

1 CAMPBELL & WILLIAMS
2 DONALD J. CAMPBELL, ESQ, (1216)
3 djc@cwlawlv.com
4 J. COLBY WILLIAMS, ESQ. (5549)
5 jcw@cwlawlv.com
6 700 South 7th Street
7 Las Vegas, Nevada 89101
8 Telephone: (702) 382-5222
9 Facsimile: (702) 382-0540

7 CONSOVOY MCCARTHY PLLC
8 WILLIAM S. CONSOVOY, ESQ.*
9 Virginia Bar No. 47704
10 will@consovoymccarthy.com
11 THOMAS R. MCCARTHY, ESQ.*
12 Virginia Bar No. 47145
13 tom@consovoymccarthy.com
14 TYLER R. GREEN, ESQ.*
15 Utah Bar No. 10660
16 tyler@consovoymccarthy.com
17 CAMERON T. NORRIS, ESQ.*
18 Virginia Bar No. 91624
19 cam@consovoymccarthy.com
20 1600 Wilson Boulevard, Suite 700
21 Arlington, Virginia 22209
22 Telephone: (703) 243-9423
23 *Attorneys for Plaintiffs*
24 **Admitted pro hac vice*

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

20 DONALD J. TRUMP FOR PRESIDENT,
21 INC.; REPUBLICAN NATIONAL
22 COMMITTEE; AND NEVADA
23 REPUBLICAN PARTY,

Plaintiffs,

v.

25 BARBARA CEGAVSKE, in her official
26 capacity as Nevada Secretary of State,

Defendant,

and

No. 2:20-cv-01445-JCM-VCF

**PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT AND
MEMORANDUM OF SUPPORTING
POINTS AND AUTHORITIES**

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DNC SERVICES
CORPORATION/DEMOCRATIC
NATIONAL COMMITTEE, DCCC, and
NEVADA STATE DEMOCRATIC
PARTY,

Intervenor-Defendants.

In accordance with Federal Rule of Civil Procedure 56(a) and LR 56-1, Plaintiffs Donald J. Trump for President, Inc., the Republican National Committee, and the Nevada Republican Party move for partial summary judgment on Count I of their Amended Complaint.

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1 **INTRODUCTION**

2 May a state count a ballot for a congressional candidate or presidential elector it receives
3 *after* Election Day if there is no proof that a voter cast that ballot *on or before* Election Day? Nevada
4 law says yes. It deems unpostmarked ballots that are received by mail before 5:00 p.m. on the Friday
5 after Election Day as having been cast on or before Election Day *as a matter of law*. Assembly Bill
6 4, §20.2.

7 That conflicts with federal law. Exercising its constitutional powers under the Elections
8 Clause and Electors Clause, Congress established one day as the uniform, national “day for the
9 election” for members of Congress and presidential and vice-presidential electors. Those laws
10 require the combined acts of voters and election officials necessary to finally select those officials
11 to be consummated on Election Day. Nothing about those federal laws tolerates a state’s mere
12 presumption that voters have timely taken those required acts.

13 Supreme Court precedent makes plain the remedy when federal and state election laws
14 conflict like this. “[T]he regulations made by Congress are paramount to those made by the State
15 legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be
16 operative.” *Ex parte Siebold*, 100 U.S. 371, 384 (1879). So it is here. Section 20.2 must be struck
17 down because, on its face, it purports to alter (by extending) the time Congress established for federal
18 elections. Since that conflict is plain on the face of the conflicting statutes, the Court should grant
19 Plaintiffs summary judgment on Count I of their Amended Complaint.

20 **STATEMENT OF UNDISPUTED FACTS**

21 As in prior cases addressing the interplay between federal and state election laws, the “issue
22 here [i]s a narrow one turning entirely on the meaning of th[os]e state and federal statutes.” *Foster*
23 *v. Love*, 522 U.S. 67, 71 (1997). So Plaintiffs first discuss those statutes—federal law setting a
24 uniform, national Election Day for members of Congress and the President; prior Nevada law
25 requiring those elections to be consummated on Election Day; and a new Nevada law allowing
26 those elections to continue after that—before explaining why the new Nevada law must fall.

1 **A. Congress has established one uniform, national Election Day for members of**
2 **Congress and for presidential and vice-presidential electors.**

3 Though the Elections Clause grants states power to set the time, place, and manner of
4 congressional elections, U.S. Const. art. I, §4, cl. 1, it also subordinates that power to federal law.
5 The Clause expressly reserves to “Congress” the power to “at any time by Law make or alter such
6 Regulations, except as to the Places of chusing Senators.” *Id.* Congress also bears similar power
7 under the Electors Clause to “determine the Time of chusing the Electors” for the offices of
8 President and Vice President. *Id.* art. II, §1, cl. 4. “[T]hese comprehensive words embrace authority
9 to provide a complete code for congressional elections, not only as to times and places, but in
10 relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and
11 corrupt practices, counting of votes, duties of inspectors and canvassers, and making and
12 publication of election returns.” *Smiley v. Holm*, 285 U.S. 355, 399 (1932).

13 Plaintiffs’ claim here arises from federal statutes embodying a crucial exercise of those
14 powers: Congress’s decision to establish “the Tuesday next after the 1st Monday in November” as
15 the uniform, national “day for the election” of members of Congress, 2 U.S.C. § 7; *see id.* §1, and
16 for appointing electors for President and Vice President, 3 U.S.C. §1. This trio of statutes “mandates
17 holding all elections for Congress and the Presidency on a single day throughout the Union.”
18 *Foster*, 522 U.S. at 70. And they are valid exercises of Congress’s power. “By establishing a
19 particular day as ‘the day’ on which these actions must take place, the statutes simply regulate the
20 time of the election, a matter on which the Constitution explicitly gives Congress the final say.” *Id.*
21 at 71-72; *see also Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1170 (9th Cir. 2001)
22 (“Without question, Congress has authority to compel states to hold these elections on the dates it
23 specifies.”).

24 Those statutes serve sound policy goals. A uniform, national Election Day prevents “the
25 distortion of the voting process threatened when the results of an early federal election in one State
26 can influence later voting in other States.” *Foster*, 522 U.S. at 73. Before Congress adopted a
27 uniform Election Day during the Reconstruction era, the “diversity of” federal election dates gave
28 ““some states”” and ““some parties”” an ““undue advantage””; as one Senator from Maine put it

1 when opposing a uniform Election Day, “we want in the future, as we have had in the past, the
2 position of indicating to the country the first sentiment on great political questions.” *Keisling*, 259
3 F.3d at 1173. Beyond that, a uniform, national Election Day “interpose[s] a not inconsiderable
4 check to frauds in elections, to double voting, to the transmission of voters from one State to
5 another, and you do allow the people to vote for the Representatives undisturbed by considerations
6 which they ought not to take at all into account.” *Id.* at 1174.

7 **B. Before 2020, Nevada law precluded voters from voting after Election Day.**

8 The Nevada Legislature has exercised its power under the Elections Clause to regulate other
9 aspects of the time, place, and manner of elections for federal officers from Nevada. *See, e.g.*, NRS
10 Chapters 293, 298, 304. As relevant here, Nevada law establishes at least five different ways that
11 Nevadans may vote in a general election: by in-person voting at the polls, NRS 293.270-293.307;
12 by provisional ballot, NRS 293.3078-293.3086; by absent ballot voting, NRS 293.3088-293.340;
13 by voting in mailing precincts, NRS 293.343-293.355; and by early in-person voting, NRS 293.356-
14 293.361. Nevada law also establishes how ballots are to be counted and the returns are to be
15 canvassed. NRS 293.3625-293.397.

16 Among those voting options, Nevadans historically have chosen overwhelmingly to vote in
17 person. In fact, the Secretary of State’s own data show that 9 of every 10 ballots cast in Nevada’s
18 general elections are in-person votes. Consider Nevada’s 2012 and 2014 general elections. In 2012,
19 91.57% of ballots cast were in-person votes; absent ballots made up the remaining 8.43%. Office
20 of Nev. Sec’y of State Ross Miller, 2012 General Election Turnout, Final Results,
21 <https://bit.ly/2YCIZ40> (attached as Ex. 1). In 2014, the numbers tilted even more toward in-person
22 voting (92.48%) than to absent ballots (7.52%). Office of Nev. Sec’y of State Ross Miller, 2014
23 General Election Turnout (Dec. 11, 2014), <https://bit.ly/3jnG87f> (attached as Ex. 2).

24 Those trends held for Nevada’s 2016 general election. There, 93.02% of the total ballots
25 cast were in-person votes cast during early voting (62.41% of total ballots) or on Election Day
26 (30.61% of total ballots). Absent ballots constituted just 6.41% of total ballots cast, and the
27 remaining 0.57% of total ballots cast were mailing ballots. Office of Nev. Sec’y of State Barbara
28

1 K. Cegavske, 2016 General Election Turnout (Feb. 10, 2017), <https://bit.ly/3a0U9nS> (attached as
2 Ex. 3).

3 So too for Nevada’s 2018 general election. There, 91.04% of the total ballots cast were in-
4 person votes cast during early voting (56.80% of total ballots) or on Election Day (34.24% of total
5 ballots). Absent ballots constituted just 8.57% of total ballots cast, and the remaining 0.39% of total
6 ballots cast were mailing ballots. Office of Nev. Sec’y of State Barbara K. Cegavske, 2018 General
7 Election Turnout (Nov. 20, 2018), <https://bit.ly/31kS81E> (attached as Ex. 4).

8 Of course, all of those in-person votes were cast on or before Election Day. Not one was
9 cast after it. So during the last decade, there has been no basis to question whether more than 90
10 percent of the votes cast in Nevada’s general elections were timely.

11 Nor was there a basis to question the timeliness of absent ballots cast in Nevada. Until this
12 year, Nevada law imposed the same day-of-election voting deadline on absent ballots as it did on
13 in-person ballots. Nevada law effective through the end of December 2019 provided that “[a]bsent
14 ballots, including special absent ballots, received by the county or city clerk after the polls are
15 closed on the day of election are invalid.” NRS 293.317 (repealed Jan. 1, 2020).

16 The upshot of those combined laws is that, before 2020, every Nevadan—the roughly 90
17 percent who voted in-person and the roughly 10 percent who voted absentee—had to cast their
18 ballot on or before Election Day. In-person or absent ballots cast after Election Day were invalid
19 and would not be counted.

20 **C. Two Nevada laws effective in 2020 authorize accepting and counting votes cast**
21 **after Election Day.**

22 All that changed in 2020. Two new Nevada laws allow absent ballots to be cast after Election
23 *Day and still be counted.*

24 The first of those laws, which took effect on January 1, 2020, replaces NRS 293.317’s old
25 close-of-polling ballot-receipt deadline with three new receipt deadlines. Two of those occur after
26 Election Day. First, ballots are timely if voters hand deliver them to the county clerk before polls
27 close. NRS 293.317(1)(a). Second, ballots are timely if they are postmarked on or before election
28 day and the county clerk receives them within seven days of Election Day. *Id.* 293.317(1)(b). Third,

1 ballots are timely if county clerks receive them “not more than 3 days after the day of the election
2 and the postmark cannot be determined.” *Id.* 293.317(2). In those circumstances, the law “deem[s]”
3 the ballot “to have been postmarked on or before the day of the election.” *Id.* Because this law took
4 effect last January, it has not yet applied to a general election. So no ballots cast under this regime
5 have been counted (or rejected) in any federal election.

6 And because of the pandemic, amended NRS 293.317 will not apply to the November 2020
7 general election, either. The second new 2020 law—Assembly Bill 4—displaces it. The Nevada
8 Legislature passed AB4 in its 32nd Special Session, a weekend session held early last month. The
9 Democratic majority in the Nevada Assembly introduced AB4 on a Friday afternoon and passed it
10 on a straight party-line vote mere hours later. AB4 then went to the Nevada Senate, which considered
11 it near midnight on Friday and again on Saturday before passing it on Sunday, August 2, 2020, also
12 on a straight party-line vote. Governor Sisolak signed AB4 into law the next day.

13 AB4 contains 88 sections. *See* AB4, Nev. Legis., 32nd Spec. Sess. (2020),
14 <https://bit.ly/2Qyk6SA> (attached as Ex. 5). Sections 2 through 29 enact entirely new provisions in
15 the Nevada Revised Statutes. Within those, Sections 2 through 27 create a new framework for
16 primary or general elections held during a declared emergency or state of disaster, defined under
17 AB4 as an “affected election.” AB4, §§5, 8. Governor Sisolak declared a state of emergency in
18 Nevada due to COVID-19 on March 12, 2020. Nev. Exec. Dep’t, Declaration of Emergency
19 Directive 009 (Revised) (Mar. 12, 2020), <https://bit.ly/3fSD28W> (attached as Ex. 6). That makes
20 Nevada’s 2020 general election an “affected election” that must be run in accordance with Sections
21 2 through 27.

22 Those sections establish three rules relevant here. First, under AB4, county clerks must
23 “prepare and distribute to each active registered voter in the county ... a mail ballot for the election.”
24 AB4, §15.1. Second, along with those ballots, county clerks must distribute a “return envelope,” *id.*
25 §16.1(b), which “must include postage prepaid by first-class mail,” *id.* §16.3. Third, to be timely,
26 ballots must be received by one of three deadlines. Ballots returned in person must be received
27 before polls close on Election Day. *Id.* §2.1(a). Ballots returned by mail and “[p]ostmarked on or
28 before the day of the election” are timely if received before 5:00 p.m. on the seventh day after the

1 election. *Id.* §20.1(b). And ballots “received by mail not later than 5 p.m. on the third day following
2 the election” are timely if “the date of the postmark cannot be determined.” *Id.* §20.2. In those
3 circumstances, Nevada law “deem[s]” the unpostmarked ballot “to have been postmarked on or
4 before the day of the election.” *Id.*

5 In other words, under §20.2, ballots mailed on Wednesday or Thursday *after* Election Day
6 are timely *as a matter of law* as long as (1) there is no proof they were mailed on Wednesday or
7 Thursday, and (2) they’re received by 5:00 p.m. on Friday after Election Day. All ballots fitting that
8 description will be counted.

9 **D. Ballots mailed on the Wednesday or Thursday after Election Day will arrive at
10 election offices by the next Friday—and some of those will not have postmarks.**

11 Section 20.2’s very existence confirms that Nevada policymakers expect ballots with no
12 postmarks to be received after Election Day. Plaintiffs share those expectations.

13 As noted, AB4 requires county clerks to send mail ballots to voters along with “a return
14 envelope” that “must include postage prepaid by first-class mail.” AB4, §16.3. The U.S. Postal
15 Service’s general policy is not to apply postmarks to postage prepaid envelopes. *See* U.S. Postal
16 Serv., §1-1.3 Postmarks (“Postmarks are not required for mailings bearing a permit, meter, or
17 precanceled stamp for postage, nor to pieces with an indicia applied by various postage evidencing
18 systems.”), <https://bit.ly/3kfft7l> (attached as Ex. 7). But USPS guidance states an exception to that
19 general no-postmarking policy for election mail. Under that guidance, in place since 2018, “all
20 ballots should be postmarked by machine or by hand.” Office of Inspector Gen., U.S. Postal Serv.,
21 *Management Alert: Timeliness of Ballot Mail in the Milwaukee Processing & Distribution Center*
22 *Service Area*, Report No. 20-235-R20, 3 (July 7, 2020), <https://bit.ly/2YbjBT0> (attached as Ex. 8).

23 But the 2020 election cycle has confirmed that—despite its policy—USPS does not postmark
24 all ballots. USPS itself acknowledges that “there can be breakdowns or exceptions to this process
25 which could prevent a ballot from receiving a postmark.” *Id.* at 7. That happened in Wisconsin’s
26 April 2020 primary election, when the Milwaukee Election Office received “about 390 voter
27 completed ballots with varying postmark issues including illegible postmarks, lack of a postmark,
28 undated postmarks, or hand-stamped postmarks.” *Id.* at 5. USPS explained that those problems could

1 have resulted from ballots being “double fed on a machine,” or when the “machines applying
2 postmarks ... run out of ink,” or from ballots being “comingled with certain mail that is not
3 processed on machinery that applies a postmark.” *Id.* at 7.

4 Similar problems plagued New York’s June 2020 primary election. Six weeks after the
5 primary election between Rep. Carolyn Maloney and Suraj Patel for New York’s 12th District,
6 results remained unknown, so a federal district judge in New York “ordered the counting of certain
7 mail ballots that arrived after Election Day but without a postmark to prove when they were sent.”
8 *An Autopsy of New York’s Mail-Vote Mess*, Wall St. J. (Aug. 7, 2020), <https://on.wsj.com/3kT7d3y>
9 (attached as Ex. 9). In that race, “1,135 of 8,285 absentee ballots received by the NYCBOE within
10 a week of Election Day—more than 13%—were not postmarked,” while the number of
11 unpostmarked ballots in another New York primary race was “nearly 10%.” *Gallagher v. N.Y. State*
12 *Bd. of Elec.*, — F. Supp. 3d —, 2020 WL 4496849, at *16 (S.D.N.Y. Aug. 3, 2020).

13 It is still not known why absentee ballots were delivered without a postmark to election
14 officials in New York even though the Postal Service’s “policy is to postmark all ballots, and the
15 city was assured it would happen.” *An Autopsy of New York’s Mail-Vote Mess*, *supra*, Ex. 9. But a
16 manager at a New York postal service processing facility testified during the lawsuit over the
17 absentee ballots and “offered two possibilities.” *Id.* “First, postmarking machines can reject mail if,
18 for example, it isn’t ‘folded over properly.’ On Election Day, USPS staff were ready to grab
19 bypassed ballots and postmark them by hand.” *Id.* That happened “‘for thousands of ballots’” on
20 Election Day, but the manager “wasn’t sure...if this happened before June 23.” *Id.* Second, “most
21 prepaid mail usually skips postmarking altogether and goes ‘directly to a sortation machine.’” *Id.*
22 “On Election Day, USPS staff overrode that procedure and forced everything through the
23 postmarking system. But again, [the manager] wasn’t sure about before June 23, saying it was ‘very
24 possible’ that some ballots went straight to sorting.” *Id.* News reports do not disclose whether USPS
25 would invoke those manual-override procedures on days *after* Election Day to ensure postmarks
26 were affixed both to improperly folded mail and to prepaid ballots placed in the mail *after* the
27 election.

28 Still, the lack of a postmark would be irrelevant if ballots mailed on the Wednesday or

1 Thursday after Election Day never arrived before 5:00 pm on the Friday after Election Day. After
2 all, both preconditions—no postmark *and* receipt before Friday by 5:00 pm—must exist before
3 §20.2 deems those ballots timely. But “all Election Mail (including ballots) mailed from individual
4 voters to state or local election officials *must* be sent by First-Class Mail,” Ltr. From Thomas J.
5 Marshall, Gen. Counsel, U.S. Postal Serv., *Re: Election Mail*, 1 (May 29, 2020),
6 <https://bit.ly/2QvyBqw> (attached as Ex. 10), and at least *some* first-class mail sent in Nevada on a
7 Wednesday *will* arrive at another Nevada address on or before the next Friday. To confirm those
8 delivery times, a representative of the committee to reelect President Trump recently mailed 10
9 letters via First-Class mail from five Las Vegas post offices to two addresses in Las Vegas. Nine of
10 those 10 letters were delivered the next day. *See* Decl. of Jesse Law, ¶¶ 1-10 (attached as Ex. 11).
11 Those outcomes comport with USPS’s standard for delivering first-class mail within “2-5 days,”
12 Marshall Ltr., *supra*, at 1, Ex. 10, and with USPS’s representation that “[i]n some instances (short
13 distance between ZIP Codes), it is possible for [first-class] delivery to occur in one day,” U.S. Postal
14 Serv., *FAQs: What are the Types of First-Class Mail?*, Article No. 000003138 (Jan. 26, 2020),
15 <https://bit.ly/2EyfERB> (attached as Ex. 12).

16 By allowing ballots to be cast after Election Day, §20.2 facilitates the precise behavior that
17 the federal Election Day statutes were enacted to prevent—avoiding improper influences on
18 elections and letting early returns give certain candidates or parties an advantage. And the facts after
19 Nevada’s June 2020 primary election show just how likely AB4 will be to facilitate those issues.
20 That primary election occurred as an all-mail election as ordered by the Secretary of State. News
21 reports state that a staggering number of mail ballots never reached the voters listed on them. For
22 example, Clark County mailed out 1,325,934 ballots. Of that total, 223,469 were returned as
23 undeliverable. Rory Appleton, *More than 223k mailed ballots returned undeliverable in primary*,
24 *Las Vegas Rev.-J.* (Aug. 14, 2020), <https://bit.ly/3kWeEXB> (attached as Ex. 13). And of those
25 223,469 undeliverable ballots, 58 percent belonged to inactive voters. But “93,585 undeliverable
26 ballots belonged to voters classified as active in Clark County’s voter rolls.” *Id.* Clark County will
27 mail general-election ballots to those more than 93,000 active registered voters even though their
28 primary-election ballots were returned to Clark County as undeliverable. Email from Joseph P.

1 Gloria, Clark County Registrar of Voters, to Jeremy Hughes (Aug. 10, 2020) (attached as Ex. 14).
 2 It's unclear whether those more than 93,000 ballots include ballots from the 2,200 people who are
 3 deceased but still on Clark County's voter rolls. *223k mailed ballots returned, supra*, Ex. 13.

4 Beyond those more than 93,000 ballots actually returned to Clark County, news reports
 5 documented photographic evidence of an untold number of primary ballots "tossed in trash cans
 6 and littering apartment mailbox areas" in Clark County during the week after they were mailed.
 7 Rory Appleton, *Primary Underway, But Argument Over Mail-In Election Continues*, Las Vegas
 8 Rev.-J. (May 19, 2020), bit.ly/2z3DHSV (attached as Ex. 15). The number of those kinds of
 9 ballots—which also should have been returned as undeliverable, but were not—will never be
 10 known.

11 SUMMARY JUDGMENT STANDARD

12 Plaintiffs are entitled to summary judgment when they "show[] that there is no genuine
 13 dispute as to any material fact and" they are "entitled to judgment as a matter of law." Fed. R Civ.
 14 P. 56(a). Like *Keisling*, "[t]his case concerns only legal issues, and no facts are in dispute." 259 F.3d
 15 at 1170. Rather, the "issue here is a narrow one turning entirely on the meaning of the state and
 16 federal statutes." *Foster*, 522 U.S. at 71. And "[w]hether a statute is facially unconstitutional is a
 17 matter of law." *Lind v. Grimmer*, 30 F.3d 1115, 1121 (9th Cir. 1994). Under those standards, §20.2's
 18 validity can (and must) be decided before Election Day, for "[t]he issue is not how many" ballots
 19 have been submitted contrary to federal law, "but rather the extent to which" §20.2 "may potentially
 20 impair" candidates' rights under federal law to have their election consummated on Election Day.
 21 *Id.* at 1121 n.6.

22 ARGUMENT

23 **I. Section 20.2 violates federal law by authorizing elections for members of Congress 24 and for presidential electors to continue after Election Day.¹**

25 **A. Federal law requires elections for federal office to be consummated on Election 26 Day.**

26 Congress has passed a trio of federal statutes that "mandates holding all elections for

27 ¹ In their Amended Complaint, Plaintiffs also allege violations of the Fourteenth
 28 Amendment. Plaintiffs stand by those claims but, for the sake of efficiency, seek partial summary

1 Congress and the Presidency on a single day throughout the Union.” *Foster*, 522 U.S. at 70. The
2 “Tuesday next after the 1st Monday in November” is the uniform, national “day for the election”
3 of members of the House of Representatives, 2 U.S.C. §7, and of the Senate, *id.* §1, and for choosing
4 presidential and vice-presidential electors, 3 U.S.C. §1.

5 What constitutes “the election” those statutes mandate? That term “refer[s] to the combined
6 actions of voters and officials meant to make a final selection of an officeholder.” *Foster*, 522 U.S.
7 at 71. Put differently, it “means a ‘consummation’ of the process of selecting an official.” *Keisling*,
8 259 F.3d at 1175. Voters’ role in that process includes not just marking a ballot but also “having it
9 delivered to the election officials and” timely “deposited in the ballot box.” *Maddox v. Bd. of State*
10 *Canvassers*, 149 P.2d 112, 115 (Mont. 1944). For “[i]t is not the marking but the depositing of the
11 ballot in the custody of election officials which constitutes casting the ballot or voting.” *Id.* After
12 all, a ballot has “no effect until it is deposited with the election officials, by whom the will of the
13 voters must be ascertained and made effective.” *Id.*

14 Given those “binding” federal requirements, *Foster*, 522 U.S. at 69, state election regimes
15 violate federal law if “the combined actions of voters and officials meant to make a final selection
16 of an officeholder” occur “prior to federal election day.” *Id.* at 71, 72 n.4. That is why the Supreme
17 Court unanimously invalidated a Louisiana election regime holding congressional elections in
18 October. Louisiana law deemed any candidate who won a majority in that October vote to be
19 “elected,” with “no further act ... done on federal election day to fill the office in question.” *Id.* at
20 70. Only “[i]f no candidate for a given office receive[d] a majority” in the October vote did
21 Louisiana hold another election, dubbed a “run-off,” on Election Day. *Id.* Louisiana’s regime was
22 thus constitutionally flawed because it established “a contested selection of candidates for a
23 congressional office that is concluded as a matter of law before the federal election day, with no
24 act in law or in fact to take place on the date chosen by Congress.” *Id.* at 468. That “clearly violates
25 [2 U.S.C.] §7.” *Id.*

26 Two conclusions follow from that holding. First, state regimes that count ballots cast before
27
28 judgment only on their claims under the Elections and Electors Clauses.

1 Election Day do not violate federal law, *Keisling*, 259 F.3d at 1175-76; *Voting Integrity Project,*
2 *Inc. v. Bomer*, 199 F.3d 773, 775-77 (5th Cir. 2000); *Millsaps v. Thompson*, 259 F.3d 535, 543-46
3 (6th Cir. 2001), but only because early voting by itself does not consummate the election before
4 Election Day. Early absentee voting merely complements other “voting” that “still takes place on”
5 Election Day. *Keisling*, 259 F.3d at 1176; *see also Bomer*, 199 F.3d at 776 (“Allowing some voters
6 to cast votes before election day does not contravene the federal election statutes because the final
7 selection is not made before the federal election day.”).

8 Second, state regimes that count ballots cast *after* Election Day *do* violate federal law. State
9 election regimes can no more require “the combined actions of voters and officials meant to make
10 a final selection of an officeholder” to stop “prior to federal election day” than they can allow those
11 combined actions to continue after it. *Foster*, 522 U.S. at 71, 72 n.4. Either type of regime
12 “purport[s] to affect the timing of federal elections”—an October election “requires no further act
13 by anyone to seal the election” on Election Day, *id.* at 73, and accepting ballots cast after Election
14 Day expressly contemplates “further act[s]” (late-cast votes) intended to influence the final result.
15 Thus both types of election systems contravene Congress’s “final say” about when federal elections
16 must occur and “clearly violate[] [2 U.S.C.] §7,” 2 U.S.C. §1, and 3 U.S.C. §1. *Id.* at 72.

17 **B. Section 20.2 allows ballots cast after Election Day to be counted.**

18 “[A]s a matter of law,” §20.2 of AB4 allows “a contested selection of candidates for a
19 congressional office”—and for presidential and vice-presidential electors—to continue after “the
20 federal election day.” *Foster*, 522 U.S. at 72. Under §20.2, if a ballot is received by mail before
21 5:00 p.m. on the Friday after Election Day “and the date of the postmark cannot be determined, the
22 mail ballot shall be deemed to have been postmarked on or before the day of the election.” That
23 requires elections officials to count mail ballots that were mailed on the Wednesday or Thursday
24 *after* Election Day—as long as they arrive by Friday at 5:00 p.m. and bear no postmark (or an
25 undiscernible one). On its face, that morphs the singular “day for the election,” 2 U.S.C. §7, into
26 the plural “Election Day—and a few days after it.”

27 Nor is there a dispute about whether ballots satisfying both conditions will in fact arrive (and
28 thus be counted). USPS’s own statements confirm as much: it acknowledges that “there can be

1 breakdowns or exceptions to this process which could prevent a ballot from receiving a postmark,”
2 *Management Alert, supra*, at 7 (Ex. 8), and that “[i]n some instances (short distance between ZIP
3 Codes), it is possible for [first-class] delivery to occur in one day,” *What are the Types of First-*
4 *Class Mail?, supra*, Ex. 12. Undisputed on-the-ground facts tell the same story: The letters sent from
5 Las Vegas by first-class mail were received in Las Vegas the day after they were mailed, confirming
6 USPS’s First-Class overnight-delivery capabilities in Nevada. *See* Law Decl., Ex. 11. And the
7 undisputed historical record of unpostmarked ballots received in Wisconsin’s and New York’s 2020
8 primary elections—constituting as many as 13% of ballots received for some New York races,
9 *Gallagher*, — F. Supp. 3d —, 2020 WL 4496849, at *16—show USPS’s commendable honesty by
10 admitting to the inevitable inconsistencies in its postmarking process.

11 **C. Because §20.2 conflicts with federal law, it is invalid.**

12 Section 20.2 deems some ballots cast after Election Day timely as a matter of law. That
13 irreconcilably conflicts with Congress’s decisions in 2 U.S.C. §§1, 7 and 3 U.S.C. §1 to require
14 that “the combined actions of voters and officials meant to make a final selection of an officeholder”
15 be “consummated” on one uniform, national Election Day. *Foster*, 522 U.S. at 71, 72 n.4. Indeed,
16 Plaintiffs are not the only ones to have identified this irreconcilable conflict so readily apparent in
17 the statutes’ plain text. *E.g.*, David B. Rivkin Jr. & Lee A. Casey, *Mail-In Voting Could Deliver*
18 *Chaos*, Wall St. J. (Aug. 25, 2020) (“no ballot cast after Nov. 3 is constitutionally valid,” and
19 “counting unpostmarked mailed ballots that arrive after Election Day would be unconstitutional, as
20 there would be no way to tell if they were cast in time”), <https://on.wsj.com/3jLMbT7> (attached as
21 Ex. 16).

22 Supreme Court precedent leaves no doubt about the necessary remedy here. Given §20.2’s
23 facial “conflict[] with federal law,” it “is void.” *Foster*, 522 U.S. at 74. For “the regulations made
24 by Congress are paramount to those made by the State legislature; and if they conflict therewith,
25 the latter, so far as the conflict extends, ceases to be operative.” *Ex parte Siebold*, 100 U.S. at 384.

26 Voiding §20.2 furthers Congress’s reasons for establishing a uniform, national Election Day
27 for members of Congress and the President. Recall Congress’s “concern[]” that when voting
28 occurred on multiple days, “the results of an early federal election in one State” would “distort[]

1 ... the voting process” and “influence later voting in other States.” *Foster*, 522 U.S. at 73. And its
2 recognition that holding an election on one day ““interpose[s] a not inconsiderable check to frauds
3 in elections [and] to double voting.”” *Keisling*, 259 F.3d at 1174. Section 20.2’s post-Election Day
4 regime implicates both concerns. Under §20.2, persons dissatisfied with Tuesday night’s election
5 returns have an opening to try to distort and improperly influence any races whose preliminary
6 outcomes displease them. And with Clark County alone mailing more than 93,000 ballots this Fall
7 to voters whom County officials know *no longer live at their registered addresses*, opportunities
8 for obtaining and returning ballots after Election Day will not be hard to find.

9 Beyond that, voiding §20.2 will eliminate a potential threat to Nevada’s ability to cast its
10 Electoral College votes. Under federal law, the Electoral College meets and votes (this year) on
11 December 14. *See* 3 U.S.C. §7. What if a dispute exists about the appointment of Nevada’s electors?
12 If any such dispute exists and is resolved under existing state law before December 8, Congress
13 must conclusively accept Nevada’s slate of electors. *Id.* §5. But if any such dispute is *not* resolved
14 by December 8, the Nevada Legislature must decide how to appoint Nevada’s electors in time for
15 them to cast votes on December 14. *Id.* §2.

16 Together, those provisions require that disputes about the validity of ballots cast for
17 presidential electors must be resolved under Nevada law by December 8 for Congress to accept
18 Nevada’s electors’ votes “conclusive[ly]” on December 14. *Id.* §5. December 8 is just 32 days after
19 §20.2’s November 6 deadline for unpostmarked ballots. And New York’s primary election this year
20 is proof enough that disputes over the validity of unpostmarked ballots can take all of 32 days (and
21 more) to resolve. The primary election between Rep. Carolyn Maloney and Suraj Patel for New
22 York’s 12th District remained unresolved for *six weeks* after the election, based in part on disputes
23 over “the counting of certain mail ballots that arrived after Election Day but without a postmark to
24 prove when they were sent.” *An Autopsy of New York’s Mail-Vote Mess, supra*. If it takes six weeks
25 to resolve disputes over unpostmarked absentee ballots counted under §20.2, Nevada will miss its
26 safe-harbor deadline for certifying its electors by 10 days—and with it federal law’s “conclusive”
27 guarantee that Nevada’s electoral votes will be counted as sent. And if that happens, and Nevada’s
28 Electoral College votes are not accepted, it would disenfranchise every voter in Nevada who voted

1 for a presidential candidate.

2 Voiding §20.2 avoids those risks. Disputes about unpostmarked ballots received after
3 Election Day will not exist if the law no longer allows counting unpostmarked ballots received after
4 Election Day. The Court should invalidate §20.2 to ensure that only ballots cast on or before
5 Election Day—the deadline federal law sets—will be counted.

6 **CONCLUSION**

7 For all these reasons, the Court should grant Plaintiffs’ motion for partial summary
8 judgment and void §20.2 because it irreconcilably conflicts with federal law.

9
10 Respectfully submitted,

11 Dated: September 4, 2020

12 /s/ J. Colby Williams

13 Donald J. Campbell (1216)
14 J. Colby Williams (5549)
15 CAMPBELL & WILLIAMS
16 700 South 7th Street
17 Las Vegas, Nevada 89101
18 (702) 382-5222
19 (702) 382-0540 (fax)

20 William S. Consovoy*
21 Thomas R. McCarthy*
22 Tyler R. Green*
23 Cameron T. Norris*
24 CONSOVOY MCCARTHY PLLC
25 1600 Wilson Boulevard, Suite 700
26 Arlington, VA 22209
27 (703) 243-9423

28 *Attorneys for Plaintiffs*

**Admitted pro hac vice*

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this pleading with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all counsel registered in this case.

Dated: September 4, 2020

/s/ J. Colby Williams
J. Colby Williams

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