No. 24-5071

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Plaintiffs-Appellants,

v.

CARI-ANN BURGESS, in her official capacity as the Washoe County Registrar of Voters, *et al.*,

Defendants-Appellees,

VET VOICE FOUNDATION, *et al.*,

Intervenor-Defendants-Appellees.

On Appeal from the United States District Court
for the District of Nevada
Case No. 3:24-cv-00198-MMD-CLB
Hon. Miranda M. Du

INTERVENOR-APPELLEES' RESPONSE BRIEF

BRADLEY S. SCHRAGER
Bravo Schrager LLP
6675 South Tenaya Way
Suite 200
Las Vegas, Nevada 89113
bradley@bravoschrager.com
(702) 996-1724

DAVID R. FOX
CHRISTOPHER D. DODGE
DANIEL J. COHEN
RICHARD A. MEDINA
Elias Law Group LLP
250 Massachusetts Ave NW, Suite 400
Washington, D.C. 20001
dfox@elias.law
(202) 968-4490

Counsel for Vet Voice Foundation and the Nevada Alliance for Retired Americans

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Intervenor-Defendants-Appellees Vet Voice Foundation and the Nevada Alliance for Retired Americans state that they have no parent corporation and that no corporation holds 10% or more of their stock. A supplemental disclosure statement will be filed upon any change in the information provided herein.

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INTRODUCTION

Plaintiffs—the Republican National Committee, the Nevada Republican Party, the Trump Campaign, and a voter—challenge Nevada's law dictating that mail ballots that are completed and mailed by election day and received by election officials no later than four days after election day shall be counted. This common-sense law makes it easier for everyone in Nevada to vote, and harder for no one. No surprise, then, that the district court held that Plaintiffs lack standing to challenge it and dismissed the case.

Plaintiffs cynically argue that they have "competitive" standing because it would be easier for them to win elections if it were harder for Nevadans to vote. But nothing about Nevada's receipt deadline inherently favors one party or candidate over another—it affects all voters equally. If Plaintiffs or their voters benefit less from the law, it is only because of personal choices they make in voting—but those choices do not give them standing to challenge the deadline. *McConnell v. FEC*, 540 U.S. 93, 228 (2003). And any harm to Plaintiffs is speculative, because it depends on voters' unpredictable response to a court-ordered change in the deadline.

Plaintiffs also argue they are injured as organizations. This argument focuses on timing: Plaintiffs say the deadline means they must pursue voters for mail ballots through election day, instead of stopping earlier, and that they must observe ballot counting for longer. But causation is lacking, because no matter what happens in this

case, Nevada law will still allow voters to return mail ballots in person or to drop boxes through election day, and it will still require election officials to allow ballot cure and to count mail ballots for seven days after election day. NRS 293.269921(1), .269927(6), .269931(1).

Even if Plaintiffs had standing, their claims are doomed on the merits. Twenty-eight states allow at least some mail ballots to be counted even if they are received after election day. None of these laws violate the federal election day statutes, which merely designate the "day for the election" of members of Congress and presidential electors. 2 U.S.C. § 7; *see also id.* § 2; 3 U.S.C. § 1. Nevada law is entirely consistent with those federal laws. Under Nevada law, every voter's ballot must be completed and deposited—in the mail, in a drop box, or with a county official—by the close of the polls on election day. It is only the ministerial process of delivering the ballots and counting them that occurs in the days that follow.

The overwhelming majority of courts to consider the issue agree. And while the Fifth Circuit recently held otherwise, its decision relies on an untenable distinction between the receipt of ballots by election officials (which the Fifth Circuit says must happen on or before election day) and the counting of ballots (which the Fifth Circuit agrees may happen after)—even though a voter's choice is final upon mailing, with both receipt and counting involving only the unilateral actions by election officials to ascertain that choice.

Whether based on standing or the merits, the Court should affirm.

JURISDICTIONAL STATEMENT

As the district court held, the federal courts lack subject matter jurisdiction over this case under Article III because Plaintiffs lack standing. The district court had statutory subject matter jurisdiction over this case under 28 U.S.C. § 1331, as Plaintiffs allege that Nevada election law violates federal law. This Court has statutory jurisdiction under 28 U.S.C. § 1291 to review the district court's final order issued on July 17, 2024, which dismissed this action for lack of subject matter jurisdiction. Plaintiffs timely appealed on August 16, 2024. Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUE PRESENTED

1. Whether Plaintiffs have standing to challenge a Nevada law that makes it easier for all voters to vote, on the theory that making it easier for everyone to vote makes it harder for Plaintiffs to win elections or harms their core activities.

2. Whether federal laws providing for a uniform federal election day preempt Nevada's law that mail ballots completed and mailed by that day will be counted if they are received no later than four days after.

STATUTORY ADDENDUM

Except for the materials included in the Statutory Addendum included with this brief, all applicable federal and state statutes are contained in the addenda

submitted by Plaintiffs and Intervenor-Defendant Democratic National Committee ("DNC").

STATEMENT OF THE CASE

I. Nevada's Receipt Deadline and Statutory Background

Nevada is a universal vote-by-mail state. Every registered Nevada voter who has not opted out receives a mail ballot for every election. NRS 293.269911. Voters may return their mail ballots by delivering them in person to the county clerk or depositing them in a ballot drop box before the close of polls on election day. NRS 293.269921(1)(a). Voters may also return their ballots by mail, in which case they must be postmarked on or before election day and received by 5 p.m. on the fourth day after election day to be counted. NRS 293.269921(1)(b). If the ballot is received by mail without a legible postmark, it must be received by the third day after election day. NRS 293.269921(2); *RNC v. Aguilar*, 558 P.3d 805 (Nev. Oct. 28, 2024) (unpublished). Nevada voters must therefore always complete and send their ballots on or before election day, but Nevada law allows for the ballots to be received by election officials shortly after.

Similar rules are extremely common nationwide. More than twenty states and U.S. territories allow mail ballots to be counted if they are cast by election day and received within a certain period thereafter. And even more states allow post-election receipt for military servicemembers specifically. In total, at least 28 states, the

District of Columbia, and several U.S. territories permit timely cast ballots to arrive after election day for at least some voters.[1] Among these states and territories, Nevada's receipt deadline is relatively modest—many states allow even more time for timely-cast ballots to arrive after election day.[2]

II. Procedural History

A. Plaintiffs' Complaint

Plaintiffs-Appellants filed this case in May 2024, more than three years after Nevada adopted the current receipt deadline for mail ballots. They contend that Nevada's counting of mail ballots received after election day is preempted by federal laws establishing a uniform national election day. *See* 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1 (the "Election Day Statutes"). They further contend that Nevada's receipt deadline violates their federal constitutional rights to stand for office and to vote. *See* ER-33–

[1] *See, e.g.*, See Ala. Code § 17-11-18(b); Alaska Stat. § 15.20.081; Ark. Code Ann. § 7-5- 411(a)(1)(A)(ii); Cal. Elec. Code § 3020(b); D.C. Code § 1-1001.05(a)(10B); Fla. Stat. § 101.6952(5); Ga. Code § 21-2-386(a)(1)(G); 10 Ill. Comp. Stat. §§ 5/19-8, 5/18A-15; Ind. Code § 3-12-1-17(b); K.S.A. 25-1132(b); Mass. Gen. Laws ch. 54 § 93; Md. Code Regs. 33.11.03.08(B)(4); Mich. Comp. Laws § 168.759a(18); Miss. Code § 23-15-637(1)(a); Mo. Rev. Stat. § 115.920(1); Nev. Rev. Stat. § 293.269921(1)(b), (2); N.J. Stat. § 19:63-22(a); N.Y. Elec. Law § 8- 412(1); N.D. Cent. Code § 16.1-07-09; Ohio Rev. Code § 3509.05(D)(2)(a); Or. Rev. Stat. § 254.470(6)(e)(B); 25 Pa. C.S. § 3511(a); R.I. Gen. Laws § 17-20-16; S.C. Code § 7-15-700(A); Tex. Elec. Code § 86.007(a)(2); Utah Code § 20A-3a-204(2)(a); Va. Code § 24.2-709(B); Wash. Rev. Code § 29A.40.091; W. Va. Code § 3-3-5(g)(2).

[2] *See Tbl. 11: Receipt & Postmark Deadlines for Absentee/Mail Ballots*, Nat'l Conf. of State Legs. (updated June 12, 2024), https://www.ncsl.org/elections-and-campaigns/table-11-receipt-and-postmark-deadlines-for-absentee-mail-ballots (collecting statutes).

34. They seek an injunction prohibiting Defendants from counting any absentee ballots received by mail after election day and a declaration that counting such ballots violates federal law. *See* ER-34–35.

Shortly after Plaintiffs filed the case, Vet Voice Foundation and the Nevada Alliance for Retired Americans ("Vet Voice Intervenors") were granted intervention and moved to dismiss for lack of standing and failure to state a claim. The Government Defendants and the DNC also moved to dismiss. On July 17, 2024, the district court granted the Government Defendants' and Vet Voice Intervenors' Motions to Dismiss and dismissed Plaintiffs' claims for lack of standing, rejecting each of Plaintiffs' standing theories in turn. *See generally* ER-6–17.

First, the district court held that Plaintiffs had not established competitive standing because any threatened electoral harm would "hinge on the response of . . . voters" to any new deadline, thus relying on speculation about the independent actions of third parties. ER-6–7 (citing *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 383 (2024)). The district court could not "'presume either to control or to predict' how Nevada voters would respond if their mail ballots were required to arrive by Election Day." ER-8 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992)). And it emphasized that "Republican candidates 'face no harms that are unique from their electoral opponents'" because every Nevada voter—including Republican voters—equally benefits from the receipt deadline.

ER-8–10 (quoting *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993, 1003 (D. Nev. 2020)).

Second, the court held that Plaintiffs did not establish organizational injury based a diversion of resources in response to an injury to their mission, because they alleged at most a minor change in the timing of their existing efforts to round up mail ballots, rather than any new activity, ER-11, and any additional poll-watching activities they engaged in were "made in pursuit of ensuring that ballots are counted correctly" and not causally related to the challenged deadline, ER-12.

Third, the court held that Plaintiffs' theory of standing based on "dilution" of lawful votes by the counting of ballots received after election day stated only a generalized grievance as the alleged injury—the counting of invalid ballots—"equally affects all voters in a state." ER-15.

The court therefore concluded that "[n]one of Plaintiffs' theories of standing meets the threshold requirements of Article III," and dismissed for lack of subject-matter jurisdiction. As it recognized, Plaintiffs' bare disagreement with the policy choices of the Nevada legislature represents "'precisely the kind of undifferentiated, generalized grievance about the conduct of government' that the Supreme Court refuses to recognize as an injury in fact." ER-16–17 (quoting *Lance v. Coffman*, 549 U.S. 437, 442 (2007)).

B. Related Recent Litigation

The district court's dismissal for lack of standing joins a chorus of federal courts that have likewise found they lack subject-matter jurisdiction over similar challenges to state mail ballot receipt laws. Indeed, since 2020, at least four other courts have reached this conclusion. *See Bost v. Ill. State Bd. of Elections*, 114 F.4th 634, 641–42 (7th Cir.), *pet. for cert. filed*, No. 24-468 (U.S. Nov. 21, 2024); *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 345–46 (3d Cir. 2020), *vacated as moot*, *Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021); *Donald J. Trump for President, Inc. v. Way* ("*Way II*"), No. 20-10753, 2020 WL 6204477, at *5–*6, *11 (D.N.J. Oct. 22, 2020); *Splonskowski v. White*, 714 F. Supp. 3d 1099, 1102 (D.N.D. 2024).

The Seventh Circuit's recent decision in *Bost* illustrates why. The *Bost* plaintiffs asserted standing as voters based upon the "dilution" of their votes by "invalid" ballots received after election day, and as a candidate based on the possibility that "invalid" votes would be counted and because the law "forces [him] to spend money and time campaigning after Election Day." *Bost v. Ill. State Bd. of Elections*, 684 F. Supp. 3d 720, 725, 731–32 (N.D. Ill. 2023). In August 2024, the Seventh Circuit affirmed the district court's dismissal for lack of standing, holding that plaintiffs lacked standing because they alleged only a generalized grievance affecting all Illinois voters and because "it was Plaintiffs' choice to expend resources

to avoid a hypothetical future harm." *Bost*, 114 F.4th at 641–42. The Seventh Circuit also rejected Plaintiffs' claimed interest in ensuring the final vote tally reflected only valid votes, noting "the election is months away and the voting process has not even started, making any threat of an inaccurate vote tally . . . speculative[.]" *Id.* at 644.

Against this weight of precedent, a single district court held last year—at the summary judgment stage and supported by uncontested affidavits—that the RNC and several other plaintiffs had standing to challenge Mississippi's mail ballot receipt deadline under a diversion of resources theory. *Republican Nat'l Comm. v. Wetzel*, No. 1:24-cv-25-LG-RPM, 2024 WL 3559623, at *5 (S.D. Miss. July 28, 2024). Even so, the district court granted summary judgment to the defendants because it concluded that federal law did not preempt the Mississippi law. *Id.* at *11. And while the Fifth Circuit later reversed on the merits, the issue of standing was not disputed on appeal. *Republican Nat'l Comm. v. Wetzel*, 120 F.4th 200, 205 n.3, 214–15 (5th Cir. 2024).

STANDARD OF REVIEW

The Court "review[s] de novo an order granting a motion to dismiss for lack of standing," resting its analysis on the complaint's allegations, which it accepts as true. *Seattle Pac. Univ. v. Ferguson*, 104 F.4th 50, 57 (9th Cir. 2024). The Court may affirm . . . on any ground supported by the record." *Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003).

SUMMARY OF THE ARGUMENT

I. A. Plaintiffs have no competitive-harm standing because they face no "state-imposed disadvantage." *Mecinas v. Hobbs*, 30 F.4th 890, 899 (9th Cir. 2022). The challenged deadline affects everyone equally by making it easier for every eligible voter to vote. Plaintiffs complain that their Democratic opponents benefit more from ballots received after election day than Plaintiffs do. But if so, that is due only to Plaintiffs' choice not to take advantage—or encourage their voters to take advantage—of the convenience that the deadline offers. That voluntary choice does not give Plaintiffs standing. *McConnell*, 540 U.S. at 228. Moreover, any competitive harm to Plaintiffs is speculative, because it turns on voters' unpredictable response to a court-ordered change in the deadline.

B. Plaintiffs have no organizational injury based on harm to their core activities because making it easier for voters to vote does not harm those activities. And while Plaintiffs allege changes to the timing of their efforts to chase mail ballots and monitor post-election counting, those efforts are not caused by the challenged deadline, because Nevada law will still allow voters to complete and return mail ballots through election day (via drop boxes and in-person delivery) regardless of the receipt deadline, and will still provide for such ballots to be cured and then counted for the next week no matter when the ballots must be received. NRS 293.269921(1), .269927(6), .269931(1).

C. Plaintiffs lack associational standing on behalf of Republican candidates because those candidates lack competitive-harm or organizational injury standing for the same reasons, and because candidates' objection to the inclusion of what they claim are invalid ballots in the final election results is just an inadequate complaint that the "law . . . has not been followed." *Lance*, 549 U.S. at 442.

D. The district court appropriately took the Plaintiffs' allegations as true in deciding the motion to dismiss, while properly declining to credit their legal conclusions in finding those allegations insufficient to support standing.

II.A. On the merits, federal law does not preempt Nevada's acceptance of ballots received by mail after election day, because voters still make their final selection when they deposit their ballot in the mail before the polls close. Officials' post-election receipt of those ballots is no different from their post-election counting and canvassing of ballots—in each case, voters' choices have been made, and all that remains is to tally those choices.

B. Plaintiffs' constitutional claims fail because the acceptance of mail ballots received after election day makes it easier, not harder, to vote and does not prevent anyone from standing for office.

III. There is no need to remand to allow dismissal without prejudice because Plaintiffs waived any right to amend by failing to seek leave to amend before appealing.

ARGUMENT

I. Plaintiffs lack standing.

The district court correctly held that Plaintiffs lack standing to sue under any of their three theories: they lack a competitive injury to their electoral prospects, they lack an organizational injury based on harm to their core activities and a diversion of resources, and they lack standing on behalf of candidates because the candidates are not injured either. The Court should affirm.

A. Plaintiffs lack standing based on a supposed competitive injury.

1. Plaintiffs cannot have competitive standing to challenge a law that affects all parties, candidates, and voters equally.

Plaintiffs' competitive-harm theory of standing fails, first, for the simple reason that Nevada's acceptance of mail ballots received after election day affects all candidates, political parties, and voters equally. Competitive harm confers standing where a plaintiff is "forced to compete under the weight of a state-imposed disadvantage." *Mecinas*, 30 F.4th at 899. The injury involved in competitive harm is "the denial of equal treatment," and demonstrating standing requires showing a "barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *see also Lake v. Hobbs*, 623 F. Supp. 3d 1015, 1029 (D. Ariz. 2022) (no competitive standing absent facts showing that "the field is 'tilted'"), *aff'd*, 83 F.4th 1199 (9th Cir. 2023).

A "personal choice" not to take advantage of a political opportunity offered by the challenged law does not suffice. *McConnell*, 540 U.S. at 228 (holding candidates had no competitive standing to challenge law raising contribution limits based on "their own personal 'wish' not to solicit or accept large contributions"), *overruled on other grounds*, *Citizens United v. FEC*, 558 U.S. 310 (2010).

Plaintiffs have no competitive standing because they allege no denial of equal treatment and no barrier that makes it more difficult for them to benefit from the acceptance of mail ballots received after election day than for their political competitors to do so. The challenged law therefore does not threaten Plaintiffs with any "harms that are unique from their electoral opponents." *Cegavske*, 488 F. Supp. at 1003, nor does it confer an "unfair advantage" to their "rival candidates." *Mecinas*, 30 F.4th at 899. Rather, as the district court explained, "[a]ny 'advantage' that Democrats may gain from the four-day grace period is one that appears to be equally available to, but simply less often employed by, Republicans." ER-10. Plaintiffs allege that Democrats vote more often by mail and tend to return their ballots closer to election day, but nothing is stopping Republican voters from doing the same. "[A]ll candidates in" Nevada, including Plaintiffs' opponents, "are subject to the same rules." *Bognet*, 980 F.3d at 351. If Plaintiffs do not benefit equally from the deadline, that is due only to their "personal choice" in how they structure their campaigns. *McConnell*, 540 U.S. at 228.

In contrast, the competitive-injury cases on which Plaintiffs rely challenged laws or actions that imposed an *unequal* burden on the plaintiff compared to the plaintiff's competitors. In *Mecinas*, the Democratic National Committee challenged an Arizona statute that provided for candidates affiliated with the party that received the most votes for governor in the last election to be listed on the ballot first. 30 F.4th at 894. In practice, this meant that "the Republican Party's candidates have appeared in the top position in the great majority of Arizona's general election ballots." *Id.* This directly disadvantaged Democratic candidates relative to Republican candidates, forcing Democratic candidates to "compete under the weight of a state-imposed disadvantage"—being listed below their opponents on the ballot—that did not apply to similarly situated Republican candidates. *Id.* at 899. Other cases upholding competitive standing to challenge ballot-order rules similarly focused on the fact that they "unequally favor[] supporters of other political parties" over the plaintiff. *Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 907 (8th Cir. 2020) (per curiam); *see also Green Party of Tenn. v. Hargett*, 767 F.3d 533, 540, 544 (6th Cir. 2014) (holding minor party had standing to challenge ballot-order statute that "discriminates against minor parties by conferring an advantage on the Republican and Democratic Parties"); *Nelson v. Warner*, 12 F.4th 376, 384 (4th Cir.

2021) (holding candidate had standing to challenge ballot-order statute that caused him to be "listed beneath the three Republican candidates").[3]

The same rule applies in other competitive-standing contexts. In *Planned Parenthood of Greater Washington and North Idaho v. HHS*, the plaintiffs challenged grant criteria for pregnancy-prevention grants that unlawfully "favored or required abstinence-only programs" that the plaintiffs did not offer, and therefore "tilt[ed] the playing field" against the plaintiffs' own offerings, which were not abstinence-only. 946 F.3d 1100, 1107–08 (9th Cir. 2020). The criteria therefore harmed the plaintiffs' ability to compete for grants by virtue of their programming and beliefs—the plaintiffs could not themselves benefit from the challenged criteria without fundamentally changing the programming they were offering to provide. *See id.*

Other competitive-standing cases involve challenges to *unlawful* activity by political competitors, which the plaintiffs could replicate only by breaking the law themselves. In *Owen v. Mulligan*, a county Republican party and Republican candidates had standing to sue the postal service to cancel a bulk mail permit that

[3] *See also City of Los Angeles v. Barr*, 929 F.3d 1163, 1173 (9th Cir. 2019) ("[T]he *inability* to compete *on an even playing field* constitutes a concrete and particularized injury." (emphasis added)); *Preston v. Heckler*, 734 F.2d 1359, 1365 (9th Cir. 1984) ("[W]hen challenged agency conduct allegedly renders a person *unable to fairly compete* for some benefit, that person has suffered a sufficient 'injury in fact' and has standing . . . ." (emphasis added)).

Democratic candidates had unlawfully used to send direct mail at lower rates than those available to Republican candidates. 640 F.2d 1130, 1131 (9th Cir. 1981). The Court explained that the plaintiffs sought to "prevent their opponent from gaining an unfair advantage in the election process through abuses of mail preferences," *id.* at 1133—an advantage that was not available to the plaintiffs unless they, too, violated postal regulations. Similarly, in *Shays v. FEC*, congressional candidates challenged campaign finance regulations that, they argued, authorized the use of "soft money" and "sham issue ads" against them in ways prohibited by campaign finance statutes. 414 F.3d 76, 84 (D.C. Cir. 2005). The D.C. Circuit explained that while the plaintiffs "could perhaps reduce or even neutralize their opponents' advantages by exploiting illegal FEC safe harbors themselves," doing so would require them to violate the statute—and "being put to the choice of either violating [the statute] or suffering disadvantage in their campaigns is itself . . . Article III injury." *Id.* at 89.

Here, in contrast, Plaintiffs allege only that *Nevada* is violating the law by counting mail ballots received after election day. Even on Plaintiffs' own account, there would be nothing illegal about Plaintiffs encouraging more of their supporters to vote by mail, nor about their continuing that encouragement through the close of the polls on election day—the measures that Plaintiffs contend have led their Democratic opponents to benefit disproportionately from the challenged receipt deadline. Br. 18. Plaintiffs may have chosen not to do so, but their "personal choice"

to forgo the benefits of the challenged law does not give them standing to challenge that law. *McConnell*, 540 U.S. at 228.

2. Plaintiffs' competitive-injury allegations are unacceptably speculative.

Plaintiffs' competitive injury theory also fails because any benefit to Plaintiffs from the court order they seek—prohibiting Nevada from counting mail ballots received by mail after election day—is entirely speculative. "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Lujan*, 504 U.S. at 565 n.2 (internal quotation marks omitted). And the "causation requirement precludes speculative links—that is, where it is not sufficiently predictable how third parties would react to government action or cause downstream injury to plaintiffs." *Hippocratic Med.*, 602 U.S. at 383. Thus, "[i]n cases of alleged future injuries to unregulated parties from government regulation, the causation requirement and the imminence element of the injury in fact requirement can overlap." *Id.* at 385 n.2.

Plaintiffs fail to allege a non-speculative basis for concluding that the existing mail ballot return deadline actually injures them. They allege that in past elections in Nevada, more Democratic voters than Republican voters have voted by mail, and that "ballots from Democratic voters also tend to arrive late" in the election process. ER-31. But Plaintiffs' claim relates only to *ballots received after election day*, and

Plaintiffs do not allege that in past elections in Nevada, more ballots received after election day have been from Democratic voters than Republican voters. ER-7.

Moreover, in this case seeking prospective relief, the question is not what happened in the past but what will happen in the future: "the past is relevant only insofar as it is a launching pad for a showing of *imminent* future injury." *Murthy v. Missouri*, 603 U.S. 43, 59 (2024) (emphasis added). Plaintiffs do not and cannot allege how voters will vote in future elections. And as the Seventh Circuit explained in rejecting competitive standing in a materially identical case, the failure to "allege that the majority of the votes that will be received and counted after Election Day will break against them . . . highlight[s] the speculative nature of the purported harm." *Bost*, 114 F.4th at 643; *see also id.* at 644 (Scudder, J., dissenting in part) ("I join my colleagues in rejecting the plaintiffs' voter-dilution and competitive-injury theories of standing.").

Making matters worse, Plaintiffs' theory wrongly assumes that voters would continue to vote in the same manner *even if the rules change as a result of this lawsuit*. Any redressable competitive injury to Plaintiffs caused by the receipt deadline turns on the "response of" a third party—voters—to a court-ordered change in that deadline. *Hippocratic Med.*, 602 U.S. at 383. In particular, Plaintiffs' competitive injury argument assumes that if the receipt deadline were changed to election day by court order, Democratic voters would disproportionately return their

ballots too late and miss that deadline, rather than changing their behavior and returning their ballots earlier if necessary. But Plaintiffs offer nothing to support that assumption aside from "speculation about the unfettered choices" that voters would make if the deadline were changed. *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 415 n.5 (2013)). Plaintiffs do not allege any facts to suggest that Democratic voters, as compared with Republican voters, would be less able to respond to a court-ordered change in the deadline, nor even that Democratic voters disproportionately miss election-day receipt deadlines in the many states that have them. Plaintiffs therefore provide no basis to conclude that their alleged competitive injury is caused by the current deadline, nor that it would be redressed by a court order changing that deadline.

Plaintiffs retort that the injury at issue is the possible loss of an election rather than the loss of any individual vote. Br. 24. That does nothing to help them—it only heightens the speculation. The deadline Plaintiffs challenge and the relief they seek could affect election results only by affecting the acceptance of individual ballots cast by individual voters across the state. Plaintiffs' argument that election results will be affected therefore assumes that individual votes will be affected, and the effect on any individual votes depends entirely on how individual voters respond to a change in the deadline. Lacking any non-speculative basis for concluding that individual voters will respond to a changed deadline in any particular way, Plaintiffs

cannot possibly have provided a non-speculative basis for concluding that voters' responses collectively might lead to a different election result than the current deadline produces.

For these reasons, Plaintiffs' allegations fundamentally differ from those in *Mecinas* and *Texas Democratic Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006), both of which did allege a non-speculative basis for predicting future voter behavior. In *Mecinas*, the plaintiff relied on the "recognized psychological phenomenon known as 'position bias' or the 'primacy effect'" to explain why the ballot order statute unfairly damaged the electoral prospects of Democrats. 30 F.4th at 895. That phenomenon had the predictable effect of favoring whatever candidate was placed first on the ballot, and it followed directly from it that if the rule were changed so that Democratic candidates were more frequently listed first, they would benefit from that listing. *See id.* Similarly, the plaintiff in *Benkiser* demonstrated through testimony that a particular "congressional candidate's chances of victory would be reduced" by an unfair bait-and-switch that would have replaced the Republican Party's nominee with a more viable candidate. 459 F.3d at 586. The court credited that testimony, which was specific to the dynamics of a particular race, in a particular district, between two candidates. Here, Plaintiffs do not even allege any sort of "specific causation," *Murthy*, 603 U.S. at 59, to suggest that past voting patterns are likely to recur under a different electoral regime.

Plaintiffs therefore fail to allege any nonspeculative basis for concluding that their candidates' election prospects are harmed by the receipt deadline they challenge, as compared with the earlier deadline they seek.

B. Plaintiffs have not suffered a cognizable harm to their core activities.

Plaintiffs also lack organizational standing based on alleged harm to their core activities. For organizations like the RNC and NVGOP to have standing in their own right, they "must satisfy the usual standards for injury in fact, causation, and redressability that apply to individuals." *Hippocratic Med.*, 602 U.S. at 393–94. An organization cannot "manufacture its own standing" simply by "expending money" in response to the law. *Id.* at 394. And if the challenged law does not "directly affect[] and interfere[]" with the organization's "core" activities, *id.* at 395, or otherwise "perceptibly impair[]" its ability to pursue its mission due to a diversion of resources, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), the plaintiff organization lacks standing.

The district court correctly held that Plaintiffs do not satisfy these requirements because their core activities are uninjured by the acceptance of mail ballots received after election day. *See* ER-10–13. The fundamental problem for Plaintiffs is that their core activities of turning out voters cannot be harmed by a law that makes it easier for those voters to vote. Plaintiffs therefore focus on what they say are changes in the *timing* of their activities, but those changes are not caused by

the deadline Plaintiffs challenge. Nevada law already requires voters to complete their mail ballots and place them in the mail, in a ballot drop box, or in the hands of the county clerk no later than the close of the polls on election day. NRS 293.269921(1). And Plaintiffs do not challenge the drop box or hand delivery deadlines. *See* ER-20. Thus, while Plaintiffs complain that they must run "mail-ballot-specific get-out-the-vote operations to encourage mail ballot voters to return their mail ballots through Election Day," Br. 9 (quoting ER-29), they would have every reason to continue to run those same operations through election day even if mail ballots had to be received by election day, given that voters could still return their mail ballots in person or to drop boxes on that day.

Similarly, while Plaintiffs complain that the post-election receipt deadline means they "must divert additional resources to poll-watching efforts and post-election observation," Br. 12, Nevada law allows mail ballots to be counted until "the seventh day following the election" no matter what the receipt deadline is, NRS 293.269931(1). And the counting cannot possibly stop before "5 p.m. on the sixth day following the election," because voters have until then to cure signature problems with their ballots. NRS 293.269927(6). Thus, if Plaintiffs feel they must observe post-election ballot counting, they will need to do so for the same number of days no matter what the receipt deadline for ballots returned by mail may be.

Largely for those reasons, Plaintiffs fail to allege facts plausibly showing that the challenged deadline "directly affect[s] and interfere[s]" with their "core" activities, *Hippocratic Med.*, 602 U.S. at 395, because they would have every reason to engage in essentially the same activities at essentially the same time with or without the deadline they challenge. Plaintiffs even admit that they do "not claim that they had to round up mail ballots in a different manner due to Nevada's revised mail-ballot deadline." Br. 38–39. They, at best, simply allege they do *more* campaigning, or different kinds of campaign work at different times, than they would choose to do if the deadline were different. But "[s]pending time and money on campaigning is an inevitable feature of running for office." *Bost*, 684 F. Supp. 3d at 739. Such evergreen costs of campaigning are not a cognizable injury.

Plaintiffs do allege that their in-person Election Day activities are harmed when they spend more resources on mail ballot chase programs and post-election activities. Br. 37; ER-22–23 ¶¶ 14, 17–19. But again, that choice is not traceable to the challenged deadline, because mail ballots could be returned through election day and counted through the seventh day after no matter what the receipt deadline is. NRS 293.269921(1), .269927(6), .269931(1). Plaintiffs' "voluntary decision" to spend more money on some pre-existing programs at the expense of other pre-existing programs is a "self-inflicted injury that is not fairly traceable to the defendant" and is insufficient to confer standing. *Our Watch With Tim Thompson v.*

Bonta, 682 F. Supp. 3d 838, 852 (E.D. Cal. 2023) (cleaned up); *see also Friends of the Earth v. Sanderson Farms, Inc.*, 992 F.3d 939, 942–43 (9th Cir. 2021) ("The question, then, is whether the [plaintiffs'] activities were 'business as usual' and a continuation of existing advocacy, or whether they were an affirmative diversion of resources to combat [the challenged conduct.]"); *see also Bost*, 684 F. Supp. 3d at 739. Plaintiffs also nowhere explain or allege how these ordinary campaign choices about how to engage with voters—in response to a law that makes voting *easier*, not harder—"frustrate" any aspect of their mission. *Havens Realty*, 455 U.S. at 369. Where a "challenged law expands access to voting through mail without restricting prior access to in-person voting . . . plaintiffs need not divert resources to enable or encourage their voters to vote." *Cegavske*, 488 F. Supp. 3d at 1002 (emphasis omitted). Because Plaintiffs fail to "identify or counteract any harms from the Nevada mail ballot receipt deadline" that cause them to divert resources, "the causal chain is too attenuated to support Article III standing." ER-13. And lacking any "concrete injury caused by a defendant's action," Plaintiffs "cannot spend [their] way into standing simply by expending money." *Hippocratic Med.*, 602 U.S. at 394.

For similar reasons, the *Bost* court rejected almost identical allegations as inadequate. *See* 684 F. Supp. 3d at 726, 728–34. It explained that an alleged need to expend more resources specifically due to ballots received after election day "is not certainly impending" and is "mere conjecture," particularly because ballots must be

completed by election day, so candidates' "electoral fate is sealed at midnight on Election Day, regardless of the resources [they] expend[] after the fact." *Id.* at 733–34. Any suggestion that Plaintiffs' alleged reallocation of resources harms them in any concrete manner is "inherently speculative." *Bognet*, 980 F.3d at 351–52 (rejecting diversion of resources standing premised on a speculative chain of predictions); *see also Way II*, 2020 WL 6204477, at *7 (rejecting diversion of resources theory as "too speculative and remote to satisfy Article III's actual or imminent injury requirement" where it relied upon an "unlikely chain of events" about post-election events).

Plaintiffs' out-of-circuit case law changes nothing. *See* Br. 31–33. In *Republican National Committee v. North Carolina State Board of Elections*, 120 F.4th 390 (4th Cir. 2024), the Fourth Circuit found that plaintiffs had standing to challenge defendant's alleged violations of the Help America Vote Act because plaintiffs were "forced . . . to divert resources into combatting election fraud." *Id.* at 397. Here, in contrast, Plaintiffs "have made no allegations that the Nevada mail ballot receipt deadline harms the integrity of the mail ballot counting process, such as by increasing the risk of error or fraud." ER-13; *see also* Br. 39 (claiming "whether late-arriving ballots are fraudulent is beside the point").

As for the Fifth Circuit's decision in *Wetzel*, it did not address standing in any depth, as the issue was not disputed by the parties on appeal. *Wetzel*, 120 F.4th at

205 n.3 ("Neither party disputes the plaintiffs' standing before this court."); *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (explaining that a "drive-by jurisdictional ruling" has "no precedential effect"). Moreover, the effect of the Mississippi deadline at issue in *Wetzel* is distinct from the effect of the Nevada deadline at issue here, because Mississippi law requires absentee ballots to be either mailed by election day or cast in person by the Saturday before election day. Miss. Code § 23-15-637(1). Thus, an election day receipt deadline in Mississippi really might allow parties and candidates to stop chasing absentee ballots on election day, whereas such a deadline in Nevada would not have that effect because of the allowance for drop-box and in-person mail-ballot return until the polls close.

Ultimately, regardless of what deadline is enforced, every Nevada voter will be entitled to vote by mail and to return their mail ballots through election day, so Plaintiffs will have every incentive to expend all available resources campaigning for their votes and running chase programs. Plaintiffs' alleged choice to divert any resources in response to the current deadline is therefore purely their own, and not traceable to any actual injury resulting from the receipt deadline.

C. Plaintiffs lack associational standing on behalf of candidates.

Plaintiffs lack associational standing on behalf of their candidates because those candidates lack "competitive" or "electoral" standing for the same reasons that the Plaintiffs themselves lack such standing: Plaintiffs' candidates could equally

benefit from the current deadline, and any effect on their election results depends on the entirely speculative response of voters to a change in the deadline. That leaves the alleged injury to Plaintiffs' candidates' right to an "accurate vote tally," but that injury boils down to a generalized complaint that the law has not been followed. Even if the Court "[f]or standing purposes, [accepts] as valid the merits of [the plaintiff's] legal claims," Br. 42 (quoting *FEC v. Cruz*, 596 U.S. 289, 298 (2022)), plaintiffs must allege more than that the "law . . . has not been followed." *Lance*, 549 U.S. at 442. The receipt deadline renders the vote tally "inaccurate," in Plaintiffs' view, only because ballots counted pursuant to that rule are "illegal." To say that candidates are injured by an "inaccurate" vote tally, therefore, is simply to say that "illegal ballots are counted." And mere illegality standing alone is not an injury in fact. *See id.*

The only authority on which Plaintiffs rely for their candidates' supposed interest in "ensuring that the final vote tally accurately reflects the legally valid votes cast," *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020), rested on flawed reasoning and has been repeatedly rejected by other federal courts, *see id.* at 1063 (Kelly, J., dissenting) (explaining the plaintiffs' "claimed injury—a potentially 'inaccurate vote tally' . . . —appears to be 'precisely the kind of undifferentiated, generalized grievance about the conduct of government' that the Supreme Court has long considered inadequate for standing." (quoting *Lance*, 549 U.S. at 442)); *see*

also Bognet, 980 F.3d at 351 n.6 (explaining *Carson*'s error); *Bost*, 114 F.4th at 643 ("[W]e question whether the Eighth Circuit's brief treatment of this issue without citation to any authority is consistent with the Supreme Court's holding in *Lance*."); *King v. Whitmer*, 505 F. Supp. 3d 720, 736 (E.D. Mich. 2020) ("This Court . . . is as unconvinced about the majority's holding in *Carson* as the dissent."); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 612 (E.D. Wis. 2020) ("Judge Kelly's reasoning is the more persuasive."); *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 710–11 (D. Ariz. 2020) (joining other courts in repudiating *Carson*'s reasoning); *Bost*, 684 F. Supp. 3d at 734 ("[T]he Court declines to follow *Carson*."). Even the rare courts that have accepted *Carson*'s premise have still required plaintiffs to "allege[] facts to show that it is plausible that the field is 'tilted.'" *Lake*, 623 F. Supp. 3d at 1029. For the reasons explained above, Plaintiffs have not done so here.

D. The district court appropriately took Plaintiffs' well-pleaded facts as true.

Finally, the district court properly took Plaintiffs' well-pleaded facts as true while ignoring their legal conclusions in concluding that Plaintiffs lack standing. A plaintiff must "clearly allege *facts* demonstrating each element" of standing, not just legal conclusions. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (cleaned up, emphasis added); *see also Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 954 (9th Cir. 2011) (no standing in ADA case where complaint alleged the conclusion that the plaintiff "encountered architectural barriers" to full access but "never

allege[d] what those barriers were and how his disability was affected by them"). And the district court consistently credited the concrete factual allegations Plaintiffs made in support of their standing arguments. The district court assumed that "Democrats are more likely to vote by mail and to vote later," as Plaintiffs allege, while properly noting that it did not necessarily follow from those factual allegations that Democratic voters were more likely specifically to cast ballots received after election day, much less to continue to do so in the future even if the deadline changed. ER-7. Similarly, the district court assumed that the receipt deadline required Plaintiffs to "devote more resources to poll watching and election-integrity trainings," despite the court's skepticism that such allegations were adequately pled. ER-12 & n.7. The court just held that as a legal matter, such expenditures were not sufficiently causally connected to the challenged deadline to convey standing because they were not undertaken to counteract any alleged harms resulting from the challenged deadline. ER-12–13.

Plaintiffs also argue that the district court failed to credit allegations that "chasing mail ballots through election day was new business." Br. 44. But Plaintiffs made no such allegations. The cited pages (ER-21 and ER-33) say nothing on the subject, and the relevant allegations (on ER-29) say only that the receipt deadline requires Plaintiffs "to *maintain* mail-ballot-specific get-out-the-vote operations . . . through Election Day." ER-29 ¶ 49 (emphasis added). That is exactly what the

district court said: that the challenged deadline at most required Plaintiffs to "keep running mail ballot collection operations" longer. ER-11.

Similarly, Plaintiffs seize on the district court's imprecise use of the word "evidence" in noting that "[t]he record is devoid of evidence . . . that Organizational Plaintiffs would not round up mail ballots in substantially the same manner" regardless of the receipt deadline, just "a few days earlier . . . or over a shortened period of time." *Id*. But imprecise word choice aside, Plaintiffs *admit* that they do "not claim that they had to round up mail ballots in a different manner due to Nevada's revised mail-ballot deadline." Br. 38–39. And they alleged exactly what the district court here said might be true: that the deadline affected the length or timing of Plaintiffs' ballot-chase programs—requiring them to "*maintain*" those programs on election day—rather than the nature of those programs. ER-11, -29.

Finally, Plaintiffs claim that the district court improperly relied on *Friends of the Earth* in imposing an "evidentiary burden upon Plaintiffs at the pleading stage." Br. 45–46. But the district court properly treated the motions to dismiss as facial attacks, not factual attacks. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). As just explained, the district court consistently credited Plaintiffs' concrete factual allegations. It cited *Friends of the Earth* only as part of its legal analysis—as support for its holding that Plaintiffs' alleged diversion of resources injury was inadequate because it was a mere continuation of ongoing activities, *see* ER-10–11, a fact that

Plaintiffs now concede. Br. 38–39. The district court therefore did not impose any evidentiary burden on Plaintiffs; it held that Plaintiffs lacked standing even accepting Plaintiffs' concrete factual allegations as true.

II. Plaintiffs fail to state a claim on the merits.

If the Court nevertheless concludes that it has jurisdiction, it should still affirm on the alternative ground that Plaintiffs fail to state a claim on the merits. This Court "may affirm a district court's judgment on any ground supported by the record, whether or not the decision of the district court relied on the same grounds or reasoning [this Court] adopt[s]." *Atel Fin. Corp.*, 321 F.3d at 926; *see also Planned Parenthood of Greater Wash.*, 946 F.3d at 1198 ("We may exercise our equitable discretion to reach the merits of a case when the court below did not."). Plaintiffs fail to state a claim because Nevada's acceptance of mail ballots mailed by election day and received within four days after election day is not preempted by the Election Day Statutes, nor does it violate any of Plaintiffs' constitutional rights.

A. The Election Day Statutes do not preempt the receipt deadline.

The Elections Clause of the U.S. Constitution expressly grants states the power to set the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress's power to "by Law make or alter such Regulations." U.S. Const., art. I, § 4, cl.1. Similarly, the Constitution vests Congress with the power to determine when electors for the office of the President and Vice

President are chosen, *id.*, art II, § 1, cl. 4, but otherwise reserves the manner of such selection to the states, *id.* art. II, § 1, cl. 2. The Supreme Court has held that as a result of these provisions, federal law "alter[s]" state election laws only when the state law cannot possibly "operate harmoniously" with the federal law "in a single procedural scheme." *Gonzalez v. Arizona*, 677 F.3d 383, 394 (9th Cir. 2012), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013). Congress's power to regulate the "Times, Places, and Manner" of congressional elections supersedes "inconsistent" State laws "so far as it is exercised, *and no farther*." *Arizona*, 570 U.S. at 9 (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)) (emphasis added).

Nevada's acceptance of mail ballots received after election day is entirely consistent with the Election Day Statutes because none of those statutes—2 U.S.C. §§ 1, 7 and 3 U.S.C. § 1—speaks to when ballots must be received to be counted. The plain meaning of the term "election" in the Election Day Statutes requires only that ballots be *cast* by election day—precisely what Nevada law requires by demanding that ballots be completed and mailed by election day. Plaintiffs' contrary view that "election" means "casting *and receipt*" of ballots finds no support in the text, structure, or history of the Election Day Statutes.

1. The receipt deadline is consistent with the Election Day Statutes' plain text.

Statutory interpretation begins (and in this case ends) with the text. *Ross v. Blake*, 578 U.S. 632, 638 (2016). When Congress exercises its power under the Elections Clause, "the reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent." *Arizona*, 570 U.S. at 14. Thus, courts should "read Elections Clause legislation simply to mean what it says." *Id.* at 15. And the Election Day Statutes simply designate when the "election" must occur. 2 U.S.C. §§ 1, 7; 3 U.S.C. §§ 1, 21(1). As courts have repeatedly held in rejecting claims indistinguishable from Plaintiffs', nothing in the Election Day Statutes' text says anything about procedures for transmission, receipt, processing, or counting of ballots. *See Bognet*, 980 F.3d at 353 ("Federal law does not provide for *when* or *how* ballot counting occurs."); *Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354, 372 (D.N.J. 2020) ("*Way I*") (the Election Day Statutes "are silent on methods of determining the timeliness of ballots"); *Bost*, 684 F. Supp. 3d at 736 (holding Illinois' post-election-day receipt deadline "operates harmoniously with the federal statutes that set the timing for federal elections"). Those decisions are therefore left to the states.

Contemporaneous dictionary definitions confirm this. Congress first enacted the Election Day Statutes in the mid-nineteenth century. *See* Act of Jan. 23, 1854, 5 Stat. 721 (1845) (predecessor to 3 U.S.C. § 1); Act of Feb. 2, 1872, 17 Stat. 28 (1872)

(predecessor to 2 U.S.C. § 7). As the Supreme Court has observed, nineteenth century dictionaries define "election" as the voters' "act of choosing a person to fill an office" *Foster v. Love*, 522 U.S. 67, 71 (1997) (quoting N. Webster, *An American Dictionary of the English Language* 433 (Charles Goodrich & N. Porter eds. 1869)). That is, "election" day is the day on which the voters "choos[e]."

Nevada law is entirely consistent with that definition. When the voter places a marked absentee ballot in the mail, they have made their final choice. At that point, the ballot is beyond the voter's custody and control—the voter has no opportunity to change their vote between the time the ballot is deposited in the mail and the time it is received, processed, and canvassed by election officials. Nevada law therefore requires that voters' final choice to be made on or before election day, just like federal law. *See Bost*, 684 F. Supp. 3d at 736–37 ("By counting only th[o]se ballots that are postmarked no later than Election Day, the Statute complies with federal law that set[s] the date for Election Day."); *Way I*, 492 F. Supp. 3d at 372 ("New Jersey law prohibits canvassing ballots *cast* after Election Day, in accordance with the Federal Election Day Statutes." (emphasis added)).

2. Nevada law is consistent with the purpose and legislative history of the Election Day Statutes.

Though the Court need not inquire beyond the statute's clear text, *see Lambert v. Tesla, Inc.*, 923 F.3d 1246, 1250–51 (9th Cir. 2019), the purpose and legislative history of the Election Day Statutes confirm that "election day" is the day by which

voters must make their "choice." The legislative history shows that the Election Day Statutes were enacted to prevent (1) "distortion of the voting process threatened when the results of an early federal election in one State can influence later voting in other States" and (2) the "burden on citizens forced to turn out on two different election days to make final selections of federal officers in presidential election years." *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 777 (5th Cir. 2000); *see also Foster*, 522 U.S. at 73–74; Cong. Globe, 42d Cong., 2d Sess. 141 (1871). Nevada's receipt deadline is entirely consistent with these purposes. It requires voters to make their final selection of candidates on or before election day, so there is no risk of "distortion" from early results in other states. And it does not force citizens to turn out on multiple days.

3. *Foster v. Love* is consistent with the plain meaning of "election".

The Supreme Court's decision in *Foster v. Love* construing the Election Day Statutes confirms this commonsense analysis. 522 U.S. at 67. In *Foster*, the Supreme Court addressed a Louisiana "open primary" system under which the election of candidates for Congress could be *concluded* as a matter of law *before* the federally-mandated "election day." *Id.* at 70. Under that system, if any candidate received a majority of the votes cast in the open primary, they would be "elected," and *no* general election would be held on the federal election day. *Id.* The Court concluded this system was inconsistent with the Election Day Statutes, but it emphasized that

its ruling was narrow, holding only that an election "*may not be consummated prior to* federal election day." *Id.* at 72 n.4 (emphasis added). It did not purport to "isolat[e] precisely what acts a State must cause to be done on federal election day . . . in order to satisfy the [Election Day Statutes]." *Id.* at 72. Nevada's receipt deadline does not "consummate[]" an election "prior to federal election day," or set a competing date on which the voters' selection "is concluded as a matter of law." *Id.* at 72 & n.4. It ensures that the voters' selection is made on or before election day. *Foster*'s holding therefore simply does not apply here.

In arguing otherwise, Plaintiffs isolate the Supreme Court's statement in *Foster* that "the election" in the Election Day Statutes "refer[s] to the combined actions of voters and officials meant to make a final selection of an officeholder . . . ." 522 U.S. at 71. But that dicta aside, the Supreme Court's decision in *Foster* was expressly limited, holding "*only* that if an election does take place, it may not be consummated prior to federal election day." *Id.* at 72 n.4. The Court explicitly warned that its decision should not be read to "par[e] the term 'election' in § 7 down to the definitional bone." *Id.* at 72. Plaintiffs' theory would broaden *Foster* to control a question that it expressly declined to decide. *See Millsaps v. Thompson*, 259 F.3d 535, 545 (6th Cir. 2001) (noting "the Supreme Court's silence in *Foster* as to which acts a State must take on federal election day").

Regardless, Nevada's mail-ballot scheme *does* require "combined actions of voters and officials meant to make a final selection of an officeholder" to take place before election day. Before voters can mark and return mail ballots, election officials must prepare and distribute them. And once the voter has completed the ballot and placed it in the mail—which Nevada law mandates must happen on or before election day—the "final selection" that is the culmination of those "combined actions" has been made. *Foster*, 522 U.S. at 71. At that point, the voter's engagement with the process ends, and with it the "combined actions" of voters and election officials. Only the officials' receipt, counting, and canvassing of the ballots remains.

The fact that officials' election-related activities continue after election day cannot possibly violate the Election Day Statutes because election officials routinely count and canvass ballots after election day, in every state. *See Millsaps*, 259 F.3d at 546 n.5 (recognizing that "official action to confirm or verify the results of the election extends well beyond federal election day"); *see also Bush v. Gore*, 531 U.S. 98, 116 (2000) (Rehnquist, C.J., Scalia & Thomas, JJ., concurring) (cataloguing administrative actions occurring in Florida after election day to conclude the election process). There is no principled reason to distinguish officials' "receipt" of a completed mail ballot from these other administrative actions. *See Millsaps*, 259 F.3d at 545–46 (the "'final selection' of an officeholder requires more than mere receipt of ballots cast by voters."). Receipt, no less than counting and canvassing, is

an administrative step necessary to *ascertain* the "final selections" that were already irrevocably made by voters before the close of the polls. If the Election Day Statutes covered those activities, then election officials would have to arbitrarily stop counting ballots at the stroke of midnight on election day, upending election administration in all fifty states. Indeed, such a requirement would make the very concept of election day an impossible moving target, requiring ballots to be cast before election day (in violation of the Supreme Court's holding in *Foster*) in order for all subsequent election administration to be completed by election day.

4. Historical practice and congressional action demonstrate that the receipt deadline is consistent with the Election Day Statutes.

Post-election receipt deadlines have been a feature of American elections for well over a century. During the Civil War, many states adopted laws to permit service members to vote in the field. Often, these soldiers cast their ballots in the field on election day, typically before their own officers. But their votes were not added to the full count until conveyed back to their home states for a canvass. *See* Josiah Henry Benton, *Voting in the Field: A Forgotten Chapter of the Civil War* 317–18 (1915). Many states, in both the North and South, extended their canvassing deadlines to accommodate this. *Id.* Under these systems, election officials would not receive the results of these in-the-field elections until well after election day. *Id.* at 318. And as absentee voting proliferated in the late 19th and early 20th centuries,

states experimented with a variety of different models that involved post-election day receipt. Five states, for example, permitted absent voters to cast ballots elsewhere on election day, and then have their ballots mailed to election officials in their home precinct after election day to be counted. P. Orman Ray, *Absent Voters*, 8 Am. Pol. Sci. Rev. 442, 442-43 (1914) (Kansas, Missouri); P. Orman Ray, *Absent-Voting Laws*, *1917*, 12 Am. Pol. Sci. Rev. 251, 253 (May 1918) (Washington); Joseph P. Harris, *Election Administration in the United States* 287-288 (1934) (Oregon, Florida). At least as early as 1924, California law required that all absentee ballots must be received "within fourteen days after the date of the election in which such ballots are to be counted." Cal. Political Code § 1360 (James H. Derring ed. 1924). In response to World War I, other states enacted similar laws specifically for military voters. In Kansas, as early as 1923, military ballots had to be "return[ed]" "before the tenth day following [the] election." K.S.A. § 25-1106 (Chester I. Long, et al., eds. 1923) (emphasis added). New York and Minnesota had similar laws. *See* P. Orman Ray, *Military Absent-Voting Laws*, 12 Am. Pol. Sci. Rev. 461, 464, 468-69 (1918).

By 1942, with the United States' entry into World War II, post-election day receipt deadlines were ubiquitous. An advisory memorandum prepared by the Office of War Information for soldiers in the field advised soldiers how to vote based on their state absentee voting laws, with a table including a column for the "Last day

for receipt of ballot by election officials." *Soldier Voting: Hearings Before the H. Comm. on Election of President, Vice President, & Representatives in Congress on H.R. 3436*, at 102, 78th Cong., 1st Sess. (Oct. 26, 1943) (reproducing publication inserted into record).[4] At least *seven* states—California, Kansas, Maryland, Missouri, Pennsylvania, Rhode Island, and Washington—had post-election receipt deadlines, either for civilians, servicemembers, or both. *Id.* at 101. Nebraska soon followed in 1943. Neb. Rev. Stat. § 32-838 (1943) (requiring acceptance of mail-in ballots received "not later than 10:00 a.m. on the second day following election day").

Against this background, Congress passed the Soldier Voting Act, which allowed servicemembers to vote absentee in federal elections using a new federal "war ballot," notwithstanding any contrary state laws. The Soldier Voting Act explicitly prohibited post-election day receipt of such ballots, specifying that "no official war ballot shall be valid . . . if it is received by the appropriate election officials . . . after the hour of closing the polls on the date of the holding of the election." Act of Sept. 16, 1942, ch. 561, 56 Stat. 753, § 9 (the "1942 Act"). If Plaintiffs' interpretation of the Election Day Statutes were correct, then the 1942 Act's explicit election day receipt deadline for war ballots would be entirely

[4] Available at https://books.google.com/books/about/Soldier_Voting_Hearings_on_H_R_3436_Also.html?id=qV5MiniL2NsC.

superfluous. And the 1942 Act shows that when Congress wished to set election day as a categorical deadline for receipt of ballots, it did so expressly.

War ballots aside, in the post-World War II era states continued to accept absentee ballots after election day. In Missouri in 1958, ballots needed to be "postmarked the day of the election and reach the election official the day next succeeding the election." *Elliott v. Hogan*, 315 S.W.2d 840, 848 (Mo. App. 1958) (citing Mo. Stat. § 112.050). In Alaska in 1978, ballots were required to be returned by the "most expeditious mail service, postmarked not later than the day of the election, to the election supervisor in [the voter's] district." *Hammond v. Hickel*, 588 P.2d 256, 268 (Alaska 1978) (citing Alaska Stat. § 15.20.150). Nebraska and Washington also allowed post-election ballot receipt for at least part of the 20th century. *See Overseas Absentee Voting: Hearing Before the S. Comm. on Rules & Admin. on S. 703*, at 33–34, 95th Cong., 1st Sess. (Mar. 8, 1977) (Statement of John C. Broger, Deputy Coordinator of the Federal Voting Assistance Program, Department of Defense).[5] And the congressional record shows that Congress was well aware of these practices. *See id*; 116 Cong. Rec. 6996 (Mar. 11, 1970) (Statement of Sen. Goldwater describing states that permit "absentee ballots of

[5] Available at https://www.govinfo.gov/content/pkg/CHRG-95shrg87234O/pdf/CHRG-95shrg87234O.pdf.

certain categories of their voters to be returned as late as the day of the election or *even later*." (emphasis added)).

In short, post-election-day receipt deadlines are nothing new. "[Y]et Congress has taken no action to curb this established practice." *Bomer*, 199 F.3d at 776. As this Court has explained in the related context of absentee voting: "What persuades us of the proper outcome in this difficult case is the long history of congressional tolerance, despite the federal election day statute, of absentee balloting and express congressional approval of absentee balloting when it has spoken on the issue." *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001).

In fact, Congress has not just implicitly "acquiesced" in these longstanding post-election receipt deadlines—it has affirmatively acknowledged them in enacting two other federal statutes. In 1986, Congress passed the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), which provides that a military or overseas voter's state absentee ballot must be counted in preference to a federal write-in ballot if the state ballot "is received by the appropriate State election official not later than the deadline for receipt of the State absentee ballot *under State law*." 52 U.S.C. § 20303(b)(3) (emphasis added). The legislative history for UOCAVA makes clear that the Congress that passed it was fully aware that enforcing the state-law deadlines for this purpose would often involve post-election day receipt: "[t]welve [states] ha[d] extended the deadline for the receipt of voted ballots to a specified number of

days *after the election*." *Uniformed and Overseas Citizens Absentee Voting: Hearing Before the H. Subcomm. on Elections on H.R. 4393,* at 21, 99th Cong., 2d Sess. (Feb. 6, 1986) (Statement of Henry Valentino, Director, Federal Voting Assistance Program) (emphasis added).[6]

More recently, in 2009, Congress further incorporated state-law receipt deadlines into the federal voting requirements for overseas servicemembers by requiring military officials to ensure that overseas servicemembers' ballots "for regularly scheduled general elections for Federal office" are delivered "to the appropriate election officials" "not later than *the date by which an absentee ballot must be received in order to be counted in the election*." 52 U.S.C. § 20304(b)(1) (emphasis added); Pub. L. No. 111-84, div. A, tit. V., subtit. H, § 580(a), 123 Stat. 2190 (Oct. 28, 2009). This language makes no sense if the Election Day Statutes categorically preempted long-existing post-election-day receipt deadlines—Congress could have just as easily required that such ballots be delivered to election officials "by election day." Instead, it again deferred to the states' constitutional prerogative to set this deadline.

[6] Available at: https://1.next.westlaw.com/Link/Document/Blob/I76dfd560adec11dc93290100000000000.pdf.

5. The Court should not follow the Fifth Circuit's outlier decision in *RNC v. Wetzel*.

Courts addressing claims like Plaintiffs have overwhelmingly followed the reasoning above to conclude that post-election day receipt deadlines are consistent with federal law. Until the Fifth Circuit's ruling, *every* court that has addressed the issue has concluded that the Election Day Statutes operate harmoniously with post-election day receipt deadlines. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 368 n.23 (Pa. 2020); *Bognet*, 980 F.3d at 353–54; *Way I*, 492 F. Supp. 3d at 372; *Bost*, 684 F. Supp. 3d at 736; *see also DNC v. Wis. State Legislature*, 141 S. Ct. 28, 34 (2020) (Kavanaugh, J., concurring) (explaining that allowing absentee ballots to "be *mailed* by election day" and received by some specified date thereafter is a "policy choice" left to the states); *Harris v. Fla. Elections Canvassing Comm'n*, 122 F. Supp. 2d 1317, 1325 (N.D. Fla. 2000) (recognizing some states "allow post-election-day acceptance of absentee ballots" and concluding "Congress did not intend 3 U.S.C. § 1" to preclude such laws), *aff'd sub nom. Harris v. Fla. Elections Comm'n*, 235 F.3d 578 (11th Cir. 2000). The only exception is the Fifth Circuit's recent decision in *RNC v. Wetzel*, 120 F.4th 200 (5th Cir. 2024), *pet. for reh'g en banc pending*. For at least three reasons, the Court should not follow that decision.

First, the Fifth Circuit's decision provides no adequate explanation for why a state cannot elect to treat ballots as "cast"—and voters' final selections therefore made—when the voters have marked them and placed them in the mail. 120 F.4th at

207. The decision just *assumes* that a ballot cannot be cast until election officials receive it. *See id.* But the Fifth Circuit's bizarre hypotheticals provide no support for that conclusion. A ballot "plac[ed] in a drawer" is obviously different because it is not out of the voter's hands nor on its way to be counted. *Id.* And a ballot image transmitted electronically—"on social media" or otherwise—would presumably be immediately received, so whatever the problems with counting such a ballot, receipt after election day would not be among them. *Id.* The court's reliance on the Montana Supreme Court's decision in *Maddox v. Board of State Canvassers*, 149 P.2d 112 (Mont. 1944), does nothing to help either, because *Maddox* turned on Montana's state-law rule that a ballot was not *cast* until received. Other states disagreed. *See, e.g., Burke v. State Bd. of Canvassers*, 107 P.2d 773, 778 (Kan. 1940) (explaining that a "vote is cast when the ballot is marked … [and] placed in envelopes and mailed on election day").

Second, the Fifth Circuit's purported distinction between a "voter's *selection* of a candidate" and the "public's *election* of the candidate" proves either nothing or far too much. *Wetzel*, 120 F.4th at 207. The Fifth Circuit acknowledged that "a single voter has made his final selection upon marking his ballot," but reasoned that "the entire polity must do so for the overall election to conclude." *Id.* But "the entire polity" is bound by Nevada law's requirement to complete and mail (or otherwise return) one's mail ballot by the close of the polls on election day. So if a single voter

has made his final selection when he deposits his ballot in the mail, as the Fifth Circuit acknowledged, then so too has the entire polity (or the "electorate") made its final selection by the close of the polls. Consideration of the "entire polity" changes nothing. And if the Fifth Circuit's point was that the *results* of the election are not knowable before the ballots have all been received, so too are they not knowable before all ballots have been counted. Yet the Fifth Circuit expressly acknowledged that it was *not* "say[ing] all the ballots must be counted on Election Day." *Id.*

Third, the Fifth Circuit mistook the historical record, writing that even under the historical statutes cited above, the "act of voting simultaneously involved receipt by election officials." *Id.* at 210. That is not accurate. While some states deputized military officers as election officials for field voting, others did *not*. Nevada, Rhode Island, and Pennsylvania allowed ballots to be placed under the charge of high commanding officers without any such designation and they were not *received* by election officials until later. 1866 Nev. Stat. 215, ch. 107; Benton, *Voting in the Field: A Forgotten Chapter of the Civil War* 171–73, 186–87, 190 (1915). The Fifth Circuit also proclaimed that early twentieth century absentee voting laws "universally foreclosed the possibility of accepting and counting ballots received *after* Election Day." 120 F.4th at 210. But California required absentee ballots be received "within fourteen days" after election day, Cal. Political Code §1360 (James H. Derring ed. 1924), and Kansas required military ballots be returned "before the

tenth day following [the] election." K.S.A. § 25-1106 (Chester I. Long, et al., eds. 1923). New York and Minnesota had similar laws. *See* P. Orman Ray, *Military Absent-Voting Laws*, 12 Am. Pol. Sci. Rev. 461, 464, 468-69 (1918). The Fifth Circuit's conclusion that, in 1938, only one state retained a post-election-day receipt deadline, 120 F.4th at 210, is contradicted by its cited source. *See* Paul G. Steinbicker, *Absentee Voting in the United States*, 32 Am. Pol. Sci. Rev. 898, 905–06 (1938). It says that—among the 42 states with absentee voting laws—all but one had express "time limits within which the ballot must be received in order to be counted." *Id.* at 905. "These limits range[d] from six days before to six days after the date of election." *Id.* at 905–06; *see also id.* at 906 n.38 (referring to "those *states* where the time limit extends beyond the day of election" (emphasis added)).

In short, the Fifth Circuit's decision in *Wetzel* rests on faulty reasoning and mistaken history. This Court should not follow it.

B. Plaintiffs' constitutional claims fail along with their statutory claims.

Counts II and III of the Complaint allege violations of Plaintiffs' rights to vote and stand for office. Plaintiffs fail to allege facts showing a violation of either of those rights, either. Even if Plaintiffs were right that the receipt deadline conflicts with the Election Day Statutes, they still do not allege facts showing that the resulting conflict violates their constitutional rights. Not every statutory violation abridges a constitutional right. Alleged burdens on the right to vote and to stand for office under

the First and Fourteenth Amendments are reviewed under the *Anderson-Burdick* standard. *See Short v. Brown*, 893 F.3d 671, 676 (9th Cir. 2018); *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016) (en banc); *Mecinas*, 30 F.4th at 904. "This is a sliding scale test, where the more severe the burden, the more compelling the state's interest must be, such that a state may justify election regulations imposing a lesser burden by demonstrating the state has important regulatory interests." *Soltysik v. Padilla*, 910 F.3d 438, 444 (9th Cir. 2018) (quoting *Ariz. Green Party v. Reagan*, 838 F.3d 983, 988 (9th Cir. 2016)).

Plaintiffs cannot possibly show that the acceptance of mail ballots received after election day makes it harder for anyone to exercise the right to vote or be placed on the ballot. *See, e.g.*, *Short*, 893 F.3d at 677 (affirming dismissal of challenge to law that "does not burden anyone's right to vote" and instead "makes it easier for some voters to cast their ballots by mail"). And Nevada has strong interests in ensuring that qualified voters who timely cast their votes do not have those ballots arbitrarily rejected. Nevada law sets a clear, predictable rule for voters to know when they must mail their ballot to ensure that it is counted, enabling eligible voters to consume more information about candidates as it becomes available closer to election day, which benefits both candidates and voters. It also accounts for significant mail delays that have plagued previous elections. All of these are compelling state interests that the Elections Clause allows Nevada to pursue.

Nor can Plaintiffs plausibly identify any burden on their right to stand for office. "[T]he right to stand for office is to some extent derivative from the right of the people to express their opinions by voting," and refers to the right to have one's name placed on the ballot. *Nader v. Keith*, 385 F.3d 729, 737 (7th Cir. 2004); *see also Ariz. Green Party*, 838 F.3d at 988. That right is not implicated here at all.

III. Plaintiffs waived any right to amend.

Plaintiffs finally argue that the Court should remand the case so that Plaintiffs can amend their complaint. Br. 47–48. But Plaintiffs waived any right to amend their Complaint when they failed to seek leave to do so before noticing their appeal. *See Rick-Mik Enters., Inc. v. Equilon Enters. LLC*, 532 F.3d 963, 977 (9th Cir. 2008) (declining to remand to allow amendment because plaintiff-appellant had "waived its right to amend" by allowing judgment to enter and noticing appeal of granting of motion to dismiss). Such an amendment would in any event be futile—as the district court explained, "Plaintiffs' underlying argument is not meritorious and cannot be remedied by additional factual allegations." ER-17 n.7. The Court's decision in *City of Oakland v. Hotels.com LP*, 572 F.3d 958, 962 (9th Cir.), *as amended* (Aug. 20, 2009), is not to the contrary, as it involved a failure to exhaust administrative remedies rather than a lack of standing.

To the extent that Plaintiffs argue more broadly that dismissal should have been without prejudice, they offer no explanation for why they think it was not.

Neither the district court's order, ER-17, nor its judgment, ER-3, specified that dismissal was with prejudice, so there is no error for the district court to correct.

CONCLUSION

The Court should affirm.

Date: February 20, 2025

Respectfully Submitted,

/s/ *David R. Fox*

DAVID R. FOX
Elias Law Group LLP

CHRISTOPHER D. DODGE
DANIEL J. COHEN
RICHARD A. MEDINA
Elias Law Group LLP
250 Massachusetts Avenue NW,
Suite 400
Washington, D.C. 20001
dfox@elias.law
(202) 968-4490

BRADLEY S. SCHRAGER
Bravo Schrager LLP
6675 South Tenaya Way
Suite 200
Las Vegas, Nevada 89113
bradley@bravoschrager.com
(702) 996-1724

Counsel for Vet Voice Foundation and the Nevada Alliance for Retired Americans

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 20, 2025.

s/*David R. Fox*
David R. Fox

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM TABLE OF CONTENTS

Miss. Code § 23-15-637

Deadline for transmission or casting of ballots; receipt; deposit; finality of ballot; rules

(1)(a) Absentee ballots and applications received by mail, except for fax or electronically transmitted ballots as otherwise provided by Section 23-15-699 for UOCAVA ballots, or common carrier, such as United Parcel Service or FedEx Corporation, must be postmarked on or before the date of the election and received by the registrar no more than five (5) business days after the election; any received after such time shall be handled as provided in Section 23-15-647 and shall not be counted.

(b) All ballots cast by the absent elector appearing in person in the office of the registrar shall be cast with an absentee paper ballot and deposited into a sealed ballot box by the voter, not later than 12:00 noon on the Saturday immediately preceding elections held on Tuesday, the Thursday immediately preceding elections held on Saturday, or the second day immediately preceding the date of elections held on other days. At the close of business each day at the office of the registrar, the ballot box used shall be sealed and not unsealed until the beginning of the next business day, and the seal number shall be recorded with the number of ballots cast which shall be stored in a secure location in the registrar's office.

(2) The registrar shall deposit all absentee ballots which have been timely cast and received by mail in a secured and sealed box in a designated location in the registrar's office upon receipt. The registrar shall not send any absentee ballots to the precinct polling locations.

(3) The Secretary of State shall promulgate rules and regulations necessary to ensure that when a qualified elector who is qualified to vote absentee votes by absentee ballot, either by mail or in person with a regular paper ballot, that person's absentee vote is final and he or she may not vote at the polling place on election day. Notwithstanding any other provisions of law to the contrary, the Secretary of State shall promulgate rules and regulations necessary to ensure that absentee ballots shall remain in the registrar's office for counting and not be taken to the precincts on election day.

N.R.S. 293.269927

Duties of county clerk upon return of mail ballot: Procedure for checking signatures; safeguarding and delivery of mail ballots for counting; procedure to contact voter to remedy certain defects in returned mail ballot

1. Except as otherwise provided in NRS 293D.200, when a mail ballot is returned by or on behalf of a voter to the county clerk, and a record of its return is made in the mail ballot record for the election, the clerk or an employee in the office of the clerk shall check the signature used for the mail ballot by electronic means pursuant to subsection 2 or manually pursuant to subsection 3.

2. To check the signature used for a mail ballot by electronic means:

(a) The electronic device must take a digital image of the signature used for the mail ballot and compare the digital image with the signatures of the voter from his or her application to register to vote or application to preregister to vote available in the records of the county clerk.

(b) If the electronic device does not match the signature of the voter, the signature shall be reviewed manually pursuant to the provisions of subsection 3.

3. To check the signature used for a mail ballot manually, the county clerk shall use the following procedure:

(a) The clerk or employee shall check the signature used for the mail ballot against all signatures of the voter available in the records of the clerk.

(b) If at least two employees in the office of the clerk believe there is a reasonable question of fact as to whether the signature used for the mail ballot matches the signature of the voter, the clerk shall contact the voter and ask the voter to confirm whether the signature used for the mail ballot belongs to the voter.

4. For purposes of subsection 3:

(a) There is a reasonable question of fact as to whether the signature used for the mail ballot matches the signature of the voter if the signature used for the mail ballot differs in multiple, significant and obvious respects from the signatures of the voter available in the records of the clerk.

(b) There is not a reasonable question of fact as to whether the signature used for the mail ballot matches the signature of the voter if:

(1) The signature used for the mail ballot is a variation of the signature of the voter caused by the substitution of initials for the first or middle name, the substitution of a different type of punctuation in the first, middle or last name, the use of a common nickname or the use of one last name for a person who has two last names and it does not otherwise differ in multiple, significant and obvious respects from the signatures of the voter available in the records of the clerk; or

(2) There are only slight dissimilarities between the signature used for the mail ballot and the signatures of the voter available in the records of the clerk.

5. Except as otherwise provided in subsection 6, if the clerk determines that the voter is entitled to cast the mail ballot, the clerk shall deposit the mail ballot in the proper ballot box or place the mail ballot, unopened, in a container that must be securely locked or under the control of the clerk at all times. The clerk shall deliver the mail ballots to the mail ballot central counting board to be processed and prepared for counting.

6. If the clerk determines when checking the signature used for the mail ballot that the voter failed to affix his or her signature or failed to affix it in the manner required by law for the mail ballot or that there is a reasonable question of fact as to whether the signature used for the mail ballot matches the signature of the voter, but the voter is otherwise entitled to cast the mail ballot, the clerk shall contact the voter and advise the voter of the procedures to provide a signature or a confirmation that the signature used for the mail ballot belongs to the voter, as applicable. For the mail ballot to be counted, the voter must provide a signature or a confirmation, as applicable, not later than 5 p.m. on the sixth day following the election.

7. The clerk shall prescribe procedures for a voter who failed to affix his or her signature or failed to affix it in the manner required by law for the mail ballot, or for whom there is a reasonable question of fact as to whether the signature used for the mail ballot matches the signature of the voter, in order to:

(a) Contact the voter;

(b) Allow the voter to provide a signature or a confirmation that the signature used for the mail ballot belongs to the voter, as applicable; and

(c) After a signature or a confirmation is provided, as applicable, ensure the mail ballot is delivered to the mail ballot central counting board.

8. If there is a reasonable question of fact as to whether the signature used for the mail ballot matches the signature of the voter, the voter must be identified by:

(a) Answering questions from the county clerk covering the personal data which is reported on the application to register to vote;

(b) Providing the county clerk, orally or in writing, with other personal data which verifies the identity of the voter; or

(c) Providing the county clerk with proof of identification as described in NRS 293.277 other than the voter registration card issued to the voter.

9. The procedures established pursuant to subsection 7 for contacting a voter must require the clerk to contact the voter, as soon as possible after receipt of the mail ballot, by:

(a) Mail;

(b) Telephone, if a telephone number for the voter is available in the records of the clerk; and

(c) Electronic means, which may include, without limitation, electronic mail, if the voter has provided the clerk with sufficient information to contact the voter by such means.

N.R.S. 293.269931

Period for counting mail ballots; counting must be public; rejection of certain mail ballots

1. The mail ballot central counting board may begin counting the received mail ballots 15 days before the day of the election. The board must complete the count of all mail ballots on or before the seventh day following the election. The counting procedure must be public.

2. If two or more mail ballots are found folded together to present the appearance of a single ballot, the mail ballots must be rejected and placed in an envelope, upon which must be written the reason for their rejection. The envelope must be signed by an election board officer and placed in the container or ballot box after the count is completed.