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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Stanley William Paher et al, *Plaintiffs*

v.

Barbara Cegavske et al., *Defendants*

and

Nevada State Dem. Party et al., *Intervenor-Defendants*

Case No.: 3:20-cv-00243

Plaintiffs' Memorandum of Points & Authorities Opposing Dismissal Motions[1]

Introduction[2]

Though this Court has ruled preliminarily on issues in this case, the opportunity now exists to consider the issues thoroughly, without the urgency of the primary election ("Primary"), because this case is not moot as shown below. As also shown below, the case Intervenors and the Secretary portray is in many ways not the actual case, such as claims that Voters merely seek to enforce state law in federal court. The actual case, discussed herein, should not be dismissed.

[1] Plaintiffs ("Voters") here oppose the dismissal motions of Intervenor-Defendants ("Intervenors"), ECF No. 71— joined by Defendants Spikula and Gloria, ECF Nos. 73, 76—and the Secretary of State ("Secretary"), ECF No. 77. As Intervenors' motion is more developed, Voters primarily address it, with references to the Secretary's motion as needed or useful. (In ECF No. 76, Gloria also joined ECF Nos. 62 and 63, but those are moot after the Amended Complaint (ECF No. 64). *See* ECF No. 79 (dismissal motion before Amended Complaint mooted).)

[2] Nomenclature: Abbreviations and terms of art established in the Amended Complaint, ECF No. 64 at 1-2, and Plaintiffs' preliminary-injunction memorandum are retained, e.g., "State Plan," "County Administrators," and "Clark County Plan," ECF No. 65 at 1-2.

Background

Intervenors discuss background. ECF No. 71 at 3-4. *Cf.* ECF No. 77 at 3-4 (Though the Secretary claims that Voters challenge more Clark County vote centers, Voters do not. *See* ECF No. 64 at 24-25). The *proper* characterization of the counts is straightforward. Count I claims that the State Plan violated the fundamental right to vote by direct disenfranchisement. ECF No. 64 at 20. Count II claims that the State Plan violates the fundamental right to vote by vote-dilution disenfranchisement. ECF No. 64 at 22. Count III claims that the State Plan violates Article I, section 4, clause 1 of the U.S. Constitution. ECF No. 64 at 23. Count IV claims that the Clark Plan violates the equal protection clause of the Fourteenth Amendment. ECF No. 64 at 24. Any *other* characterization of these claims, e.g, that they merely seek to enforce state law, is erroneous.

Legal Standard

Intervenors discuss legal standards, ECF No. 71:4-5, which need not be repeated. But Voters highlight two things. First, as Intervenors acknowledge, *id.*, for a facial attack on jurisdiction under Federal Rule of Procedure 12(b)(1) and a failure-to-state-a-claim challenge under Rule 12(B)(6), all allegations are accepted as true and inferences go to Voters.[3] Second, for Article III standing, "[a]n allegation of future injury may suffice if ... there is a "'*substantial risk*' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U. S. 398, 409, 414 n.5 (2013)) (emphasis added).[4]

Argument

As established here, this case is not moot (Part I), Voters have standing (Part II), and all counts state claims upon which relief can be granted (Part III).

I.

This case fits the mootness exception for cases capable or repetition yet evading review.

Though Voters challenged the State and Clark County Plans for the June 9 primary election ("Primary"), the November general elections looms and this case is not moot because it readily

[3] Voters' intended inferences attached to statements in the Amended Complaint, ECF No. 64, are developed in their contemporaneous Second Preliminary-Injunction Motion, ECF No. 65.

[4] As Voters allege a *substantial risk* of direct and vote-dilution disenfranchisement, the Secretary's claim that vote dilution can't be determined until after vote counting, ECF No. 77 at 4, errs on that ground as well as being unsupported by vote-dilution cases that often turn on the risk.

fits the mootness exception for cases "capable of repetition, yet evading review." *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). As a general rule,

> the capable of repetition, yet evading review doctrine is limited to the situation where two elements combine: (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again.

Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (per curiam) (cleaned up). *See also Kingdomware Technologies v. U.S.*, 136 S. Ct. 1969, 1976 (2016) (same). "The 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks." *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974). In *Storer*, the Court held that independent candidates' challenge to election burdens was not moot because their "effects ... will persist as the California statutes are applied in future elections." *Id.* The Court cited no evidence that the four candidates intended to run again, instead inferring intent from past action. In *Norman v. Reed*, 502 U.S. 279 (1992), voter plaintiffs challenged restrictions on getting a new political party on the ballot and the election was over, yet the Court found the case not moot because "[t]here would be every reason to expect the same parties to generate a similar, future controversy subject to identical time if [the Court] should fail to resolve the constitutional issues," *id.* at 287-88. The Court cited no evidence of future intent, again inferring intent from past actions.

A. This case fits the evading-review prong.

This case readily fits the first prong. Election cases are quintessential examples of cases that evade review. *See, e.g.*, *Joyner v. Mofford*, 706 F.2d 1523, 1527 (9th Cir. 1983) ("Election cases ... come within the type of controversy that is 'capable of repetition, yet evading review.'"); *Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005) ("Challenges to election laws are one of the quintessential categories of cases "capable of repetition yet evading review" because litigation has only a few months before the remedy sought is rendered impossible by the occurrence of the relevant election."); *Libertarian Party of N.M. v. Herrera*, 506 F.3d 1303, 1306 n.1 (10th Cir. 2007) ("Even though the case for an injunction became moot after the election date had passed, the principal controversy—whether the New Mexico ballot access scheme for minor party candidates is constitutional—continues to affect the Libertarian Party."); *Majors v. Abell*, 317 F.3d

719, 722 (7th Cir. 2003) (challenge by candidate Majors to election law was capable of repetition after election because election cases are treated as capable of repetition like abortion cases) (citing *Roe v. Wade*, 410 U.S. 113, 125 (1973), as the abortion-case example and *Norman v. Reed*, 502 U.S. 279, 287-88 (1992); *Meyer v. Grant*, 486 U.S. 414, 417 n. 2 (1988); and *Stewart v. Taylor*, 104 F.3d 965, 969-70 (7th Cir. 1997), as election-case examples).

Here, the State and Clark County Plans were announced in March and April 2020, the initial complaint was filed April 21, and the June 9 Primary occurred without the opportunity for full review by this Court, let alone by an appeals court. This case fits prong one.

B. This case fits the capable-of-repetition prong.

This case also fits the second prong. This is so for candidate Gladwill and all Voters.

Abell held that a candidate has standing to challenge a provision that affects his rights, and that the case doesn't become moot even if he is denied a preliminary injunction, loses his election, and doesn't immediately run for office again because

> [a] candidate plaintiff has no more duty to run in every election ... to keep his suit alive than an abortion plaintiff has a duty to become pregnant again at the earliest possible opportunity ... to keep her suit alive. Politicians who are defeated in an election will often wait years before running again; obviously this doesn't show they're not serious about their political career.

317 F.3d at 722-23. As *Abell* noted, the capable repetition need not be by the *same plaintiff*:

> Furthermore, while canonical statements of the exception to mootness for cases capable of repetition but evading review require that the dispute giving rise to the case be capable of repetition *by the same plaintiff*, e.g., *Weinstein v. Bradford*, supra, 423 U.S. at 149; *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam); *LaRouche v. Fowler*, 332 U.S. App. D.C. 25, 152 F.3d 974, 978 (D.C. Cir. 1998), the courts, perhaps to avoid complicating lawsuits with incessant interruptions to assure the continued existence of a live controversy, do not interpret the requirement literally, at least in abortion and election cases, *Honig v. Doe*, 484 U.S. 305, 335-36 (1988) (dissenting opinion); see *Dunn v. Blumstein*, 405 U.S. 330, 333 n. 2 (1972); cf. *Krislov v. Rednour*, 226 F.3d 851, 858 (7th Cir. 2000); but cf. *Van Wie v. Pataki*, 267 F.3d 109, 114-15 (2d Cir. 2001)—and possibly more generally, *Honig v. Doe*, *supra*, 484 U.S. at 318-20 and n. 6 (majority opinion), though we needn't worry about that. If a suit attacking an abortion statute has dragged on for several years after the plaintiff's pregnancy terminated, the court does not conduct a hearing on whether she may have fertility problems or may have decided that she doesn't want to become pregnant again. And similarly in an election case the court will not keep interrogating the plaintiff to assess the likely trajectory of his political career.

Id. at 723 (emphasis in original).

Moreover, as in *Abell*—and earlier in *Storer*, 415 U.S. 724—a candidate need not even *state an intent* to run again for the case to be capable of repetition because it is *inferred* from prior in-

tent.[5] This is supported in other case law as to *both* candidates and voter-plaintiffs. For example, in *Lawrance v. Blackwell*, 430 F.3d 368 (6th Cir. 2005), the court noted that there was no evidence that a plaintiff candidate intended to run again or that a voter-plaintiff intended to vote for such an independent candidate again, but it held that the second prong was satisfied because it was *capable* of repetition:

> The Supreme Court has stated that the purpose of the second prong is to determine "whether the controversy was *capable* of repetition and not ... whether the claimant had demonstrated that a recurrence of the dispute was more probable than not." *Honig v. Doe*, 484 U.S. 305, 319 n. 6 (1988) (emphasis in original). Although Lawrence has not specifically stated that he plans to run in a future election, he is certainly capable of doing so, and under the circumstances it is reasonable to expect that he will do so. Neither is an explicit statement from Shilo necessary in order to reasonably expect that in a future election she will wish to vote for an independent candidate who did not decide to run until after the early filing deadline passed. The law at issue is still valid and applicable to both Lawrence and any independent candidate Shilo might wish to vote for in future election years. Therefore, the controversy is capable of repetition.

Id. at 371, *quoted in Graveline v. Benson*, 430 F. Supp. 3d 297, 306 (E.D. Mich. 2019). *See also Norman*, 502 U.S. at 288 (without evidence of future intent, Court inferred that "[t]here would be every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints if [the Court] should fail to resolve the constitutional issues"); *Int'l Org. of Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 473 (1991) (without evidence of future intent, the Court inferred that a candidate "has run for office before and may well do so again");

A "reasonable expectation" or "some likelihood" of recurrence suffices:

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[5] Of course, where such an intent is stated, it is relevant but not required. *See, e.g.*, *Porter v. Jones*, 319 F.ed 483, 490 (9th Cir. 2003) (one plaintiff stated intent to create future website that "other plaintiffs are likely to use" without statement of such intent as to the latter); *Schaefer v. Townsend*, 215 F.3d 1031, 1033 (9th Cir. 2000) (challenge to residency requirement not moot though candidate would not disclose whether he intended to run in future elections). Other circuits have not required evidence of future intent by candidates for a case to be capable of repetition, rather inferring that though an election has occurred the case is capable of repetition. *See Kucinich v. Tex. Dem. Party*, 563 F.3d 161, 165 (5th Cir. 2009); *Lawrance*, 430 U.S. at 371-72 (6th Cir.); *Merle v. United States*, 351 F.3d 92, 94-95 (3d Cir. 2003); *Vote Choice v. DiStefano*, 4 F.3d 26, 37 n.12 (1st Cir. 1993); *McLain v. Meier*, 637 F.2d 1159, 1162 n.5 (8th Cir. 1980); *Abell*, 317 F.3d 719, 723 (7th Cir. 2003). In *Hall v. Secretary, Alabama*, 902 F.3d 1294 (11th Cir. 2018), the court recognized the relaxation of the same-party rule in election cases, with the concomitant inference of future intent without evidence, but held that, uniquely, special elections are so rare in Alabama that "it is highly unlikely" that the candidate would ever be able to run in a special election again, *id.* at 1305. That is not the case here.

> We believe the dissent overstates the stringency of the "capable of repetition" test. Although Justice SCALIA equates "reasonable expectation" with "demonstrated probability," the very case he cites for this proposition described these standards in the disjunctive, see *Murphy v. Hunt*, 455 U.S., at 482 ("[T]here must be a 'reasonable expectation' *or* a 'demonstrated probability' that the same controversy will recur" (emphasis added)), and in numerous cases decided both before and since *Hunt* we have found controversies capable of repetition based on expectations that, while reasonable, were hardly demonstrably probable. See, e.g., *Burlington Northern R. Co. v. Maintenance of Way Employes*, 481 U.S. 429, 436, n. 4 (1987) (parties "reasonably likely" to find themselves in future disputes over collective-bargaining agreement); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 578 (O'CONNOR, J.) ("likely" that respondent would again submit mining plans that would trigger contested state permit requirement); *Press–Enterprise Co. v. Superior Court of Cal., Riverside County*, 478 U.S. 1, 6 (1986) ("It can reasonably be assumed" that newspaper publisher will be subjected to similar closure order in the future); *Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 603 (1982) (same); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980) (case not moot where litigant "faces some likelihood of becoming involved in same controversy in the future") (dicta). Our concern in these cases, as in all others involving potentially moot claims, was whether the controversy was capable of repetition and not, as the dissent seems to insist, whether the claimant had demonstrated that a recurrence of the dispute was more probable than not.

Honig, 486 U.S. at 319 n.6 (emphasis in original). So no "demonstrated probability" is needed.

The present case is likewise capable of repetition under the foregoing standards that apply to candidates and voters in election cases. Though candidate Gladwill did not win his election, *see* https://silverstateelection.nv.gov/county-results/lyon.shtml,[6] the cases require that his intent to run again be inferred from his past actions so that his claims are capable of repetition. For all plaintiff voters, their intent to vote again must be inferred from their past actions. Of course such inferences are not only required by case law in election cases but also because all inferences go to Voters in resisting a dismissal motion so that their past actions require the inference of intent to do future similar actions.

The governmental actions of which Voters complain are capable of repetition, indeed they are highly likely in future elections if allowed in this case—if not due to COVID-19 then due to another cause. The exact fact pattern is not required to meet the capable-of-repetition prong. *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 463 (2007) ("*WRTL-II*"). So the future trigger need not be the coronavirus that causes COVID-19 but could be, e.g., another virus that periodically appears on the public-health scene, such as H5N1. *See, e.g.*, CDC, *Highly Pathogenic Asian Avian Influenza A (H5N1) Virus*, https://www.cdc.gov/flu/avianflu/h5n1-virus.htm. But regarding COVID-19, this Court said the problem is ongoing. ECF No. 83 at 5. Nevada is only at Phase 2

[6] All links were last visited on July 2, 2020.

of reopening as of July 2, 2020, so many things are not open and others have restrictions. *See, e.g.*, https://nvhealthresponse.nv.gov/wp-content/uploads/2020/06/SitRep-6-25-20.pdf (Nevada Health Response, *COVID-19 PANDEMIC, Weekly Sit. Rep.* (June 25, 2020)). No predictions are posted when further reopening will occur, and the CDC reports ongoing cases nationwide and in Nevada. *See* www.cdc.gov/covid-data-tracker/#cases. To the extent COVID-19 concerns arguably might have justified the Plans,[7] those concerns continue, so that these or similar plans are likely to be implemented for the November general election. Defendant Gloria recommended a mail-in election for November 3 to the Clark County Commission, the commissioners voiced informal support for that recommendation, and Registrar Gloria will recommend that to the State. *See* https://clark.granicus.com/MediaPlayer.php?view_id=17&clip_id=6737&meta_id=1386075 (video of Clark County Bd. Comm'rs, Emerg'y Mtg. (June 19, 2020)). *See also* Agenda and Action Summary, *id.*[8] *See* also Shea Johnson, *Clark County supports mail-in general election in November*, Las Vegas Review-Journal (June 19, 2020), www.reviewjournal.com/news/politics-and-government/clark-county/clark-county-supports-mail-in-general-election-in-november-2057209/. In the cited Clark County Commission meeting, Defendant Gloria asked for guidance on whether to send unsolicited ballots to inactive voters, noting that he believed many had been returned as undeliverable, and the informal, non-binding opinions of individual Commissioners were summarized in the Action Summary as indicating that they did not believe the cost of mailing to inactive voters was justified. But the Clark County decision to mail to inactive voters arose in response to a lawsuit by Democratic Party groups and allies, *see* ECF No. 64 at 8, ¶ 39 and Ex. P. at 2, and such cases are highly likely to be brought again across the country, and especially in

[7] Voters argued that the Plans were not justified because, for the vast majority, in-person voting with the safeguards prescribed for other essential activities (such as grocery shopping) is no more of a burden than that approved in *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), so that the Plans failed the required narrow tailoring under *Burdick v. Takushi*, 504 U.S. 428 (1992). ECF No. 65 at 15-18.

[8] The Action Summary states "no action taken by Board" but summarized individual commissioners' comments as follows: "The Board recommended mail-in ballots for general election based upon the turn-out increasing by 10.5%; due to there being an alternative means to vote in the general election the cost was not justified for inactive voters especially for returned ballots; and supported utilizing necessary resources for the general election taking into consideration the federal and CARES Act doallrs [sic] available." *Id.* (all-capital text altered).

Nevada where there are two such cases (in state court and this Court), just as they were in the Primary[9]—so those are certainly capable of repetition and of coercing counties to conduct elections as desired by such groups. From the foregoing, without more, it is clear that future election plans similar to the Plans challenged here are not only *capable* of repetition but *likely* to recur, so this case is not moot.

Moreover, if the Secretary's authority for the State Plan is argued as authorized by NRS 293.247(1), then that Plan controls through November:

> 1. The Secretary of State shall adopt regulations, not inconsistent with the election laws of this State, for the conduct of primary, general, special and district elections in all cities and counties. Permanent regulations of the Secretary of State that regulate the conduct of a primary, general, special or district election and are effective on or before the last business day of February immediately preceding a primary, general, special or district election govern the conduct of that election.

Section 247(1) says regulations enacted under *this* authority that "govern the conduct of ... election[s]" are "permanent regulations" that control until replaced by new regulations in February of another election year. While the Secretary styled the Plan as for the Primary, if she asserts authority under *this* provision, then since the Plan is in effect "preceding a ... general ... election" it "govern[s] the conduct of that election." But the Plan is capable of repetition even without this.

In sum, despite the Primary having occurred, this case fits both prongs of the mootness exception for cases capable of repetition, yet evading review. It is not moot.

II.
Voters have standing.

Voters have standing for each claim, satisfying the (i) injury-in-fact, (ii) traceability, and (iii) redressability elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An injury-in-fact is present given the "'*substantial risk*' that the harm will occur." *Driehaus*, 573 U.S. at 158 (citation omitted) (emphasis added).

[9] Intervenors' counsel Marc Elias created the Democracy Docket, www.democracydocket.com/about/, which lists similar cases in which he is involved (including the two in Nevada), www.democracydocket.com/our-cases/. Some Democratic Party group cases involving COVID-19 are collected along with key documents at https://moritzlaw.osu.edu/electionlaw/litigation/, including *DNC v. Bostelemann* (https://moritzlaw.osu.edu/electionlaw/litigation/Bostelmann.php); *Texas Democratic Party v. Abbot* (https://moritzlaw.osu.edu/electionlaw/litigation/Abott.php), *Texas Democratic Party v. Hughes* (https://moritzlaw.osu.edu/electionlaw/litigation/Hughs.php).

A. Voters have standing for Count I (direct disenfranchisement).

Voters have standing for Count I because they have alleged facts, which must be taken as true and favorable inferences therefrom given to Voters, that establish that (**i**) they have a cognizable injury-in-fact because the Plans impose a substantial risk of direct disenfranchisement for Voters, ECF No. 64 at 1-2 (¶¶ 1-3 (mailing unrequested ballots, including to inactive voters in Clark County)); *id.* at 11 (¶ 54 (Legislature's plan not followed)); *id.* at 12-14 ("*Anti-Vote-Fraud Safeguards*" include *by-request* absentee ballots); *id.* at 17-20 ("*Mail Balloting Issues*"); *id.* at 20-22 ("Count I"); *id.* at 20-21 (¶ 101 (that vote-fraud is connected to mail-in ballots and legislatures balance election access and integrity to reduce harm to safe levels are well established under, e.g., *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008), and *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004)), (**ii**) that substantial risk is traceable to Defendants because they substituted the Plans for the Legislature's plan for mostly in-person voting with a modest amount of mail-in voting and by-request absentee ballots, and (**iii**) the requested relief, *id.* at 25-26, would redress the substantial risk of direct disenfranchisement.

Intervenors acknowledge that "disenfranchisement, or the serious risk thereof, is an injury-in-fact cognizable under Article III." ECF No. 71 at 6. However, Intervenors say "Plaintiffs have not articulated why the decision to proactively mail ballots to voters is more likely to result in disenfranchisement simply because it is—allegedly—against the law." *Id.* But that mischaracterizes the claim and ignores the already stated nexus.

Regarding the mischaracterization, Count I is a direct-disenfrachisement claim, not an ultra-vires claim. The failure of the Plan to comply with state law is relevant to two arguments. First, it is relevant to Count III and whether the Plan is the "Manner ... prescribed ... by the Legislature" as required by Article I, § 4, cl. 1 of the U.S. Constitution. Second, it is relevant to the substantial risk of direct and vote-dilution disenfranchisement in Counts I and II because the Legislature necessarily exercised its sole authority to balance voting access with election integrity (including avoiding direct and vote-dilution disenfranchisement) when it established a primarily in-person system with limited mail-in voting. Only *that* Manner keeps the inherent risk of direct and vote

dilution disenfranchisement at a level the Legislature found acceptable for Nevada.[10] Because the Plan *inverted* the Legislature's Manner, the risks of direct and vote-dilution disenfranchisement are, *as a matter of law*, *above* what the Legislature found to be safe in Nevada. So the failure to follow the Legislature's prescribed Manner proves Voters' constitutional claims of a substantial risk of direct and vote-dilution disenfranchisement. This key, matter-of-law analysis is developed further in ECF No. 65 at 11-12 and is incorporated by reference to avoid duplication, but Intervenors ignore it, relying instead on the strawman argument that Voters are merely trying to enforce state law in federal court. Voters are not.

Regarding the nexus between the alleged harm of a substantial risk of disenfranchisement and the Plans that Defendants imposed, Voters stated it clearly in Count I. ECF No. 64 at 20-22. There, Voters (**i**) explained the analysis above (in the foregoing paragraph) at ¶¶ 98-102, (**ii**) explained that there would be a sudden surge of mail-in ballots under the Plans, ¶¶ 103-04, and (**iii**) alleged that "[d]ue to the sudden surge in mail-in ballots that will result from the Plans, many voters will be disenfranchised because requested ballots never arrive or arrive too late and filled-out ballots get lost or are delayed in the return process," ¶ 105. And for that nexus allegation, Voters cited ¶¶ 82-96 of the Amended Complaint, titled "Mail Balloting Issues," which described at length the disenfranchisement problems caused with the sudden flood of mail-in ballots in recent elections where a similar sudden change to mail-in ballots was imposed—due to the inability of the U.S. Postal Service and election workers to adequately process a sudden flood of mail-in ballots for which they had not planned and budgeted and which had not been phased in over time as required—and concluded with evidence of a similar problem *already occurring in Nevada*, ¶ 96. In the present dismissal context, those allegations must be accepted as true, as must all inferences therefrom favorable to Voters. So the nexus between the alleged substantial risk of

[10] *All* that the Legislature enacted to protect election integrity was necessarily deemed essential by the Legislature, so the Secretary's notion that *other* anti-fraud measures might suffice to prevent voter fraud, ECF No. 77 at 5, flies in the face of what the *Legislature* found essential. She concedes, "the search for the proper balance between voter access and election integrity considerations is a matter for policy makers," *id.*, though *only the Legislature*'s balancing controls, not the Secretary's nor County Administrators'. Her Plan supplanted the Legislature's plan for a primarily in-person election with modest mail-in voting and by-request absentee ballots.

direct disenfranchisement and the Plans that the Defendants substituted for the Legislature's prescribed Manner (primarily in-person voting with limited mail-in voting) was clearly established. Intervenors say the "how" of missing ballots is missing, ECF No. 71 at 6, but the "how" is clearly stated in ¶¶ 82-96 and 105 of the Amended Complaint. Intervenors say Voters' "preferred method of voting[is] absentee ballots," ECF No. 71 at 7, but Voters clearly preferred and defended the *Legislature*'s prescribed Manner, i.e, a primarily *in-person* election with appropriate safeguards used for other such essential activity and *by-request* absentee ballots, *see, e.g.*, ECF No. 64 at ¶¶ 78-81, 102, and 106; *see also id.* at 25-26 (Prayer for Relief). So Intervenors' strawman attempt to compare Voters' supposedly "preferred method" with the all-mail Plans, ECF No. 71 at 7, fails as an invalid comparison. But even if "*more* voting" *might* occur, *id.*—which Intervenors don't establish while Voters' factual allegations must be accepted—that would not remove the substantial risk that Voters will be disenfranchised as Voters alleged, *see, e.g.*, ECF No. 64 at ¶¶ 83-90, 105 (which must be accepted as true in this dismissal context).

Intervenors also *mentioned* "redressability" without developing it, ECF No. 71 at 7, but the application of the foregoing analysis in the required *Burdick* analysis, ECF No. 64 at 21-22, ¶ 106, and the resulting requested relief in the Amended Complaint, *id.* at 25-16, would redress the substantial risk of direct disenfranchisement by appropriate declaratory and injunctive relief. So Voters have standing for Count I.

B. Voters have standing for Count II (vote-dilution disenfranchisement).

Voters have standing for Count II because they have alleged facts, which must be taken as true and favorable inferences therefrom given to Voters, that establish that (**i**) they have a cognizable injury-in-fact because the Plans impose a substantial risk of vote-dilution disenfranchisement for Voters, ECF No. 64 at 1-2 (¶¶ 1-3 (mailing unrequested ballots, including to inactive voters in Clark County); *id.* at 11 (¶ 54 (Legislature's plan not followed)); *id.* at 17-20 ("*Mail Balloting Issues*"); *id.* at 23-24 ("Count II"); *id.* at 20-21 (¶ 101 (vote-fraud is connected to mail-in ballots and Legislatures balance election access and integrity to reduce harm to safe levels are well established under, e.g., *Crawford*, 553 U.S. 181, and *Griffin*, 385 F.3d 1128), (**ii**) substantial risk of disenfranchisement is traceable to Defendants because they substituted the Plans for the

Legislature's plan for mostly in-person voting with a modest amount of mail-in voting and substituted by-request absentee ballots for unrequested mail-in ballots, and (**iii**) the requested relief would redress the substantial likelihood of disenfranchisement. Intervenors dispute this on the grounds that Voters' allegation of a substantial risk of vote-dilution disenfranchisement is a "generalized grievance" and "speculative." ECF No. 71 at 9-10. Both err.

Regarding the generalized grievance claim, Voters' grievance is particularized, not generalized, for two distinct reasons arising from the generalized-grievance test in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Note *Lujan*'s two formulations of the test:

- "a plaintiff raising only a generally available grievance about government—claiming only harm to his and *every citizens*'s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy," *id.* at 560-61 (emphasis added), and
- "an injury amounting only to the alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable . . . [and] cannot alone satisfy the requirements of Art. III ...," *id.* at 575-76 (internal quotation marks and citation omitted).

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

First, Voters don't bring their claims under mere "citizen" standing. Rather, they assert personal harms from the violation of their own fundamental right to vote that is protected by the First and Fourteenth Amendments, as well as their right to vote in an election compliant with

Article I, § 4, cl. 1. So they assert constitutionally protected rights, and given the Supremacy Clause, U.S. Const. art. IV, para. 2, state officials must obey constitutional mandates. Voters claim is also particularized. They don't challenge anything not directly bearing on their constitutional claims, so they are not just trying to make the government do its job in some general way but rather challenge that which particularly violates their right to vote. So they are not mere citizens just trying to make the government do its job.

Second, Voters assert a harm that is not the same as for every "citizen." "The bar is based not on the number of people affected—a grievance is not generalized merely because it is suffered by large numbers of people." *Andrade*, 345 S.W.3d at 7 (citing Chemerinsky, *Constitutional Law* 91). "[D]enying standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody." *United States v. SCRAP*, 412 U.S. 660, 686-68 (1973). "[W]here a harm is concrete, though widely shared, the Court has found injury in fact." *FEC v. Akins*, 524 U.S. 11, 24 (1998). "The fact than an injury may be suffered by a large number of people does not of itself make the injury a nonjusticiable generalized grievance." *Spokeo v. Robbins*, 136 S. Ct. 1540, 1548 n. 7 (2016). It is irrelevant that an injury is "widely shared," if plaintiffs "suffer a particularized harm." *Id.* Voters' claim of harm here is actually three levels of specificity below any harm suffered by "citizens." (1) Within the class of citizens are those *registered* to vote; only those registered could suffer vote dilution. (2) Within the those registered to vote are *eligible* voters; only the eligible have a right to vote that could suffer vote dilution. (3) Within the those eligible and registered to vote are those who *actually vote*; only those who actually vote can have that vote diluted by illegal votes. So Voters' vote-dilution claim is highly particularized and not even close to *Lujan*'s citizen-standing definition of a generalized grievance.

Regarding Intervenors claim that a substantial risk of vote-dilution disenfranchisement is speculative or conjectural, ECF No. 71 at 10, it is not. Intervenors again ignore the fact explained above, *supra* at II.A, that the Legislature necessarily and authoritatively *balanced* vote access and preventing illegal votes to minimize the risk of vote-dilution disenfranchisement by requiring a primarily in-person election with modest mail-in voting, ECF No. 64 at 2 (¶ 1, 3) so that, by in-

verting the Legislature's prescribed Manner, Defendants *maximized* what the Legislature *minimized* as a matter of law. There is nothing speculative about that, and Voters supported that matter-of-law argument with factual allegations concerning the "[m]ail-in-ballot fraud risk," ECF No. 64 at 17-20 ("*Mail Balloting Issues*"); *see also* ECF No. 65 at 6-9 (more evidence of harms), which must be accepted as true in this dismissal context. Included in that evidence was the U.S. Supreme Court's recognition in *Crawford*, 553 U.S. 181, that there is corruption in elections that must be resisted by appropriate measures and that mail-in ballots pose the greater risk compared to in-person voting, *id.* at 191-97. ECF No. 64 at 20-21 (¶ 101). So there is nothing speculative or conjectural about the claim that mail-in ballots pose vote-fraud risk, or about the fact that legislatures balance the amount of such risk by limiting or expanding mail-in votes based on the perceived risk in a particular jurisdiction, or that with a sudden flood of mail-in ballots election workers are less able to screen for fraudulent ballots due to the unplanned-for onslaught.

The non-controlling cases Intervenors recite don't change the foregoing or help Intervenors. ECF No. 71 at 10. *ACRU v. Martinez-Rivera*, 166 F. Supp. 3d 779 (W.D. Tex. 2105), involved review of a magistrate's report, so unobjected findings were reviewed only for clear error. ACRU did not object to the magistrate's finding that "undermined voter confidence and potential vote dilution[] merely amount to generalized grievances about the government, which do not give rise to associational standing" and the court found no clear error. *Id.* at 787. But in that case the argument was *not* that the legislature had already done a balancing concerning the risk of vote dilution, the abandonment of which necessarily presented a substantial risk beyond what the legislature had decided was permissible, but only that failure to purge voting rolls (under the National Voter Registration Act) might result in vote dilution. That substantially differs in kind, and present Voters have a direct harm caused by abandoning the balancing and protections of the Legislature's prescribed Manner in an actual election. And Voters *do* object to the assertion that theirs is a generalized grievance, which they have shown it is not.

United States v. Florida, 2012 U.S. Dist. LEXIS 189624 (N.D. Fla. 2012), involved an effort to intervene by "four individuals [who] sa[id] that if people are improperly registered to vote it will dilute the votes of properly registered voters," *id.* at *4, and they (and members of Judicial

Watch) were held to have only the generalized interest of "every other registered voter in the state," *id.* (True the Vote asserted a different interest—monitoring voter-registration lists—but as there was no interference with that it was not allowed to intervene. *Id.* at *5-6.) As with *ACRU*, no actual voting was underway under an inversion of the Legislature's balancing that of itself raises the dilution problem and makes it substantial because it is not within the bounds that the Legislature deemed safe for this state. Intervenors quote *ACRU* as saying that "'the risk of vote dilution[is] speculative.'" ECF No. 71 at 10 (citing 166 F. Supp. 3d at 789). But that is not a categorical holding that vote-dilution claims are speculative, as Intervenors present it to be, only that in *ACRU* the vote-dilution claim there was speculative based on those particular facts.

Nor *are* vote-dilution claims categorically speculative because that notion is precluded by (inter alia) *Reynolds v. Sims*, 377 U.S. 533, 554-55 & n.29 (1964), which held that "[t]he right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing," *id.* at 555 (internal citations omitted), and "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise," *id.*[11] Ballot-box stuffing clearly dilutes legal votes by the inclusion of illegal votes, just as the Plans create dilution by increasing the substantial risk of illegal votes. Vote dilution is readily apparent where illegal votes are allowed because of inadequate safeguards. Only the votes of eligible, registered voters are supposed to be cast and counted. So every legitimate voter is one of the total number of legitimate voters. For example, if a voter's vote is one of ten legitimate votes cast, her vote is worth one tenth. But if ten illegal votes are added, her vote is now worth one twentieth. That vote dilution violates her constitutional right to vote. Here, the Plans create a substantial risk of this non-speculative form of vote dilution from illegal votes due to sending unrequested mail-in ballots to all active registered voters in the State Plan and also to inactive registered voters in the Clark County Plan and by creating a sudden flood of ballots with the substantial risk that election workers will be unable to ade-

[11] *See also, e.g.*, *Gray v. Sanders*, 372 U.S. 368, 380 (1963) (every vote must be "protected from the diluting effect of illegal ballots."); *Crawford*, 553 U.S. 181, 196 (2008) (plurality op. of Stevens, J.) ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters.").

quately screen out illegal votes.

That the vote-fraud risk is not speculative specifically in Nevada is also supported by the evidence included in ¶ 96 of the Amended Complaint in which Daniel Virgilio found his own ballot outside his mailbox, along with other ballots scattered about in various nearby locations. ECF No. 64 at 20. This must be accepted as true for current purposes (and it is supported by an affidavit), and the inference is that these ballots would be among those not returned as in ¶ 95, ECF No. 64 at 19, and that these free-floating ballots are available for use by those engaged in the known, matter-of-law risk of vote fraud that is higher with mail-in voting than in-person voting. *See, e.g.*, *id.* at 17 (¶ 82 & n.2), 20 (¶ 101).

Intervenors again suggest, without argument, that Voters are simply trying to "'have the Government act in accordance with law.'" ECF No. 71 at 10 (citation omitted). This strawman argument has already been rejected. *See supra* II.A. So Voters have a cognizable injury-in-fact in the form of a substantial risk of vote-dilution disenfranchisement. That harm is traceable to Defendants—because they enacted the Plans that invert the Legislature's balancing to minimize mail-in-ballot voter fraud and create the sudden flood of ballots that makes it more difficult for election workers to screen out fraudulent ballots—and it is redressable by the requested relief.

C. Voters have standing for Count III (Elections Clause, Art. I, § 4, cl. 1).

The Plans violate Voters' right to have, and to vote in, a federal election where the "Manner" of election is "prescribed . . . by the Legislature." U.S. Const. art. I, § 4, cl. 1. As federal candidates are on the ballot, the primary must be conducted in the Legislature's prescribed manner. The Plans are contrary to the legislative mandate. In *Bush v. Gore*, 531 U.S. 98 (2000), the Supreme Court noted a claim based on a parallel provision, the Electors Clause, which requires that elections for presidential electors be conducted in the manner chosen by the legislature, but decided that it need not reach it because what the Florida Supreme Court had done fell so woefully short of what was required under the vote-dilution ban that the manner-of-election issue need not be reached. *Id.* at 103 (the issue was "whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution"). Notably, the Court in *Bush* did *not* say that there was no private

cause of action for the parallel Electors Clause, which it could have done if there were no private cause of action, only that it need not be reached. That is strong evidence that there is a private cause of action for the Electors Clause and thus for the parallel Elections Clause. While Intervenors cite some general authorities, ECF No. 71 at 12, neither addresses the Elections Clause and Intervenors cite no authority for the proposition that there is no private right of action for the Elections Clause as there is for the Electors Clause. And contrary to Intervenors' suggestion that the Elections Clause is not a "rights-focused" provision, *id.*, Voters assert that they do have a right to vote in an election with federal candidates compliant with the Elections Clause just as *Bush* did not dispute a right to vote in such a federal election compliant with the Electors Clause. So there is a cognizable injury-in-fact from the Plans, which is traceable to Defendants who enacted the Plans, and which is redressable by requested relief.

D. Voters have standing for Count IV (Equal Protection Clause, Amend. XIV).

Though Intervenors challenge standing on other counts, ECF No. 71 at 5 (Count I), 9 (Count II), 11 (Count III), they don't contest standing as to Count IV, ECF No. 71 at 12 (Count IV). So Voters consider standing conceded on Count IV, as it should be for such equal-protection claims.

E. Plaintiff Gladwill, as a candidate, has uniquely particularized standing.

At the time of the Amended Complaint, Plaintiff Gary Gladwill was a local candidate, who had already mailed in his ballot. ECF No. 64 at 4, ¶ 13. As a voter, he has the same standing as the other Voters described above. But he *also* asserted separately and distinctly that "[h]e is also a candidate." *Id.* In the contemporaneous Second Preliminary Injunction Motion, he argued the necessary inference of his additional identification as a candidate by asserting "the added interest that he is likely to lose ballots cast for him from voters suffering such disenfranchisement." ECF No. 65 at 10. This is particularized harm, traceable to those enacting the Plans, and redressable by requested relief, providing him with standing on that ground alone. And his candidacy is capable of repetition, yet evading review, so the fact that he lost his election doesn't make his claims moot. *See supra* Part I.

III.
All counts state a claim on which relief can be granted.

Each count states a claim on which relief can be granted. Given a cognizable legal theory, claims need only provide enough facts to make the claims "plausible":

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.*, at 570. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid*. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 557 (brackets omitted).

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)); *accord Nayab v. Capital One Bank (USA), N.A.*, 942 F.3d 480, 495-96 (9th Cir. 2019).

A. Count I states a claim on which relief can be granted.

Count I claims that the Plans violate the fundamental right to vote by creating a substantial risk of direct disenfranchisement caused by a sudden flood of mail-in ballots. ECF No. 64 at 20-22. This is a claim on which relief can be granted. First, disenfranchisement is a cognizable legal theory. ECF No. 64 at 20 (citing *Reynolds*, 377 U.S. at 555). Second, as Voters alleged and established legally and factually, (**a**) the Legislature has the sole authority and expertise to balance voting access and vote-fraud issues to prescribe a manner of election with confidence of election integrity for a particular state, and the Legislature created a primarily in-person voting system with limited mail-in voting and by-request absentee ballots, thereby exercising its balancing expertise and authority in deciding *not* to impose a sudden-flood, mail-in voting system, ECF No. 64 at 9-14; (**b**) Defendants created and substituted election Plans that *inverted* the Legislature's voting system, substituting primarily mail-in systems with limited in-person voting and mailing ballots without request to all active registered voters (State Plan) and also to inactive registered voters (Clark County Plan), thereby imposing the sudden flood of mail-in ballots that the Legislature had chosen *not* to impose in its authoritative balancing, ECF No. 64 at 1-2, 5-9; (**c**) in recent similar situations where sudden floods of mail-in voting has been imposed, voters have been disenfranchised as a result, ECF No. 64 at 17-20; and (**d**) evidence of the same problems with a sudden flood of mail-in ballots is already present in Nevada, ECF No. 64 at 20 (¶ 96, ballots not in

mailbox and discarded). Defendants actions have created a substantial risk of disenfranchisement to Voters who mail their ballots,[12] which substantial risk was caused by Defendants and is not justified under the balancing required by *Burdick v. Takushi*, 504 U.S. 428 (1992). ECF No. 64 at 21-22. The foregoing plainly "pleads factual content that allows the court to draw the reasonable inference that ... defendant[s are]liable for the misconduct alleged" and so satisfies *Iqbal*, 556 U.S. at 678. And those well-supported, clear factual allegations underpin a cognizable legal theory of disenfranchisement based on a straightforward argument, as more fully developed in Plaintiffs' Second Preliminary-Injunction Motion, ECF No. 65 at 11-18 (which argument is incorporated here by reference to avoid repetition).

Intervenors say Voters only seek "to enforce state election laws" for which "the U.S. Constitution is not a vehicle." ECF No. 71 at 7. But of course this is the strawman argument already identified, *supra* II.A, because this is a disenfranchisement claim, not an *ultra vires* claim.

Intervenors say "Count I fails as a matter of law because it rests on an incorrect interpretation of Nevada's election laws," saying Defendants have authority to create mail precincts. ECF No. 71 at 8-9. But Defendants miss the forest for the trees because the Legislature did its authoritative balancing and prescribed for Nevada a primarily in-person voting system with limited mail-in voting, a balancing of voting access and vote-fraud concerns that cannot be gainsaid. Defendants *inverted* that balancing, with the attendant risks that the Legislature found to be permissible under its pattern now impermissible due to the inversion.[13] And that inversion is clearly of constitutional dimension because it maximizes what the Legislature minimized in terms of the risks attending a sudden flood of mail-in ballots.

In sum, a substantial risk of disenfranchisement is a cognizable legal theory, and Voters have pleaded more than is required under *Iqbal*. This claim should not be dismissed.

B. Count II states a claim on which relief can be granted.

Count II claims that the Plans violate the fundamental right to vote by creating a substantial

[12] Plaintiffs Gladwill and Barnett voted by mail. ECF No. 64 at 4.

[13] Voters established Defendants' noncompliance with other details of Nevada law required by the Legislature, ECF No. 64 at 5-12; *see also* ECF No. 65 at 3-6, but the inversion of the Legislature's plan based on what it deemed required to protect Nevada from vote fraud is crucial.

risk of vote-dilution disenfranchisement caused by (i) supplanting the Legislature's primacy for in-person voting (with its inherent safeguards) by inverting the Legislature's prescribed manner of election, (ii) eliminating the requirement that absentee ballots be by request with the inherent safeguards of that requirement, and (iii) sending unsolicited ballots to all active registered voters (as well as inactive in Clark County), which together alter the usual percentage of absentee ballots that the Legislature found safe, cause large numbers of unsolicited ballots to flood the public with the risk that those will be used illegally, and create a sudden flood of mail-in votes that reduce the possibility that election workers will be able to screen out illegal votes—all resulting in a substantial risk of illegal votes that dilute legal votes. ECF No. 64 at 22-23.

This is a claim on which relief can be granted. First, dilution of legal votes by illegal votes is a cognizable legal theory. *Id.* at 22 (citing *Reynolds*, 377 U.S. at 555 (illegal votes, e.g., by ballot stuffing, dilute votes and thus violate the right to vote). *See also supra* note11 and accompanying text). Second, as Voters alleged and established legally and factually, (**a**) the Legislature has the sole authority and expertise to balance voting access and vote-fraud issues to prescribe a manner of election with confidence of election integrity for a particular state, and the Legislature created a primarily in-person voting system with limited mail-in voting and by-request absentee ballots, thereby exercising its balancing expertise and authority to decide *not* to impose a sudden-flood, mail-in voting system and not to send unsolicited ballots to all active (let alone inactive) registered voters, ECF No. 64 at 9-14; (**b**) Defendants created and substituted election Plans that *inverted* the Legislature's voting system, substituting primarily mail-in systems with limited in-person voting and mailing ballots without request to all active registered voters (State Plan) and also to inactive registered voters (Clark County Plan), thereby imposing the sudden flood of mail-in ballots that the Legislature had chosen *not* to impose in its authoritative balancing and which reduces election workers' ability to screen for illegal votes, ECF No. 64 at 1-2, 5-9; (**c**) voting fraud connected to mail-in ballots is well-established, as recognized in *Crawford*, 553 U.S. 1at 191-97, ECF No. 64 at 20-21 (¶ 101); and (**d**) evidence of non-delivered, discarded, and free-floating mail-in ballots capable of being used illegally is present in Nevada, ECF No. 64 at 20 (¶ 96). Defendants actions have created a substantial risk of vote-dilution disenfranchisement to

all Voters due to illegal votes, which substantial risk was caused by Defendants and is not justified under the balancing required by *Burdick v. Takushi*, 504 U.S. 428 (1992). ECF No. 64 at 21-22. The foregoing plainly "pleads factual content that allows the court to draw the reasonable inference that ... defendant[s are]liable for the misconduct alleged" and so satisfies *Iqbal*, 556 U.S. at 678. And those well-supported, clear factual allegations underpin a cognizable legal theory of disenfranchisement based on a straightforward argument, as more fully developed in Plaintiffs' Second Preliminary-Injunction Motion, ECF No. 65 at 6-8, 11-12, 18-21 (incorporated here by reference to avoid repetition).

C. Count III states a claim on which relief can be granted.

Count III claims that the Plans violate Voters' right to have, and vote in, a federal election where the "Manner" of election is "prescribed by the Legislature" as required by the Election Clause, U.S. Const. art. I, § 4, cl. 1. ECF No. 64 at 23-24. This is a claim on which relief can be granted. First, violation of the Elections Clause is a cognizable legal theory with a private cause of action as established in the standing discussion for this claim. *Supra* II.C. Second, Voters established extensive factual evidence that the Plans that Defendants implemented do not comply with the Legislature's prescribed Manner. ECF No. 64 at 2, 5-14, 23-24.[14] Crucially, the Plans conflict with the Legislature's intent that elections be primarily by in-person voting with limited mail-in voting and that absentee ballots be by request. *See, e.g.*, *id.* at 10-11 (¶¶ 52, 54); *id.* at 13 (¶ 67). The argument based on factual noncompliance is more fully developed in Plaintiffs' Second Preliminary-Injunction Motion, ECF No. 65 at 3-6, 21 (incorporated by reference to avoid repetition). And as stated there, the key is the Legislature's intent for primarily mail-in voting:

> 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

[14] The Secretary acknowledges a tardy notice, saying it contributes to no injury. ECF No. 77 at 8. But it does directly contribute to the harm alleged in this Count III because it is noncompliant with the prescribed Manner. The Legislature prescribed that regulations be made and mail precincts formed in certain ways, which must be followed. For example, NRS 293.205 requires that County Clerks to "*establish* election precincts" in March, which differs from a separate requirement to "*define* the boundaries" (emphasis added). For other harms, the *inversion* of the Legislature's balancing of election access and integrity creates the substantial risks alleged.

> mailing precincts, the legislature mandated legal requirements for "establishing" or "designating" such a precinct ....

Id. at 4. The inversion of the Legislature's prescribed Manner is of profound constitutional import because only the Legislature has the authority and expertise to balance voting access and Supreme-Court-recognized ballot-fraud risk.[15] The foregoing plainly "pleads factual content that allows the court to draw the reasonable inference that ... defendant[s are]liable for the misconduct alleged" and so satisfies *Iqbal*, 556 U.S. at 678.

Intervenors says there is no private right of action, ECF No. 71, but that has been shown to be erroneous, *supra* II.C. Intervenors say Voters have a generalized grievance for reasons previously shown, ECF No. 71 at 12, but Voters have established that their claims are not generalized grievances, *supra* II.B, which applies equally here. Intervenors say the claim rests on an incorrect reading of Nevada law, ECF No. 71 at 12, but they make no effort to disprove the fundamental and crucial fact that the Legislature's election plan is for primarily in-person voting with limited mail-in voting and absentee ballots by request. ECF No. 64 at 10-11 (¶¶ 52, 54); *id.* at 13 (¶ 67).

D. Count IV states a claim on which relief can be granted.

Count IV claims that the Clark County Plan (agreed to by the Secretary[16] and planned and implemented by Registrar Gloria) violates the right to vote (by dilution of vote values in other counties) and the Equal Protection Clause by advantaging Clark County voters at the expense of voters in other counties by sending mail-in ballots to both active and inactive registered voters and by using county-approved ballot harvesters to collect ballots. ECF No. 64 at 24-25. This is a claim on which relief can be granted. First, vote-dilution disenfranchisement and equal-protection violations by favoring voters in one county over others are cognizable legal theories. ECF No. 64 at 24 (¶¶ 124-25 (citing *Bush v. Gore*, 531 U.S. 98, 107 (2000)). Second, Voters alleged

[15] Voters established Defendants' noncompliance with other details of Nevada law required by the Legislature, ECF No. 64 at 5-12; *see also* ECF No. 65 at 3-6, but the inversion of the Legislature's plan based on what it deemed required to protect Nevada from vote fraud is crucial.

[16] The Secretary concedes that she "deferred" to Registrar Gloria on mailing to inactive voters, though she "ultimately has enforcement authority" over county plans. ECF No. 77 at 7. The Secretary mischaracterizes this claim as "a desire to reduce voter turnout in Clark County," *id.*, but the actual claim involves not giving enhanced voting power in one county over other counties, for which actual claim Voters did provide authority as discussed again here in text.

facts, which must be accepted as true, that establish these claims: (**a**) what the Clark County Plan does differently, as just described, (**b**) that "[t]hose things enhance the odds of voters in Clark County being able to vote and have their votes counted (while violating the Legislature's controlling balancing of access and fraud risk by increasing the odds of ballot fraud)," ECF No. 64 at 24-25 (¶ 126), and (**c**) that "[p]roportionally more votes will be obtained from Clark County, Nevada's most populous county, than from other counties—the difference will not be accounted for by population differences," *id.* at 25 (¶ 127). The foregoing plainly "pleads factual content that allows the court to draw the reasonable inference that ... defendant[s are]liable for the misconduct alleged" and so satisfies *Iqbal*, 556 U.S. at 678. Those factual allegations underpin a cognizable legal theory of disenfranchisement based on a straightforward argument, as more fully developed in Plaintiffs' Second Preliminary-Injunction Motion, ECF No. 65 at 21-23 (incorporated here by reference to avoid repetition). As discussed there, U.S. Supreme Court decisions, including *Bush*, establish that voters of one county may not have "greater voting strength" than those in other counties. *Id.* at 22. *Bush* involved a central authority (there the Florida Supreme Court) that allowed votes to be counted from counties that had differing standards for recognizing legal votes (one more forgiving than the other) with the result that the more forgiving county "uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the two counties." 531 U.S. at 107. That violated the equal-protection clause. *Id.* at 111. The parallel here is that a central authority, the Secretary, permitted Clark County to implement a plan that differs from the Secretary's own Plan (as well as the Legislature's prescribed Manner) that will enable more votes to be gathered from Clark County but disproportionate to its larger population.[17] This parallel establishes that this claim should not be dismissed.

Intervenors say this claim is foreclosed by *Short v. Brown*, 893 F.3d 671 (9th Cir. 2018). ECF No. 71 at 13. But *Short* doesn't control for at least three reasons. First, Plaintiffs don't argue that the Clark County Plan makes it harder for them to vote, so quotes to the effect that it doesn't

[17] As Voters noted, this technique is commonly used to mine more votes from areas known to favor a particular political party, ECF No. 65 at 22, which is particularly relevant in general elections, such as the coming November general election, and is relevant here based on the fact that this case is capable of repetition in general elections, yet evading review.

are beside the point. Second, because Plaintiffs don't challenge this Plan for making it harder to vote, the notion that rational-basis scrutiny applies because mail-in voting makes it easier to vote is beside the point. Third, the part of *Short* that Intervenors ignore is the part that controls. Note that *Short* only involved the phasing in of mail-in voting in California, *id.* at 674-75, and voters in non-all-mail counties claimed their vote was diluted by votes in all-mail counties because mail-in voting was easier. After rejecting that argument, which Plaintiffs don't make, the Ninth Circuit said this case is "nothing like" the line of cases that Plaintiffs cited from *Bush* that found an equal-protection violation where some counties are given greater voting strength, *id.* at 678-78. In those disparate-voting-strength cases, strict scrutiny applies because violation of equal protection and vote-dilution disenfranchisement are severe harms. And under strict scrutiny, it is the burden of Clark County, and of the Secretary who allowed the disparate voting strength in contravention of her own State Plan, to establish that it is narrowly tailored to a compelling interest, which they have made no effort to do. Nor could they because there is no justification, even amid COVID-19 concerns, to empower one county over another.

Intervenors try to distinguish *Bush* by arguing that "Plaintiffs have not alleged that their ballots—or anyone else's—will be arbitrarily rejected." ECF No. 71 at 13. But that was not the issue in *Bush* and so can't serve to distinguish the applicable *Bush* analysis here established.

Conclusion

For the reasons shown, this case should not be dismissed.

Respectfully submitted,

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Certificate of Service

I hereby certify that on July 2, 2020, I served a true and correct copy of the foregoing on the following parties via this Court's CM/ECF electronic filing system to the addresses listed below.

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