
 23 voting, subject to recommended safeguards to protect their health. As one may go to a grocery
 24 store, one may go vote in person following recommended safeguards.

25 These measures have been effective. The curve is flattening, the spread is being controlled,
 26 testing is increasing, the calculated death rate is lowering as tests show more people had mild

27 ¹ *See* <https://www.nvsos.gov/sos/Home/Components/News/News/2823/23> (Am. Compl. Ex.
 28 K); <https://www.nvsos.gov/sos/elections/voters/absentee-voting> (Am. Compl. Ex. J). All links
 herein were last checked on May 13, 2020.

1 cases, and total deaths are lower than originally projected.² So states are relaxing stay-at-home
 2 orders, reopening (inter alia) retail businesses, restaurants, gyms, beaches, and salons and restart-
 3 ing elective medical procedures.³ Many states not yet re-opening plan to do so in May. *Id.* Social
 4 distancing and good hygiene are effective ways to stop transmission of the virus.⁴ Social distanc-
 5 ing means “deliberately increasing the physical space between people to avoid spreading illness.
 6 Staying at least six feet away from other people lessens [the] chances of catching COVID-19.”⁵

7 These recommended safeguards are effective to prevent the spread of the virus for in-person
 8 voting.⁶ No causal link connects in-person voting and a spike in COVID-19, as shown in the
 9 Wisconsin in-person election where COVID-19 cases did not spike.⁷

10 **B. The Plans’ noncompliance with the legislature’s prescribed manner**

11 As noted in the Motion, the State Plan is to send mail-in ballots to all *active* registered vot-
 12 ers, while Clark County plans to give Clark County voters advantages over other-county voters
 13 by mailing ballots to inactive voters and allowing harvesters to collect ballots. *See* Am. Compl.

14 ² *See This is where all 50 states stand on reopening*, CNN.com, <https://www.cnn.com/inter->
 15 [active/2020/us/states-reopen-coronavirus-trnd/](https://www.cnn.com/interactive/2020/us/states-reopen-coronavirus-trnd/); *see also Provisional Death Counts for Corona-*
 16 *virus Disease (COVID-19)*, Center for Disease Control and Prevention (“CDC”),
 17 <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm>; *COVIDView*, CDC,
 18 <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/>; Y. Saplakoglu *Coronavirus*
 19 *death rate may be lower than previously thought*, LiveScience.com, Mar. 31, 2020,
 20 <https://www.livescience.com/death-rate-lower-than-estimates.html>(death rate is around .66%).

21 ³ *See This is where all 50 states stand on reopening*, CNN.com, <https://www.cnn.com/inter->
 22 [active/2020/us/states-reopen-coronavirus-trnd/](https://www.cnn.com/interactive/2020/us/states-reopen-coronavirus-trnd/).

23 ⁴ *See Coronavirus disease (COVID-19) advice for the public*, World Health Organization,
 24 <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public>; *Stop the*
 25 *Spread of Germs*, CDC, [https://www.cdc.gov/coronavirus/2019-ncov/downloads/stop-the-](https://www.cdc.gov/coronavirus/2019-ncov/downloads/stop-the-spread-of-germs.pdf)
 26 [spread-of-germs.pdf](https://www.cdc.gov/coronavirus/2019-ncov/downloads/stop-the-spread-of-germs.pdf) .

27 ⁵ *Coronavirus, Social and Physical Distancing and Self-Quarantine*, John Hopkins Medi-
 28 *cine*, [https://www.hopkinsmedicine.org/health/conditions-and-diseases/](https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-social-distancing-and-self-quarantine) [coronavirus/coronavirus-social-distancing-and-self-quarantine](https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-social-distancing-and-self-quarantine).

⁶ *See AP, Tennessee Official: Fear of Virus Not Reason to Vote by Mail*, May 20, 2020,
<https://www.nytimes.com/aponline/2020/05/12/us/ap-us-virus-voting-tennessee.html?smid=tw-s>
[hare](https://www.nytimes.com/aponline/2020/05/12/us/ap-us-virus-voting-tennessee.html?smid=tw-s) (listing safeguards for in-person voting; increased absentee ballots will be a challenge).

⁷ D. Chen & J. Diedrich, *Two weeks after election, COVID-19 cases have not spiked in Wis-*
consin but experts urge caution about conclusions, Milwaukee J. Sentinel, Apr. 22, 2020,
[https://www.jsonline.com/story/news/2020/04/22/covid-19-hasnt-spiked-after-wisconsin-](https://www.jsonline.com/story/news/2020/04/22/covid-19-hasnt-spiked-after-wisconsin-election-experts-urge-caution/2997394001/)
[election-experts-urge-caution/2997394001/](https://www.jsonline.com/story/news/2020/04/22/covid-19-hasnt-spiked-after-wisconsin-election-experts-urge-caution/2997394001/)

¶¶ 20-26; 33-47. These are not the legislature’s balancing and prescribed manner as required.

First and foremost, the legislature nowhere created or authorized an all-mail or primarily all-mail election system for this primary with federal candidates. It allowed creation of mail-in precincts in counties with low votes and provided some authority for others, but only in a scheme where the exception would not swallow the rule. And to create new mailing precincts, the legislature mandated legal requirements for “establishing” or “designating” such a precinct:

- (1) The deadline to “establish[] election precincts” and “designate precincts” is “by on or before the third Wednesday in March of every even-numbered year”—March 18, 2020. § 205(1).⁸
- (2) Notice must be “posted in the manner prescribed for a regular meeting of the board of county commissioners” and mailed to many public officials, § 213 (5) (a) and (b), 14 days prior to “establishing or designating a precinct as a mailing precinct”—March 4, 2020. § 213 (5).
- (3) Prior approval from the Secretary to “establish a mailing precinct” must be obtained before the notices required by § 213(5)(a) and (b) are sent out—before March 4, 2020. § 213(4).
- (4) The county clerk shall notify the Secretary and Legislative Counsel of boundaries of all election precincts by March 31, 206, after they are established and designated. § 205(1). It is unknown if or when the Washoe Registrar did this a second time after redesignating all precincts as mailing precincts.
- (5) Section 343 et seq. establishes the procedures for mailing precincts, “whenever the county clerk has designated a precinct as a mailing precinct.” § 343(2)

So the deadline for establishing and designating a precinct as a mailing precinct was March 18 and the process needed to begin before March 4 with the approval of the Secretary.

The Washoe County Registrar did not comply with the legislature’s prescribed manner:

- (1) Washoe County timely designated its precincts as in-person by notice to the Secretary on March 10, 2020, and Legislative Counsel on March 20, which was due March 31. Am. Compl. Exs. A, B. § 206.
- (2) Washoe County received approval from the Secretary to designate its precincts as mailing precincts on March 30. Am. Compl. Ex. C. Under the statutory deadlines, this had to be

⁸ All section references to state law herein are to sections of NRS Chapter 293 (“Elections”).

1 done before March 4. § 213(5).

2 (3) Washoe County mailed public official notice of its proposed designation of all precincts as
3 mailing precincts on March 31, Am. Compl. Ex. D, and requested a notice to be published
4 also on March 31, Am. Compl. Ex. E. § 213 (5)(a) and (b). Under the statutory deadlines,
5 this needed to be done on or before March 4. § 206. 213(5).

6 (4) On April 8 and thereafter, Washoe County published a notice designating all precincts as
7 mailing precincts as required by § 213(5)(a). Am. Compl. Ex. F.

8 (5) The Washoe County Registrar claims that “the actual designation by my office of the mail
9 precincts occurred on April 20, 2020.” ECF No. 50 at ¶ 4. Plaintiffs have requested a copy of
10 this “actual designation,” but the notice was first published on April 8, so the “actual designa-
11 tion” was before expiration of the 14 day prior notice period required by § 213(5), i.e., April
12 22. Under the statutory deadlines, this needed to be done by March 18. § 205(1).

13 (6) Plaintiffs have also requested a copy of any subsequent notice to the Secretary and Legisla-
14 tive Counsel of this actual designation on April 20 as required by § 206. The statutory dead-
15 line was March 31. § 206.

16 So instead of designating all the precincts as mailing precincts by March 18, the Washoe Regis-
17 trar designated them as mailing precincts on April 8 which is after the deadline. § 205(1).

18 The Clark County Registrar did not comply with the legislature’s prescribed manner:

19 (1) Clark County timely designated its precincts as in person by notice to the Secretary and Leg-
20 islative Counsel on March 30. Am. Compl. Ex. G. § 206.

21 (2) Clark County requested approval from the Secretary to designate its precincts as mailing pre-
22 cincts on March 18, A. Compl. Ex. R, and received approval from the Secretary at some un-
23 known date thereafter. Under the statutory deadlines, this needed to be done before March 4.
24 § 213(5).

25 (3) Clark County mailed public officials notice of its proposed designation of all precincts as
26 mailing precincts on March 30. § 213(5)(b). Am. Compl. Ex. S. Under the statutory dead-
27 lines, this needed to be done on or before March 4. § 206, 213(5).

28 (4) On April 9, Clark County published a notice designating all of its precincts as mailing pre-

1 precincts required by § 213(5)(a). Am. Compl. Ex. H. Under the statutory deadlines, this needed
2 to be done on or before March 4. § 206, 213(5).

3 (5) Beginning on April 2, the Clark County Registrar provided public notice of that all precincts
4 in Clark County would be mailing precincts and designated certain places as “drop off loca-
5 tions” for mail ballots. Am. Compl. Ex. I. But this notice was first published on April 2 be-
6 fore the 14 day prior notice period required by § 213(5) began, since that notice, Am. Compl.
7 Ex. H, wasn’t published until April 9. Under the statutory deadlines, this needed to be done
8 on or before March 18. § 205(1).

9 (6) Plaintiffs have also requested a copy of any subsequent notice to the Secretary and Legisla-
10 tive Counsel of this actual designation of the mailing precincts, as required by § 206. The
11 statutory deadline was March 31. § 206.

12 So instead of designating all the precincts as mailing precincts by March 18, Clark designated
13 them as mailing precincts on or about April 2, which is after the deadline. § 205(1).

14 **C. Mail-in-ballot fraud risk**

15 Vote buying, coercion, and fraud occur with mail-in voting, as courts have recognized, mak-
16 ing this a cognizable issue and interest for balancing that need not be proven. *See, e.g., Crawford*
17 *v. Marion Cty. Election Bd.*, 553 U.S. 181, 191-97 (2008); *Griffin v. Roupas*, 385 F.3d 1128,
18 1130-31 (7th Cir. 2004). Nonetheless, examples abound. *See, e.g., M. Fernandez, Texas Vote-*
19 *Buying Case Casts Glare on Tradition of Election Day Goads*, N.Y. Times, Jan. 12, 2014,
20 [https://www.nytimes.com/2014/01/13/us/politics/texas-vote-buying-case-casts-glare-on-](https://www.nytimes.com/2014/01/13/us/politics/texas-vote-buying-case-casts-glare-on-tradition-of-election-day-goads.html)
21 [tradition-of-election-day-goads.html](https://www.nytimes.com/2014/01/13/us/politics/texas-vote-buying-case-casts-glare-on-tradition-of-election-day-goads.html); P. Elliott, *Why North Carolina’s Election Fraud Hurts*
22 *American Democracy*, Time USA Mag., Feb. 22, 2019, [https://time.com/5535292/northcarolina-](https://time.com/5535292/northcarolina-election-fraud/)
23 [election-fraud/](https://time.com/5535292/northcarolina-election-fraud/). In *U.S. v. Brown*, mail-in ballots were required to be notarized and notaries were
24 sent to steal ballots from mailboxes and fill them out fraudulently, largely targeting impoverished
25 minorities. 494 F. Supp. 2d 440, 457 (2007). *See also* R. Gonzales, *North Carolina GOP Opera-*
26 *tive Faces New Felony Charges That Allege Ballot Fraud*, NPR, July 30, 2019,
27 [https://www.npr.org/2019/07/30/746800630/north-carolina-gop-operative-faces-new-felo-](https://www.npr.org/2019/07/30/746800630/north-carolina-gop-operative-faces-new-felo-nycharges-that-allege-ballot-fraud)
28 [nycharges-that-allege-ballot-fraud](https://www.npr.org/2019/07/30/746800630/north-carolina-gop-operative-faces-new-felo-nycharges-that-allege-ballot-fraud); F. Lucas, *15 Election Results That Were Tossed Over Fraudu-*

1 *lent Mail-In Ballots*, Daily Sig. (2020), <https://www.dailysignal.com/2020/04/21/15-election-re->
2 [sults-that-were-thrown-out-because-of-fraudulent-mail-in-ballots/](https://www.dailysignal.com/2020/04/21/15-election-re-). Absentee ballots can be filled
3 out in private by someone other than the voter or by voters subject to undue influence. An Ore-
4 gon survey found 5% of voters admitted someone else filled out their ballot. A *‘Modern’ Democracy*
5 *That Can’t Count Votes*, L.A. Times, Dec. 11, 2000, <https://www.latimes.com/archives/la->
6 [xpm-2000-dec-11-mn-64090-story.html](https://www.latimes.com/archives/la-). The benefits of the secret ballot are lost where people
7 living together fill out ballots with others near. Absentee ballots have been filled out fraudulently
8 for ineligible, false, impersonated, or duplicate voter registrations. *See, e.g., U.S. Has 3.5 Million*
9 *More Registered Voters Than Live Adults—A Red Flag For Electoral Fraud*, Investor’s Bus.
10 Daily, Aug. 16, 2017, <https://www.investors.com/politics/editorials/u->
11 [s-has-3-5-million-more-registered-voters-than-live-adults-a-red-flag-for-electoral-fraud/](https://www.investors.com/politics/editorials/u-)
12 [https://www.investors.com/politics/editorials/u-s-has-3-5-million-more-registered-voters-than-](https://www.investors.com/politics/editorials/u-)
13 [live-adults-a-redflag-for-electoral-fraud/](https://www.investors.com/politics/editorials/u-); *Oregon AG gets guilty plea voter fraud case*, Oregon
14 Catalyst, Sept. 18, 2010, <https://oregoncatalyst.com/3510-oregon-ag-gets-guilty-plea-voter-fraud->
15 [case.html](https://oregoncatalyst.com/3510-oregon-ag-gets-guilty-plea-voter-fraud-).

16 So it is unsurprising that The Heritage Foundation has been able to compile *A Sampling of*
17 *Recent Election Fraud Cases from Across the United States* with 1,285 cases of documented
18 voter fraud in recent years. *See* <https://www.heritage.org/voterfraud>. *See also* K. Samalis-Aldrich
19 & H. von Spakovsky, *Database Swells to 1,285 Proven Cases of Voter Fraud in America*, Daily
20 Signal, May 9, 2020, <https://www.dailysignal.com/2020/05/09/databaseswells-to-1285-proven->
21 [cases-of-voter-fraud-in-america/](https://www.dailysignal.com/2020/05/09/databaseswells-to-1285-proven-); The Heritage Foundation, *Standards for Absentee Ballots and*
22 *All-Mail Elections: Doing It Right ... and Doing It Wrong*, [https://www.heritage.org/sites/de-](https://www.heritage.org/sites/default/files/2020-05/FS_188_NEW.pdf)
23 [fault/files/2020-05/FS_188_NEW.pdf](https://www.heritage.org/sites/default/files/2020-05/FS_188_NEW.pdf); H. von Spakovsky & J. Adams, *COVID-19 and Ebola:*
24 *What We Can Learn from Prior Elections*, <https://www.heritage.org/election-integrity/re->
25 [port/covid-19-and-ebola-what-we-can-learn-prior-elections](https://www.heritage.org/election-integrity/re-) (how Wisconsin and Liberia held
26 safe elections in pandemics); H. Spakovsky, *Potential for Fraud Is Why Mail-In Elections Should*
27 *Be Dead Letter*, Apr. 10, 2020, <https://www.heritage.org/election-integrity/commentary/poten->
28

1 [tial-fraud-why-mail-elections-should-be-dead-letter](#).⁹

2 **D. Problems with a sudden flood of mailed ballots**

3 With a sudden flood of mail-in ballot requests, many are unlikely to receive a ballot. *See*
 4 *RNC v. DNC*, 206 L. Ed. 2d 452, 457; 2020 U.S. LEXIS 2195; 140 S. Ct. 1205(2020) (Ginsberg,
 5 J. dissenting) (the “surge in absentee-ballot requests has overwhelmed election officials, who
 6 face a huge backlog in sending ballots”). According to the Wisconsin Election Commission Ad-
 7 ministrator, several bins containing numerous ballots were found by state officials undelivered
 8 after the election, either “on their way to voters or already filled out and on their way back to
 9 clerks.”¹⁰ It was reported that over 9000 voters requesting a mail-in ballot never received one.¹¹
 10 Similar problems occurred in Ohio.¹² The USPS would require a massive overhaul in operations
 11 to avoid a repeat of the Wisconsin events. The USPS has requested additional federal funding as
 12 they have been stretched thin to the brink of breakdown.¹³ There are yet no funding appropria-
 13 tions for USPS operations in response to the surge in mail-in voting, and even when funding ar-
 14

15 ⁹ Given the costs involved, mail-in voting is more expensive and complicated than the pri-
 16 marily in-person voting. The Brennan Center estimated costs of “maintaining in-person voting”
 17 nationally as \$271.4 million. The estimated national cost for an all “vote by mail option” was
 18 \$982 million – \$1.4 billion. Lawrence Norden et al., *Report: Estimated Costs of Covid-19 Elec-*
tion Resiliency Measures, Brennan Center for Justice (2020), [https://www.brennancenter.org/our-](https://www.brennancenter.org/our-work/research-reports/estimated-costs-covid-19-election-resiliency-measures)
[work/research-reports/estimated-costs-covid-19-election-resiliency-measures](https://www.brennancenter.org/our-work/research-reports/estimated-costs-covid-19-election-resiliency-measures) .

19 ¹⁰ P. Marley, A. Dirr & M. Spicuzza, *Wisconsin is discovering problems with absentee bal-*
 20 *lots, including hundreds that were never delivered*, Milwaukee J. Sentinel, April 8, 2020,
 21 [https://www.jsonline.com/story/news/politics/elections/2020/04/08/wisconsin-election-3-tubs-](https://www.jsonline.com/story/news/politics/elections/2020/04/08/wisconsin-election-3-tubs-ballots-found-mail-processing-center/2971078001/)
[ballots-found-mail-processing-center/2971078001/](https://www.jsonline.com/story/news/politics/elections/2020/04/08/wisconsin-election-3-tubs-ballots-found-mail-processing-center/2971078001/) .

22 ¹¹ N. Corasaniti & S. Saul, *Inside Wisconsin’s Election Mess: Thousands of Missing or Nul-*
 23 *lified Ballots*, N.Y. Times, Apr. 9, 2020, [https://www.nytimes.com/2020/04/09/us/po-](https://www.nytimes.com/2020/04/09/us/politics/wisconsin-election-absentee-coronavirus.html)
[litics/wisconsin-election-absentee-coronavirus.html](https://www.nytimes.com/2020/04/09/us/politics/wisconsin-election-absentee-coronavirus.html) .

24 ¹² The Center for Public Integrity, *Ohio’s Mail-in Ballot Brouhaha: A Sign of Coming Trou-*
 25 *ble?*, Public Integrity, Apr. 28, 2020, [https://publicintegrity.org/politics/elections/ohios-mail-in-](https://publicintegrity.org/politics/elections/ohios-mail-in-ballot-brouhaha-a-sign-of-coming-trouble/)
 26 [ballot-brouhaha-a-sign-of-coming-trouble/](https://publicintegrity.org/politics/elections/ohios-mail-in-ballot-brouhaha-a-sign-of-coming-trouble/). *See also* Meg Cunningham, ‘More time would have
 27 *been helpful’: Ohio election officials face ballot issues due to postal service delays*, ABC News,
 28 [https://abcnews.go.com/Politics/time-helpful-ohio-election-officials-face-ballot-issues/story?id=7](https://abcnews.go.com/Politics/time-helpful-ohio-election-officials-face-ballot-issues/story?id=70333752)
[0333752](https://abcnews.go.com/Politics/time-helpful-ohio-election-officials-face-ballot-issues/story?id=70333752)

¹³ Fandos & Tankersly, *Coronavirus Is Threatening One of Gov.’s Steadiest Services: The*
 Mail, N.Y. Times, 2020, [https://www.nytimes.com/2020/04/09/us/politics/coronavirus-is-](https://www.nytimes.com/2020/04/09/us/politics/coronavirus-is-threatening-one-of-governments-stadiest-services-the-mail.html)
[threatening-one-of-governments-stadiest-services-the-mail.html](https://www.nytimes.com/2020/04/09/us/politics/coronavirus-is-threatening-one-of-governments-stadiest-services-the-mail.html) .

1 rives, improving staffing and capacity will take time. Mail-in ballots impact minorities nega-
2 tively.¹⁴ The fact that Nevada is sending mail-in ballots without request to active voters (and in-
3 active in Clark County) does not evade the problems in Wisconsin and Ohio. The mail system in
4 Nevada will still have to deliver and return the ballots. There will still be incorrect addresses.
5 Election officials will still have to process the unusual flood. And inactive voters must request,
6 receive, and return ballots, and are more likely to vote absentee given Defendants' push for all-
7 mail voting and reduction of traditional polling places. Nevada is included in a list of states
8 whose "infrastructure capabilities ... are similarly situated to Wisconsin."¹⁵ Moreover, problems
9 are happening now with similar mail-in ballot plans. News from New Jersey's third largest city
10 reports that 800 mail-in ballots, about 6%, have been set aside because they were bundled—300
11 hundred bundled in one mailbox alone—and accusations of ballot fraud are flying while the pub-
12 lic doubts election integrity. J. Dienst, *Voter Fraud Claims in Paterson*, May 12, 2020, NBC
13 News N.Y., [https://www.nbcnewyork.com/news/local/hundreds-of-mail-in-votes-already-set-](https://www.nbcnewyork.com/news/local/hundreds-of-mail-in-votes-already-set-aside-due-to-paterson-voter-fraud-claims/2414171/)
14 [aside-due-to-paterson-voter-fraud-claims/2414171/](https://www.nbcnewyork.com/news/local/hundreds-of-mail-in-votes-already-set-aside-due-to-paterson-voter-fraud-claims/2414171/). "There's people stealing them out of mail-
15 boxes. I am getting phone calls from people who say they never received them,' Paterson City
16 Council candidate Frank Filipelli said." *Id.* "There have been reports of postal workers leaving
17 stacks of ballots in building lobbies because voting rolls have outdated addresses listed." *Id.* And
18 "local council elections in Paterson have been decided by just dozens of votes. The hundreds of
19 potentially fraudulent ballots have the potential to sway the outcome" *Id.* Similar problems are
20 already happening in Nevada as verified by Daniel D. Virgilio, who reports that he found his own
21 ballot outside his mailbox, discarded in part of a bundle of ballots. Am. Compl. Ex. O.

22 **E. Injuries and irreparable harm to Plaintiffs**

23 Plaintiffs include registered, eligible voters who intend to vote in the upcoming primary of

24
25 ¹⁴ Tierney Sneed, *Vote-By-Mail, Critical In Pandemic, Poses Risks For Voters Of Color*,
26 Talking Points Memo, Apr. 22, 2020. [https://talkingpointsmemo.com/news/vote-by-mail-covid-](https://talkingpointsmemo.com/news/vote-by-mail-covid-19-minority-voters-obstacles)
[19-minority-voters-obstacles](https://talkingpointsmemo.com/news/vote-by-mail-covid-19-minority-voters-obstacles).

27 ¹⁵ D. Root, Center for American Progress, *Wisconsin Primary Shows Why States Must Pre-*
28 *pare Their Elections for the Coronavirus*, Apr. 27, 2020, [https://www.americanprogress.org/is-](https://www.americanprogress.org/issues/democracy/news/2020/04/27/484013/wisconsin-primary-shows-states-must-prepare-elections-coronavirus/)
[sues/democracy/news/2020/04/27/484013/wisconsin-primary-shows-states-must-prepare-](https://www.americanprogress.org/issues/democracy/news/2020/04/27/484013/wisconsin-primary-shows-states-must-prepare-elections-coronavirus/)
[elections-coronavirus/](https://www.americanprogress.org/issues/democracy/news/2020/04/27/484013/wisconsin-primary-shows-states-must-prepare-elections-coronavirus/).

1 the political party of their choice. Am. Compl. ¶¶ 8-14. All will be disenfranchised in the pri-
2 mary if the Plans remain in place. First, the flood of ballots that will be beyond the abilities of
3 USPS and election workers (who were all expecting and preparing for the normal number of ab-
4 sentee ballots) to adequately handle, will result in ballots not sent, lost ballots, and tardy ballots,
5 resulting in direct disenfranchisement. Second, the flood of ballots will be beyond the abilities of
6 election workers to adequately process and monitor, resulting in more illegal ballots and
7 vote-dilution disenfranchisement. Third, there will not be a Manner-Clause-compliant election.
8 Fourth, Plaintiffs living outside Clark County will suffer a violation of their one-person-one-vote
9 rights under the Clark County Plan. The harms are irreparable; elections lack do-overs. Plaintiff
10 Gary Gladwill is a local candidate, who has already mailed in his ballot, but has the same risk of
11 direct and vote-dilution disenfranchisement, along with the added interest that he is likely to lose
12 ballots cast for him from voters suffering such disenfranchisement. Am. Compl. ¶ 13. Plaintiff
13 Nevada Right to Life (“NVRTL”) asserts the interests of its members, who include registered,
14 eligible Nevada voters who intend to vote in the coming primary but fear disenfranchisement as
15 outlined herein. It is a central mission of NVRTL to educate and motivate prolife voters to sup-
16 port prolife candidates and to assist them to do so as needed. Am. Compl. ¶ 15.

17 **Argument**

18 The Ninth Circuit uses a sliding-scale preliminary-injunction test:

19 Plaintiffs ... must establish that: (1) they are likely to succeed on the merits; (2) they are
20 likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of
21 equities tips in their favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res.*
22 *Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit weighs these factors on a
23 sliding scale, such that where there are only “serious questions going to the merits”—that
is, less than a “likelihood of success” on the merits—a preliminary injunction may still
issue so long as “the balance of hardships tips *sharply* in the plaintiff’s favor” and the other
two factors are satisfied.

24 *Short v. Brown*, 893 F.3d 671, 675 (9th Cir. 2018) (citations omitted) (emphasis in original). On
25 the merits-success prong, “the burdens at the preliminary injunction stage track the burdens at
26 trial.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006).
27
28

I.

Plaintiffs are likely to prevail on the merits because the U.S. Constitutional Amendments I and XIV and Article I, § 4, cl.1, require Nevada to follow the legislative mandate.

Plaintiffs are likely to prevail on the merits because (A) only the legislature may lawfully balance ballot access and ballot fraud and prescribe the election manner, and it nowhere authorized all-mail-in-ballot voting, but rather in-person voting with modest mail-in voting. Based on what the legislature decided, the State and Clark County Plans will cause (B) *direct* disenfranchisement and (C) *vote-dilution* disenfranchisement. The Plans (D) are inconsistent with Article I, § 4, cl. 1. And (E) the Clark County Plan violates the Equal Protection Clause by treating counties differently in violation of the one-person-one-vote mandate.

A. Only the legislature may lawfully balance ballot access with election integrity, so its legislative mandate must be followed and its balancing establishes as a matter of law the presence of disenfranchisement risks.

The U.S. Constitution “confers on states broad authority to regulate the conduct of elections, including federal ones.” *Griffin*, 385 F.3d at 1130 (citing U.S. Const. art I, § 4, cl.1). “[S]triking ... the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a *legislative* judgment” *Id.* at 1131 (emphasis added). There is no right to vote absentee and absentee ballots pose special fraud risks, so only the legislature has the authority and is equipped to balance access and integrity in the absentee-ballot context. *Id.* at 1130-31.

The legislative judgment cannot be gainsaid based on what other states do because only *this* state’s legislature has authority to balance and mandate what is needed in *this* state, including prescribing a manner that allows only a modest amount of absentee voting, which curtails the risk posed by mail-in ballots by keeping them to a modest percentage of all votes. “[S]tates that have more liberal positions for absentee voting may well have different political cultures ..., cultures less hospitable to election fraud.” *Id.* So “[o]ne size need not fit all.” *Id.*

Nor can the legislative judgment be gainsaid on the notion that a particular safeguard isn’t needed because the legislature provided others. The legislature thought they *all* were required in its balancing. Specifically, as *Griffin* and *Crawford*, 553 U.S. at 193-96, recognize there is a known and greater risk of ballot fraud with absentee ballots than in-person voting. Knowing that risk, the legislature tightens or loosens absentee-ballot access to control the approximate percent-

1 age of absentee ballots on the basis of perceived risk. If the risk is deemed high, reducing the
2 number of absentee ballots reduces the impact of absent-ballot vote fraud. And controlling the
3 approximate percentage of mailed ballots is essential to prevent direct disenfranchisement be-
4 cause the U.S. Postal Service (“USPS”) and election workers are overwhelmed by a sudden flood
5 of mailed ballots for which they were unable to plan, resulting in lost and tardy ballots and vote-
6 dilution because overwhelmed screeners are unable to do as careful a job of screening out illegal
7 ballots. Defendants decision vitiates the legislature’s balancing by throwing access wide open,
8 which poses serious risks of direct and vote-dilution disenfranchisement. Other safeguards can-
9 not repair the lost legislative balancing.

10 Maintaining the legislature’s vital balance of absentee ballot access and election integrity is
11 essential because “confidence in the integrity of our electoral processes is essential to the func-
12 tioning of our participatory democracy” and “[v]oter fraud drives honest citizens out of the dem-
13 ocratic process and breeds distrust of our government.” *Purcell v. Gonzalez*, 549 U.S. 1, 4
14 (2006). The Seventh Circuit recently stayed an injunction by the U.S. District Court for the West-
15 ern District of Wisconsin because it had given inadequate attention to the interest in preventing
16 voter fraud by eliminating a witness requirement for absentee-ballot signatures: “This court is
17 concerned with the overbreadth of the district court’s order, which categorically eliminates the
18 witness requirement applicable to absentee ballots and gives no effect to the state’s substantial
19 interest in combating voter fraud.” *Democratic National Committee v. Bostelmann*, slip op. 3,
20 Nos. 20-1538, 20-1539, 20-1545 & 20-1546 (7th Cir. Apr. 3, 2020) (citing *Griffin v. Roupas*, 385
21 F.3d 1128, 1130 (7th Cir. 2004)), available at [https://moritzlaw.osu.edu/electionlaw/litiga-
22 tion/documents/DNC_v_Bost_BL-30.pdf](https://moritzlaw.osu.edu/electionlaw/litigation/documents/DNC_v_Bost_BL-30.pdf). Defendants here have likewise made absentee-ballot
23 access overbroad and given inadequate effect to the legislature’s balancing to avoid fraud.

24 **B. Discarding the legislature’s balance of in-person and mail-in voting and throwing mail-
25 in voting open to all violates the right to vote by causing numerous voters to suffer di-
26 rect disenfranchisement.**

27 The Nevada Legislature exercised its exclusive balancing and manner authority and enacted
28 detailed legislation (the “legislative mandate”) governing how elections are to be conducted in
NRS Title 24, Chapter 293 (titled “Elections”). The legislature did *not* prescribe an all-mail elec-

1 tion or even a predominantly by-mail election, but rather an in-person election with limited mail-
 2 vote exceptions. By not prescribing such a mail-in-ballot voting scheme, the legislature exercised
 3 its balancing and manner authority to decide *not* to impose the overwhelming flood of a mail-in
 4 ballot system on the USPS and election workers—*especially* not suddenly as here.¹⁶ Yet under
 5 the State Plan, Defendants intend to conduct the primary by sending mail-in ballots to all *active*
 6 voters, so there is a sudden surge of mailed ballots that will be difficult to account for and pro-
 7 cess, and because of limited in-person voting there will be a surge of absentee ballot requests
 8 from those who did not get a mailed ballot. The Clark County Plan will send mail-in ballots to
 9 *both* active and inactive voters. But the legislative mandate cannot be gainsaid. The rule of law
 10 may not be ignored, even amidst diminishing COVID-19 concerns. To the extent measures need
 11 to be taken to protect public health, those may not *alter* the legislative mandate. Rather, safety
 12 measures must be taken *within* what the legislative mandate by employing safety measures rec-
 13 ommended for essential activities to in-person voting.

14 A “state election law” is reviewed under *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). But
 15 the legislative mandate is not being challenged. Rather the Plans replace it and Plaintiffs defend
 16 it. The Plans fail the *Burdick* test, which requires “weighing ‘the character and magnitude of the
 17 asserted injury to the rights . . . that the plaintiff seeks to vindicate’ against ‘the precise interests
 18 put forward by the State as justifications for the burden imposed by its rule,’” considering “‘the

19 ¹⁶ In *Purcell*, 549 U.S. 1 (2006), the Supreme Court recognized that voting-rule changes near
 20 an election *themselves* “result in voter confusion and consequent incentive to remain away from
 21 the polls. As an election draws closer, that risk will increase,” *id.* at 4-5. So near-election changes
 22 are discouraged. Because that principle is anchored in the right to vote, its logic applies to Defen-
 23 dants who changed the rules near an election because their actions pose that risk. Of course this
 24 court can *repair* near-election changes that violate constitutional rights, as the Supreme Court
 25 recently did in *Republican National Committee v. Democratic National Committee*, No.
 26 19A1016, 2020 U.S. LEXIS 2195 (U.S. Apr. 6, 2020) (per curiam), though *RNC* said “courts
 27 should *ordinarily* not alter the election rules on the eve of an election.” 2020 U.S. LEXIS 2195, at
 28 **2-3 (emphasis added). But *RNC* stayed an order allowing voters to mail absentee ballots after
 election day. *RNC* recited various problems that the lower-court order posed and said they “un-
 underscore[] the wisdom of the *Purcell* principle.” *Id.* at **3. A crucial point was that the lower-
 court order “fundamentally alters the nature of the election.” *Id.* Here, Defendants have funda-
 mentally altered the nature of absentee-ballot voting and that near-election harm should be re-
 paired here. *RNC* shows that Defendants cannot do a *Purcell* principle violation and then assert
 that principle to avoid judicial review to protect fundamental rights.

1 extent to which those interests make it necessary to burden the plaintiff's rights.” *Id.* at 434 (ci-
2 tation omitted). Strict scrutiny applies to “‘severe’ restrictions,” but “reasonable, nondiscrimina-
3 tory restrictions” only get rational-basis review and typically survive, *id.* at 434. As disenfran-
4 chisement is a severe burden, *see, e.g., LWV of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th
5 Cir. 2014); *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012), De-
6 fendants must prove the Plan narrowly tailored to a compelling governmental interest.

7 **1. A sudden increase in mailed-in ballots contrary to the legislative mandate will**
8 **cause numerous voters to suffer direct disenfranchisement.**

9 As established in *Burdick*, once a voter challenges a provision, the justification of that provi-
10 sion requires examining the impact on all voters. Mr. Burdick wanted to do banned write-in vot-
11 ing, but the Court held “[i]t is critical to understand that [his] case is not an isolated example,”
12 and “at least some voters would cast write-in votes for other candidates if given the option. 504
13 U.S. at 442-43. Based on that analysis, the impact on all voters must be considered here.

14 As shown in the Factual Background, Facts(D), recent experience with large surges in the
15 number of mail-in ballots has caused numerous voters to suffer direct disenfranchisement. For
16 example, while there was no sudden spike in COVID-19 cases after Wisconsin’s *in-person* pri-
17 mary, *supra* at 3 & n.7, that *absentee-ballot* experience disenfranchised many voters, *supra*
18 Facts(D). A sudden surge of mail-in ballots is guaranteed here because the Plans are sending
19 them out, including for inactive voters in the Clark County Plan, and absentee-ballot requests
20 will also surge because of the limited in-person opportunities and Defendants’ promotion of a
21 mail-in election. Experience elsewhere indicates that the resulting large surge in mailed ballots
22 will result in disenfranchisement from lost or tardy ballots coming and going through the USPS
23 from and to election workers, with postal and election workers overwhelmed by the flood. More-
24 over, those who don’t get a mailed ballot must jump through extra hoops to get one, and might
25 not get one due to the same sudden-flood problems, and with limited in-person voting options
26 they may be unable to vote, either due to the distance to the polling place or the overwhelming
27 numbers who try to vote at the same place. Though the foregoing suffices to establish that nu-
28 merous voters will be disenfranchised, it is vital to note that the *legislature* found its own limit to
the usual percentage of absentee ballots to be necessary as expressed in the fact that it nowhere

1 prescribes an all-mail or primarily all-mail election. That establishes the disenfranchisement
2 harm as a matter of law. In sum, the sudden flood of mail-in ballots poses a substantial risk that
3 Plaintiffs and many other voters who use the mail-in ballots will not have them counted. That
4 violates their right to vote by direct disenfranchisement.

5 **2. In-person voting is an essential activity that may be safely pursued following rec-**
6 **ommended safeguards for those engaging in other essential activities and is no**
7 **greater burden than that held “reasonable” in *Crawford*.**

8 In-person voting is essential activity, like going to the grocery. The recommended safeguards
9 for shopping apply to in-person voting. Those safeguards (social distancing, sanitizing, masks,
10 etc.) are designed specifically to keep people safe while doing essential activities. Wisconsin had
11 an in-person election, with such safeguards, including plexiglass shields between election-board
12 workers and voters, and there was no resulting spike in COVID-19. *See supra* at 3 & n.7. Defen-
13 dants’ Plans are based on speculation of great risk based on models since shown to be flawed.
14 But harms and risks associated with COVID-19 are receding and society is reopening, *see supra*
15 Facts (A), which undercuts the purported justification for the Plans in balancing.

16 A benchmark for a reasonable burden that readily survives a *Burdick* balancing is in *Craw-*
17 *ford*, 553 U.S. 181, which held it not unreasonable to require those lacking photo identification to
18 vote to bear “the inconvenience of going to the Bureau of Motor Vehicles, gathering required
19 documents, and posing for a photograph” to get a free ID card because that did “not qualify as a
20 substantial burden on most voters’ right to vote ...,” *id.* at 198 (Stevens, J., joined by Roberts,
21 C.J., and Kennedy, J.) (controlling op.). And that burden was mitigated by the fact that voters
22 could vote a provisional ballot and then “travel to the circuit court clerk’s office within 10 days
23 to execute the required affidavit.” *Id.* at 199. And that burden “is unlikely ... [to] pose a constitu-
24 tional problem” *Id.* “And even assuming that the burden may not be justified as to a few vot-
25 ers, that conclusion is by no means sufficient to establish” the facial relief sought. *Id.* at 199-00.
26 These reasonable burdens were closely related to legitimate state interests in “election moderniza-
27 tion” (including cleaning up voter roles recognized to contain unqualified voters), preventing
28 “voter fraud,” and “safeguarding voter confidence.” *Id.* at 192-97. *Crawford* recognized that vote
fraud exists and is more associated with absentee ballots than in-person voting. *Id.* at 194-96.

1 Since the burden of required travel and inconvenience in *Crawford* was reasonable and justified
2 for the voter-identification requirement despite some possible harm to some persons, Defendants
3 must prove any burden here is substantially greater and not similarly a reasonable requirement for
4 most people. But practicing the recommended safeguards for engaging in essential activities is no
5 greater burden than the burden found reasonable in *Crawford*, so it is a reasonable, nondiscrimi-
6 natory restriction that is readily justified in balancing by state interests in election integrity. And
7 even if the legislative mandate might be a problem for a small number, that in no way justifies
8 the facial replacement of the legislative mandate with the Plans. *Id.* at 199-200.

9 **3. Applicable balancing establishes that the Plans violate the right to vote by direct**
10 **disenfranchisement.**

11 In balancing interests, recall that the legislature already *did* the controlling balancing here in
12 its legislative mandate and Plaintiffs simply defend what the *legislature* authoritatively decided is
13 required for this state to avoid direct and vote-dilution disenfranchisement. That should control.
14 So considering the legislature's balancing in a *Burdick* balancing provides a foundation for *Bur-*
15 *dick* balancing of the Plans. The legislature's decision *not* to prescribe statewide mail-in voting is
16 a "reasonable, nondiscriminatory restriction" under *Burdick*. Compared to *Crawford*'s bench-
17 mark, primarily state-wide in-person voting under recommended safeguards for doing essential
18 activities is no less reasonable than burdens in *Crawford*. So the well-established state interests
19 in preventing direct and vote-dilution disenfranchisement resulting from a sudden flood of
20 absentee-ballot voting readily justify the original legislative mandate.

21 Given that the legislative mandate readily survives *Burdick* balancing, Defendants must jus-
22 tify supplanting it with their Plans. Given that disenfranchisement is a severe burden, they must
23 prove their Plans narrowly tailored to a compelling state interest. Preliminarily, note that the
24 Plans are a facial remedy, not one applied to those specially at risk, Defendants essentially held
25 the legislative mandate unconstitutional facially. So they must satisfy the test in *United States v.*
26 *Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most
27 difficult challenge to mount successfully, since the challenger must establish that no set of cir-
28 cumstances exists under which the Act would be valid"). So at a minimum, the remedy the Plans
impose should have been as applied to those specially at risk. Instead, Defendants replaced the

1 legislative mandate with overbroad mail-in-ballot Plans. That overbreadth alone dooms the Plans
2 under *Burdick*. As the Supreme Court said when applying *Burdick* and *Salerno* in *Crawford*, one
3 ought not invalidate the whole provision.

4 A facial challenge must fail where the statute has plainly legitimate sweep. When we
5 consider the statute's broad application to all Indiana voters, we conclude that it imposes
6 only a limited burden on voters' rights. The precise interests are advanced by the State are
7 therefore sufficient to defeat petitioners' facial challenge. ... [P]etitioners have not demon-
8 strated that the proper remedy—even assuming an unjustified burden on some vot-
9 ers—would be to invalidate the entire statute.

10 553 U.S. at 202-03 (quotation marks and citations omitted). *See also Bostelmann*, slip op. 3,¹⁷
11 (lower court facial remedy “categorically eliminates the witness requirement applicable to absen-
12 tee ballots and gives no effect to the state’s substantial interest in combating voter fraud”). This
13 tailoring analyses proves Defendants cannot meet their burden to prove that their facial remedy is
14 narrowly tailored to a compelling state interest. Regarding interests, Defendants will say COVID-
15 19 made the Plans necessary because the legislative mandate would have caused disenfranchise-
16 ment. But that fails for at least three reasons.

17 First, for disenfranchisement to compel a change to the legislative mandate, there must have
18 been state action. But no state action would have caused the disenfranchisement, rather any dis-
19 enfranchisement would result from COVID-19 concerns and personal choices as to how to react
20 to them. Civil-rights claims require state action. But COVID-19 and resulting problems “are not
21 impediments created by the State.” *Bethea v. Deal*, 2016 WL 6123241, at *2 (S.D. Ga. Oct 19,
22 2016). Defendants believe the state has passive liability for not *changing* its law in the face of
23 issues not of its making, which is not the sort of claims *Burdick* balances. *Bethea*, *id.* at *2-3 (no
24 “precedent that would constitutionally or statutorily mandate that Defendants provide an exten-
25 sion in the absence of any actual government action that burdens an individual’s right to vote”).
26 So the legislative mandate did not, could not, cause disenfranchisement.

27 Second, even if cognizable as state action (it is not) the idea that the legislative mandate
28 might cause elective, self-disenfranchisement due to COVID-19 is built on speculation likely
based on early, badly flawed models of COVID-19 with an erroneously high fatality rate and ex-
orbitant numbers of predicted death. Those models proved wrong. Unlike early predictions, hos-

¹⁷ See https://moritzlaw.osu.edu/electionlaw/litigation/documents/DNC_v_Bost_BL-30.pdf.

1 pits are not being overwhelmed, ventilators are at a surplus for the extremely rare patient who
 2 needs one, treatments have been developed and more are coming, deaths have declined dramati-
 3 cally, increased testing shows that large numbers of individuals had COVID-19 with mild or no
 4 symptoms (so the calculated fatality rate of COVID-19 is dropping dramatically), testing is be-
 5 coming widespread to better detect who has antibodies¹⁸ and who has active disease (so they can
 6 be isolated), and society is reopening as a result of all these improvements. These are things of
 7 which this court can and should take judicial notice. There is no reason most people can't vote
 8 under recommended safeguards to protect those engaged in such essential services. Wisconsin's
 9 recent primary shows that in-person voting could be held even earlier in the COVID-19 outbreak
 10 with the usual safeguards for essential activities without a resulting spike in COVID-19 caused
 11 by voting. *See supra* at 3 & n.7. So the notion that individuals must choose between voting and
 12 their health is overblown and overbroad. If there were ever any validity to the notion that "gov-
 13 ernment action" by *inaction* was disenfranchising persons because some thought they had to
 14 choose voting or their health, that notion is now invalid for most people. So there is no justifica-
 15 tion for the Plans' facial remedy.

16 Third, we now know from experience with Wisconsin and other recent elections, that the
 17 sudden flood of mailed ballots, which Defendants are causing, *itself* causes disenfranchisement.
 18 *See supra* Facts(D). So numerous state voters will be disenfranchised by the Plans.

19 So Defendants cannot prove the Plans narrowly tailored or supported by compelling interests
 20 in displacing the legislative mandate and causing widespread *direct* disenfranchisement.

21 **C. Discarding the legislature's determination that voting should be primarily in person,
 22 and mailing absentee ballots without request violates the right to vote by causing nu-
 23 merous voters to suffer *vote-dilution* disenfranchisement.**

24 The legislature determined (by its sole balancing authority and expertise) that most voters
 25 should vote with the statutory safeguards that accompany in-person voting and *by-request* absen-
 26 tee ballots.¹⁹ The Plans flood the state with unrequested absentee ballots, even to inactive voters
 27 in Clark County. That means that, there will be ballots left for persons who have moved or whose

28 ¹⁸ As herd immunity to viruses typically develops as more people get the virus and recover, Defendants would have to prove that this would not be the case with this virus.

¹⁹ These include the statutory procedures for in-person and absentee-ballot voting.

1 address has otherwise changed, laying open the risk of absentee ballots being readily available
2 for absentee-ballot fraud. And unrequested ballots will arrive at addresses where people are not
3 expecting them and are liable to be ignored, discarded, put in a pile to allow any viruses to die,
4 etc., increasing the risk of the ballots not being cast or of being cast by others. But the legislature
5 determined that, given the known risk of absentee-ballot fraud, the percentage of absentee votes
6 must be limited to a typical percentage and not be transformed into all-mail voting by having the
7 exception become the rule, and without request. That balancing and judgment may not be gain-
8 said. As a result of the forbidden increase in absentee votes and resulting increase in illegal votes,
9 legal votes will be diluted, and vote dilution is a form of forbidden disenfranchisement.

10 The fundamental right to vote is well-established: “Undeniably the Constitution of the
11 United States protects the right of all qualified citizens to vote, in state as well as in federal elec-
12 tions” and to have that vote counted. *Reynolds*, 377 U.S. at 554. “[T]he right of suffrage can be
13 denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by
14 wholly prohibiting the free exercise of the franchise.” *Id.* at 555. As the Plans will flood the state
15 with absentee votes beyond what the legislature determined to be a safe percentage for this elec-
16 tion to prevent absent-ballot fraud, numerous voters will have their votes diluted by illegal votes.

17 Under *Burdick*, Defendants must prove their Plans narrowly tailored to compelling interests.
18 As just established, the Plans aren’t narrowly tailored, their purported interest is not compelling,
19 and the Plans actually *causes* disenfranchisement. That applies here too.

20 If Defendants argue that Plaintiffs lack standing because their vote-dilution claim is a gener-
21 alized grievance, that argument fails for two distinct reasons arising from the generalized-griev-
22 ance test in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Note *Lujan*’s two formulations:

- 23 • “a plaintiff raising only a generally available grievance about government—claiming only
24 harm to his and *every citizens*’s interest in proper application of the Constitution and laws,
25 and seeking relief that no more directly and tangibly benefits him than it does the public at
26 large—does not state an Article III case or controversy,” *id.* at 560-61 (emphasis added), and
- 27 • “an injury amounting only to the alleged violation of a right to have the Government act in
28 accordance with law [is] not judicially cognizable . . . [and] cannot alone satisfy the require-

1 ments of Art. III,” *id.* at 575-76 (internal quotation marks and citation omitted).

2 So there are two questions: (1) is the claimant just a *citizen* trying only to make the government
3 do its job without more? and (2) is the claim the same claim held by “every citizen”? Because the
4 first of these questions is more specific, it is the core of the analysis. “[T]he proper inquiry is
5 whether the plaintiffs sue solely as *citizens* who insist that the government follows the law.”
6 *Andrade v. NAACP of Austin*, 345 S.W.3d 1, (Tex. 2011) (citing E. Chemerinsky, *Constitutional*
7 *Law: Principles and Policies* 91 (3d ed. 2006)) (emphasis added). “[N]either *citizens* nor taxpay-
8 ers can appear before a court simply to insist that the government and its officials adhere to the
9 requirements of law.” C.A. Wright et al., *Federal Practice & Procedure* § 3531.10 (3d ed. 2008)
10 (emphasis added). So mere “citizen” standing is the issue, and the present challenge is not a gen-
11 eralized grievance under the first or second question.

12 First, Plaintiffs don’t bring their vote-dilution claim under mere “citizen” standing. Rather,
13 they assert personal harms from the violation of their own fundamental right to vote that is pro-
14 tected by the First and Fourteenth Amendments. They assert a constitutionally protected right,
15 and given the Supremacy Clause, U.S. Const. art. IV, para. 2, state officials must obey constitu-
16 tional mandates. Plaintiffs claim is also particularized. They don’t challenge anything not directly
17 bearing on their vote-dilution claim, so they are not just trying to make the government do its job
18 in some general way but rather challenge that which particularly violates their right to vote. So
19 they are not mere citizens just trying to make the government do its job.

20 Second, Plaintiffs assert a harm that is not the same as for every “citizen.” “The bar is based
21 not on the number of people affected—a grievance is not generalized merely because it is suf-
22 fered by large numbers of people.” *Andrade*, 345 S.W.3d at 7 (citing Chemerinsky, *Constitu-*
23 *tional Law* 91). “[D]enying standing to persons who are in fact injured simply because many oth-
24 ers are also injured, would mean that the most injurious and widespread Government actions
25 could be questioned by nobody.” *United States v. SCRAP*, 412 U.S. 660, 686-68 (1973).
26 “[W]here a harm is concrete, though widely shared, the Court has found injury in fact.” *FEC v.*
27 *Akins*, 524 U.S. 11, 24 (1998). Plaintiffs’ claim of harm here is actually three levels of specificity
28 below any harm suffered by “citizens.” (1) Within the class of citizens are *registered* voters; only

1 those registered could suffer vote dilution. (2) Within the class of registered voters are *eligible*
2 voters; only the eligible have a right to vote that could suffer vote dilution. (3) Within the class of
3 registered, eligible voters are those who *actually vote*; only those who actually vote can have that
4 vote diluted by illegal votes. So Plaintiffs' vote-dilution claim is highly particularized and not
5 even close to *Lujan*'s citizen-standing definition of a generalized grievance.

6 So the Plans directly harm Plaintiffs and large numbers of other registered, eligible voters
7 who vote, because they will cause vote-dilution disenfranchisement, an outcome the legislature
8 expressly rejected for this election in its legislative mandate, which the Plans displace.

9 **D. Discarding the legislative mandate violates U.S. Constitution Article I, § 4, cl. 1, which**
10 **mandates that the legislature prescribe the manner of election.**

11 The Plans violate Plaintiffs' right to have, and to vote in, a federal election where the "Man-
12 ner" of election is "prescribed . . . by the Legislature." U.S. Const. art. I, § 4, cl. 1. As federal
13 candidates are on the ballot, the primary must be conducted in the legislature's prescribed man-
14 ner. The Plans are contrary to the legislative mandate. In *Bush v. Gore*, 531 U.S. 98 (2000), the
15 Supreme Court listed a similar provision requiring that elections for presidential electors be con-
16 ducted in the manner chosen by the legislature as an issue in the case, but decided that it need not
17 reach it because what the Florida Supreme Court had done fell so woefully short of what was
18 required under the vote-dilution ban that the manner-of-election issue need not be reached. *Id.* at
19 103 ("whether the Florida Supreme Court established new standards for resolving Presidential
20 election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution"). Simi-
21 larly here, the parallel Manner Clause issue need not be reached because the disenfranchise-
22 ment claims can readily decide the case. But if the Court doesn't decide this case on vote-dilution
23 or another claim, the Manner Clause issue should be decided.

24 **E. The Clark County Plan to enhance its voters' voting violates the equal-protection and**
25 **right-to-vote rights of voters in other counties under the one-person-one-vote doctrine.**

26 Clark County plans to send mail-in ballots to not only active voters, as with the State Plan,
27 but also to *inactive* voters. And it intends to send county-approved ballot harvesters to collect
28 ballots. Those things give Clark County voters greater voting power than other-county voters.
They enhance the odds of voters in Clark County being able to vote and have their votes counted

1 (while violating the legislature’s controlling balancing of access and fraud risk by increasing the
2 odds of ballot fraud). As a result, proportionally more votes will be obtained from Clark County,
3 Nevada’s most populous county, than from other counties—the difference will not be accounted
4 for by population differences. From a political perspective, mining extra votes from Clark
5 County favors the dominant political party there at the expense of voters in more rural counties of
6 a different political persuasion as happened in Florida in *Bush*. And the fact that the vote harvest-
7 ers are supposed to be *bipartisan* and collect *sealed* ballots doesn’t alter the facts that (i) mining
8 for votes in areas of known political persuasion will get more votes of that political persuasion
9 and (ii) Clark County voters are empowered over other voters.

10 But empowering voters in one county to the disadvantage of voters in other counties violates
11 a long line of one-person-one-vote authority that requires that citizens in one county not be disad-
12 vantaged compared to voters in other counties—precisely what the Supreme Court held was an
13 impermissible violation of the right to vote (by dilution of vote values in other counties) and the
14 Equal Protection Clause of the Fourteenth Amendment as discussed in *Bush*, 531 U.S. 98.

15 As *Bush* noted, the voters of one county may not have “greater voting strength”:

16 An early case in our one-person, one-vote jurisprudence arose when a State accorded
17 arbitrary and disparate treatment to voters in its different counties. *Gray v. Sanders*, 372
18 U.S. 368 (1963). The Court found a constitutional violation. We relied on these principles
19 in the context of the Presidential selection process in *Moore v. Ogilvie*, 394 U.S. 814
20 (1969), where we invalidated a county-based procedure that diluted the influence of citizens
in larger counties in the nominating process. There we observed that “[t]he idea that one
group can be granted greater voting strength than another is hostile to the one man, one vote
basis of our representative government.” *Id.*, at 819.

21 *Id.* at 107. The same disparate treatment occurred in the 2020 Florida election, where the Florida
22 Supreme Court’s plan was to include totals from two counties though “each of the counties used
23 varying standards to determine what was a legal vote. Broward County used a more forgiving
24 standard than Palm Beach County, and uncovered almost three times as many new votes, a result
25 markedly disproportionate to the difference in population between the counties.” *Id.* Because of
26 this and similar equal-protection violations causing and risking vote dilution, “[s]even Justices of
27 the Court agree[d] that there [were] constitutional problems with the recount ordered by the
28 Florida Supreme Court that demand[ed] a remedy.” *Id.* at 111. The Florida Supreme Court
should have implement eda system *without* greater voting strength for one group, just as the Ne-

1 vada Legislature was required to adopt such a neutral system. But the Clark County Plan violates
2 that. Just as the Florida plan had to be enjoined, the Clark County Plan must be enjoined.

3 * * *

4 As Plaintiffs have a strong likelihood of success on their claims, other preliminary-injunc-
5 tion factors follow, particularly since the right to vote is based on the First and Fourteenth
6 Amendments. At a minimum, “the balance of hardships tips *sharply* in [Plaintiffs’] favor’ and
7 the other two factors are satisfied.” *Short*, 893 F.3d at 675 (citation omitted).

8 **II.**

9 **A preliminary injunction is necessary to prevent irreparable harm to Plaintiffs’ constitutional rights.**

10 Plaintiffs have irreparable harm for reasons tracking their claims. They have no remedy at
11 law if the Plans proceed and the election is held in violation of Plaintiffs’ constitutional rights. If
12 the Plans proceed, their rights to vote, to equal protection, and to a federal election compliant
13 with the Manner Clause will be violated. Because “the right of suffrage is a fundamental matter
14 in a free and democratic society.” *Reynolds*, 377 U.S. at 561–62 (1964), “[c]ourts routinely deem
15 restrictions on fundamental voting rights irreparable injury,” *League of Women Voters of N.C. v.*
16 *North Carolina* (“LWVNC”), 769 F.3d 224, 247 (4th Cir. 2014) (collecting cases). “[O]nce the
17 election occurs, there can be no do-over and no redress,” making the injury to “voters ... real and
18 completely irreparable if nothing is done to enjoin [the challenged] law.” *LWVNC*, 769 F.3d at
19 247. “[T]here are no mulligans” where voters are disenfranchised by denial of requested relief.
20 *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1258 (N.D. Fla. 2016). And the harm is
21 imminent because the election is June 9 and the Plans are already being implemented.

22 **III.**

23 **The balance of equities and the public interest support injunctive relief.**

24 Where as here, Plaintiffs and numerous other voters will be disenfranchised, it is in the pub-
25 lic interest that their right to vote be protected. There is no harm to a state if likely unconstitu-
26 tional actions are preliminarily enjoined. *See, e.g., Giovanni Carandola v. Bason*, 303 F.3d 507,
27 521 (4th Cir. 2002). “[U]pholding constitutional rights surely serves the public interest.” *Id.*
28 While safeguarding the public health is a traditional police power, the exercise of that power as

1 the Plans do is unjustified by COVID-19 concerns because (i) no state action was disenfranchis-
 2 ing voters, (ii) for most, recommended safeguards for essential activities such as in-person voting
 3 will keep them safe, (iii) the Plans overbroadly and facially send mail-in ballots without limiting
 4 the remedy (assuming *arguendo* it is authorized), so the balancing of harms and public interest
 5 was impermissibly skewed by from the beginning, (iv) we know from the experience in Wiscon-
 6 sin and elsewhere that the Plan itself will cause disenfranchisement due to the sudden flood of
 7 ballots, and such disenfranchisement is not in the public interest, and (v) nothing justifies em-
 8 powering Clark County voters over other-county voters. Vitally, following the legislature's own
 9 balancing of access and integrity, i.e., following the rule of law as expressed in the legislative
 10 mandate, is strongly in the public interest and should outweigh all because only the legislature is
 11 authorized and equipped to balance such interests and prescribe the manner of the election. Vio-
 12 lating the fundamental rule of law as the Plans do is decidedly not in the public interest. The bal-
 13 ance of harms and public interest favor the requested relief.

14 **Conclusion**

15 For the reasons shown, this Court should preliminarily enjoin the Plan and provide the relief
 16 in the Amended Complaint's Prayer for Relief.

17
 18 May 13, 2020

Respectfully submitted,

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