No. 89149

IN THE SUPREME COURT
OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

REPUBLICAN NATIONAL COMMITTEE, et al.,

Appellants,

v.

FRANCISCO AGUILAR, in his official capacity as Nevada Secretary of State, et al.,

Respondents.

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On Appeal from the First Judicial
District Court of the State of Nevada
Case No. 24 OC 00101 1B

GOVERNMENT RESPONDENTS' ANSWERING BRIEF

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ISSUES PRESENTED FOR REVIEW

1. Whether the district court properly denied Plaintiffs-Appellants' ("Plaintiffs")[1] motion for a preliminary injunction because Plaintiffs did show a likelihood of success on the merits based on their:

   a. Failure to show they have standing;

   b. Legally deficient interpretation of NRS 293.269921(2);

   c. Failure to allege a violation of the Nevada Administrative Procedure Act ("APA"); and

   d. Failure to join a necessary party.

2. Whether the district court properly concluded that Plaintiffs failed to establish any reasonable probability of irreparable harm.

3. Whether the district court properly concluded that the public interest did not favor issuance of a preliminary injunction.

4. Whether the Organizational Defendants are precluded from re-litigating standing.

5. Whether laches bars Plaintiffs' request for a preliminary injunction.

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[1] Plaintiffs are the Republican National Committee ("RNC"), Nevada Republican Party ("NVGOP"), Donald J. Trump for President 2024, Inc. (together with the RNC and NVGOP, the "Organizational Plaintiffs"), and Scott Johnston.

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STATEMENT OF THE CASE

Plaintiffs initiated this lawsuit in the First Judicial District Court of the State of Nevada on June 4, 2024. Joint App. Volume ("JA") 1 JA00003. They seek declaratory and injunctive relief to preclude the counting of mail ballots that lack a postmark if received after election day. JA 1 JA00039. They further seek a declaration that "Memo 2024-015 – Indeterminate Postmark" ("Memorandum"), issued by Respondent the Secretary of State on May 29, 2024 and interpreting the Postmark Provision, violates the APA. JA 1 JA00040; JA 1 JA00091–92.

On July 3, 2024, Plaintiffs moved for a preliminary injunction "prohibiting Nevada officials from counting mail ballots received after election day that lack a postmark." JA 1 JA00045. The Government Respondents[2] opposed, arguing: (1) Plaintiffs failed to establish a likelihood of success on the merits because (a) they failed to join a necessary party, (b) they did not have standing, (c) their interpretation of the Postmark Provision was legally deficient, and (d) the Secretary did not violate the APA by issuing the Memorandum; (2) Plaintiffs failed to show irreparable harm;

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[2] The Government Respondents are (1) Francisco V. Aguilar, in his official capacity as Nevada Secretary of State ("Secretary") and the State of Nevada (together with the Secretary, State Respondents; (2) Cari-Ann Burgess, in her official capacity as the Washoe County Registrar of Voters and Jan Galassini, in her official capacity as the Washoe County Clerk (together with Burgess, the "Washoe County Respondents"); and (3) Lorena Portillo, in her official capacity as the Clark County Registrar of Voters and Lynn Marie Goya, in her official capacity as the Clark County Clerk (together with Portillo, the "Clark County Respondents").

(3) the public interest warranted denial of the motion; and (4) Plaintiffs' request for a preliminary injunction was barred by laches. JA 1 JA00104–07; JA 1 JA00117–40. Respondents Vet Voice Foundation and Nevada Alliance for Retired Americans also opposed. JA 1 JA00074–86. On August 2, 2024, the district court heard argument on Plaintiffs' motion. *See* JA 2 JA000192–249. No party called a witness. *See id.*

The district court denied Plaintiffs' motion because (1) Plaintiffs did not establish a likelihood of success on the merits because (a) they lacked standing, (b) they failed to join a necessary party, (c) their interpretation of the Postmark Provision failed as a matter of law, and (d) the Secretary had statutory authority to issue the Memorandum; (2) Plaintiffs failed to show a reasonable probability of irreparable harm; and (3) the public interest did not warrant granting the motion. JA 2 JA000277–94. This appeal followed. JA 2 JA00318–20.

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STATEMENT OF FACTS

I. Nevada Law

In Nevada, mail ballots are generally sent to active registered voters between 45 and 14 days before an election. *See* NRS 293.269911; NRS 293D.320(1). Voters can vote by mail ballot by delivering the mail ballot to a county clerk,[3] delivering

[3] Elections in Washoe County and Clark County are administered by each county's registrar of voters. Registrars of voters are included in the definition, and are thus "synonymous with," "county clerks" in NRS Chapter 293.

the mail ballot to a drop box, or mailing the mail ballot to the county clerk. NRS 293.269921.

Effective January 1, 2022, Nevada law has provided for county clerks to count all mail ballots received by mail if they are either (1) "[p]ostmarked on or before the day of the election[] and [r]eceived by the clerk not later than 5 p.m. on the fourth day following the election"; or (2) "received by mail not later than 5 p.m. on the third day following the election and the date of the postmark cannot be determined" ("Postmark Provision"). NRS 293.269921(1)(b), (2).

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The Postmark Provision, allowing county clerks to count mail ballots received within three days after an election if "the date of the postmark cannot be determined," was initially adopted in 2020 for elections held during a declared state of emergency. Assembly Bill 4 of the 32nd (2020) Special Session of the Nevada Legislature ("AB 4") §§ 8(1), 20(2). The Postmark Provision language in AB 4 is identical to the language currently in effect through NRS 293.269921(2).

II. The Organizational Plaintiffs' Prior Lawsuits Against the Secretary

A. 2020 Federal Lawsuit

In 2020, Donald J. Trump for President, Inc., the RNC, and the NVGOP sued former Secretary of State Barbara Cegavske in the U.S. District Court for the District

See NRS 293.040; NRS 293.044; *see also* NRS 244.164. This Brief's references to county clerks includes registrars of voters.

of Nevada in connection with the implementation of AB 4. Am. Compl. for Declaratory and Inj. Relief, ECF No. 29, *Donald J. Trump for President, Inc. v. Cegavske*, Case No. 2:20-cv-01445-JCM-VCF (D. Nev. Aug. 20, 2020) ("*Cegavske* Am. Compl."). The plaintiffs challenged, among other things, the legality of AB 4 § 20(2) because it "allow[ed] absent ballots to be cast after Election Day but still [be] counted as lawfully cast votes in the 2020 general election." *Id.* ¶ 119. Because maximizing opportunities for voters to vote should not be a partisan issue, the Republican Secretary of State moved to dismiss, and the court granted the motion because the plaintiffs did not have either associational or direct organizational standing. *See generally Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993 (D. Nev. 2020) ("*Cegavske*").

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In the 2020 litigation, both the Secretary and the plaintiffs recognized that the language in AB 4, which is identical to the language in NRS 293.269921(2) challenged here, meant that mail ballots with no postmark would be counted if received not later than 5 p.m. on the third day following the election. *Cegavske* Am. Compl. ¶ 115 ("Section 20.2 of AB4 . . . permit[s] absent ballots that have not been postmarked to be counted if they are received by 5:00 pm three days after Election Day . . . ."); Def. Sec'y of State Barbara Cegavske's Mot. to Dismiss at 5, ECF No. 37, *Donald J. Trump for President, Inc. v. Cegavske*, Case No. 2:20-cv-01445-JCM-VCF (D. Nev. August 24, 2020) ("Section 20(2) establishes a presumption that a

mailed ballot received within 3 days after the election was cast on or before the date of the election if the ballot envelope bears no postmark.”).

Since 2020, the Organizational Plaintiffs have therefore been on notice of (and agreed with until now) the Secretary’s position that mail ballots with no postmark should be counted if received by 5 p.m. on the third day following an election.

B. 2024 Federal Lawsuit

As Plaintiffs note, the Organizational Plaintiffs “challenged Nevada’s counting of late-arriving mail ballots as violating federal law in the U.S. District Court for the District of Nevada in a case captioned *Republican National Committee et al. v. Cari-Ann Burgess, et al*, No. 24-cv-00198 (D. Nev.).” JA 1 JA00036–37 ¶ 80. On July 17, 2024, Chief Judge Miranda M. Du granted dismissal because the plaintiffs lacked standing. *See generally RNC v. Burgess*, Case No. 3:24-cv-00198-MMD-CLB, 2024 WL 3445254 (D. Nev. July 17, 2024) (“*Burgess*”). The *Burgess* plaintiffs have appealed the dismissal to the Ninth Circuit Court of Appeals. *RNC v. Burgess*, Case No. 24-5071 (9th Cir.).

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SUMMARY OF ARGUMENT

Plaintiffs seek to prevent Nevada election officials from counting mail ballots received by mail where the U.S. Postal Service (“USPS”) arbitrarily fails to apply a postmark because they believe Republican candidates and voters will be harmed if

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such mail ballots are counted. But NRS 293.269921(2) allows mail ballots without postmarks to be counted if received up to three days after an election.

Any interpretation otherwise would lead to absurd results and would require rejection of *all* mail ballots received by mail without a postmark, regardless of whether they were received before election day or after. Even Plaintiffs appear to recognize that this would be an absurd result; they seek only to enjoin the counting of mail ballots without postmarks received *after* election day. They offer, however, no rationale to draw this temporal distinction under their reading of NRS 293.269921(2). That's because there is none.

Consistent with the plain language, the Secretary has interpreted the Postmark Provision, including in an appropriate Memorandum, to authorize the counting of mail ballots without postmarks if received up to three days after an election. The Government Respondents are acting here in accordance with the law to ensure voters are not disenfranchised for reasons outside their control.

The district court properly rejected Plaintiffs' motion for a preliminary injunction. Not only is Plaintiffs' reading of NRS 293.269921(2) legally untenable, but Plaintiffs have no likelihood of success on the merits because they lack standing, the Secretary had statutory authority to issue an interpretation of NRS 293.269921(2) in the Memorandum, and Plaintiffs failed to join a necessary party. Further, Plaintiffs failed to establish a reasonable probability of irreparable harm, and the

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public interest does not favor issuance of a preliminary injunction. Finally, Plaintiffs' belated request for preliminary injunctive relief before the November 5, 2024 general election is barred by the doctrine of laches.

STANDARD OF REVIEW

This Court will affirm a district court's order on any ground supported by the record, even if the district court did not rely on that ground. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010).

An applicant for a preliminary injunction order bears the burden of showing both "(1) a likelihood of success on the merits; and (2) a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy." *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). Additionally, courts "weigh the potential hardships to the relative parties and others, and the public interest." *Id.* A preliminary injunction should be denied "in the absence of testimony or exhibits establishing the material allegations of the complaint." *Coronet Homes, Inc. v. Mylan*, 84 Nev. 435, 437, 442 P.2d 901, 902 (1968) (citations omitted).

"Because the district court has discretion in determining whether to grant a preliminary injunction," a district court's decision will only be reversed if "the district court abused its discretion or based its decision on an erroneous legal

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standard or on clearly erroneous findings of fact." *Excellence Cmty. Mgmt., LLC v. Gilmore*, 131 Nev. 347, 351, 351 P.3d 720, 722 (2015) (citation omitted). Further, questions of law are reviewed *de novo*. *Id.*

ARGUMENT

I. The District Court Properly Declined to Enter a Preliminary Injunction Because Plaintiffs Failed to Show a Likelihood of Success on the Merits

A. Plaintiffs Failed to Establish Standing[4]

Nevada "caselaw generally requires the same showing of injury-in-fact, redressability, and causation that federal cases require for Article III standing." *Nat'l Assoc. of Mut. Ins. Cos. v. Dep't of Bus. & Indus., Div. of Ins.*, 139 Nev. Adv. Op. 3, 524 P.3d 470, 476 (2023) (citations omitted). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized,' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citation omitted). Plaintiffs failed to show they have standing here. While Plaintiffs complain that "[i]f none of [them] have standing, then no party would ever have standing to challenge even brazen violations of Nevada election law outside of a post-election contest" Appellants' Opening Br. ("OB") at 15, "[t]he assumption that if [Plaintiffs] have no

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[4] The Government Respondents argued, and the district court agreed, that Plaintiffs could not establish standing based on theories of vote dilution and associational standing. JA 1 JA00122; JA 1 JA00135; JA 2 JA000282–83. Plaintiffs do not challenge the district court's holdings on these theories.

standing to sue, no one would have standing, is not a reason to find standing," *Clapper v. Amnesty Int'l USA, 568 U.S. 398, 420 (2013)* (citations omitted).

At bottom, Plaintiffs are attempting to manufacture an injury from a generalized grievance about Nevada's election procedures. A party, however, "must show a personal injury and not merely a general interest that is common to all members of the public." *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016) (citations omitted); *see also Lance v. Coffman*, 549 U.S. 437, 439 (2007) ("[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.").

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Plaintiffs' inability to show they have standing precludes injunctive relief because they have no likelihood of success on the merits of their claims.[5]

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[5] This Court has not definitively resolved the issue of standing as one of subject matter jurisdiction or a failure to state a claim. *See Superpumper, Inc. v. Leonard*, 137 Nev. 429, 433 n.2, 495 P.3d 101, 106 n.2 (2021) (reserving question of "whether standing and subject matter jurisdiction are distinct principles"). Either way, Plaintiffs' failure to show standing is fatal to their ability to show a likelihood of success on the merits.

1. Plaintiffs Failed to Establish that the Secretary's Interpretation of the Postmark Provision Causes Them Competitive Injury

Plaintiffs claim that they have standing based on a theory of competitive injury. OB at 22–31. They assert that that the Secretary's interpretation of the Postmark Provision causes them harm because more Democratic votes will be counted. *See id.* But, contrary to their protestations, they provided no evidence that would support that conclusion. The supposed "mountains of evidence" Plaintiffs claim to have offered do not so much as amount to a molehill. *See* OB at 28. Ultimately, the burden is on Plaintiffs to show injury, *see Schwartz*, 132 Nev. at 743, 382 P.3d at 894, not on the defendants to disprove standing or otherwise advance evidence, as Plaintiffs appear to argue. OB at 24. Their failure to meet their burden cannot be shifted to the defendants.

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The district court correctly determined that Plaintiffs failed to show the "potential loss of an election" or "that they are 'forced to compete under the weight of a state-imposed disadvantage.'" JA 2 JA000280 (quoting *Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011); *Mecinas v. Hobbs*, 30 F.4th 890, 899 (9th Cir. 2022)).[6]

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[6] Plaintiffs argue "that a regulation that 'makes the competitive landscape worse' for political parties and candidates is sufficient to establish competitive injury." OB at 23 (quoting *Mecinas*, 30 F.4th at 898). As the *Burgess* court explained, however, a challenged law must still give an opponent some "unfair advantage in the election process . . . or otherwise render[a candidate] unable to 'compete on an even playing field.'" 2024 WL 3445254, at *3 (citations omitted). There is no such unfair advantage or uneven playing field here; the Postmark Provision applies equally to

a. Plaintiffs Provided No Evidence that Mail Ballots that Arrive After Election Day Break in Democrats' Favor

Plaintiffs claim that data from the Secretary supports that "late-arriving ballots break[] in favor of Democratic candidates." OB at 26. It does not.

As an initial matter, Plaintiffs cite voter turnout results from Nevada's 2020 and 2022 general elections and 2024 primary elections to support that mail ballots favor Democrats. *See id.* Those results do not show that mail ballots favor Democrats. In the 2020 general election, 690,548 mail ballots were returned, of which 190,331 (or 27.6%) were cast by voters who were not affiliated with the Democratic or Republican parties. Nev. Sec'y of State, 2020 General Election Turnout (last updated Nov. 25, 2020), https://bit.ly/3X16FfO. In the 2022 general election, 523,868 mail ballots were returned, of which 146,789 (or 28.0%) were cast by voters who were not affiliated with the Democratic or Republican parties. Nev. Sec'y of State, 2022 General Election Turnout (last updated Dec. 23, 2022), https://bit.ly/3YSmtEk. And in the June 2024 primary election,[7] 249,012 mail and

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all candidates and voters, so no one is specifically disadvantaged. *See* JA 2 JA000281. Regardless, even under Plaintiffs' articulation of competitive standing, Plaintiffs would need to show injury, which, as described below, they have not.

[7] For the February 2024 presidential preference primary election, only Democratic and Republican voters were eligible to vote, *see* NRS 298.680(2), and the results therefore do not include votes by voters unaffiliated with those two parties. Republicans and Democrats do not vote for the same candidates in a presidential preference primary election, *see id.*, so it is irrelevant whether one group votes by mail more frequently in such elections as there is no possibility of competitive injury.

EASE[8] ballots were returned, of which 40,164 (or 16.1%) were cast by voters who were not affiliated with the Democratic or Republican parties. Nev. Sec'y of State, 2024 Primary Final Official Turnout (last updated June 21, 2024), https://bit.ly/4cUeBWp.

In each of these elections, the unaffiliated mail ballot votes more than cover the gap between mail ballots cast by Democratic and Republican voters. And Plaintiffs offer no evidence of the partisan lean of those unaffiliated voters. It is thus wholly speculative that mail ballots favor Democrats.

Next, Plaintiffs make the leap that late-arriving ballots in particular favor Democrats. *See* OB at 26. Their only support for this is an article from 2020 that does not say that mail ballots that arrive after election day come more from Democratic voters as opposed to Republican (or unaffiliated) voters.[9]

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[8] EASE (or the Effective Absentee System for Elections) is the system by which covered voters, including military-overseas voters, can vote pursuant to NRS 293D.200. EASE ballots historically account for a small number of votes cast. *See* Nev. Sec'y of State, 2022 General Election Turnout (last updated Dec. 23, 2022), https://bit.ly/3YSmtEk (2,507 EASE ballots cast in the 2022 general election).

[9] Plaintiffs also cite their amended complaint for the proposition that "data from the Nevada Secretary of State's office and county election offices indicates that there were approximately 50% more late-arriving ballots from registered Democratic voters than registered Republican voters in both the 2020 and 2022 general elections." OB at 27 (citing JA 1 JA00035). They did not submit any such data, and their naked allegation does not support issuance of a preliminary injunction. *See Coronet Homes, Inc.*, 84 Nev. at 437, 442 P.2d at 902 ("[I]n the absence of testimony or exhibits establishing the material allegations of the complaint, . . . the application for a preliminary injunction [should be] denied.").

See OB at 26–27 (citing Ed Kilgore, *Why Do the Last Votes Counted Skew Democratic?*, Intelligencer (Aug. 10, 2020)). The article explains that Democratic votes tend to be counted later than other votes, a phenomenon that is in part explained by Democratic voters casting more provisional ballots and because mail ballots tend to be counted later than in-person ballots. *See* Ed Kilgore, *Why Do the Last Votes Counted Skew Democratic?*, Intelligencer (Aug. 10, 2020). The article also theorizes, based on one individual's speculation, not actual facts, that Democratic voters may vote by mail later in an election cycle, but there is no indication that Democratic voters disproportionately cast mail ballots that arrive after election day. *See id.* Nor do Plaintiffs offer anything that supports that mail ballots arriving after election day that the USPS arbitrarily fails to postmark favor Democrats.

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Finally, Plaintiffs take issue with the district court's conclusion that "'it is far from guaranteed that Nevada voters' will continue their same mail ballot voting trends," making it "'inherently speculative' that mail ballots [without postmarks] received in Nevada after Election Day will favor Democratic candidates and that, if they do, such votes will be 'sufficient in number to change the outcome of the election to [Republicans'] detriment." *See* OB at 28 (citing JA 2 JA000281); JA 2 JA000281 (quoting *Burgess*, 2024 WL 3445254, at *2). The evidence, however,

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clearly does not support Plaintiffs' core theory that Democrats will vote more by mail than Republicans in the 2024 general election.

In the 2020 general election, Democratic voters cast 138,146 more mail ballots than Republicans. Nev. Sec'y of State, 2020 General Election Turnout (last updated Nov. 25, 2020), https://bit.ly/3X16FfO (319,149 mail ballots cast by Democrats and 181,003 mail ballots cast by Republicans). In the 2022 general election, Democratic voters cast 70,769 more mail ballots than Republicans. Nev. Sec'y of State, 2022 General Election Turnout (last updated Dec. 23, 2022), https://bit.ly/3YSmtEk (223,924 mail ballots cast by Democrats and 153,155 mail ballots cast by Republicans). In the February 2024 presidential preference primary election, Democratic voters cast 47,125 more mail ballots than Republicans. Nev. Sec'y of State, 2024 Presidential Preference Primary Turnout (last updated Feb. 20, 2024), https://bit.ly/4cM2CtW (107,987 mail ballots cast by Democrats and 60,862 mail ballots cast by Republicans). And in the June 2024 primary election, Democratic voters cast 26,750 more mail and EASE ballots than Republicans. Nev. Sec'y of State, 2024 Primary Final Official Turnout (last updated June 21, 2024), https://bit.ly/4cUeBWp (117,799 mail and EASE ballots cast by Democrats and 91,049 mail and EASE ballots cast by Republicans).

The dramatically shrinking gap between Democratic and Republican voters' use of mail ballots renders Plaintiffs' theory that mail ballots will favor Democratic

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candidates untenably speculative. See *Burgess*, 2024 WL 3445254, at *2 ("[E]ven if later-arriving mail ballots have favored Democrats [in] past elections, it is far from guaranteed that Nevada voters will behave similarly this November."); *Donald J. Trump for President, Inc. v. Way*, Civil Action No. 20-10753 (MAS) (ZNQ), 2020 WL 6204477, at *6 (D.N.J. Oct. 22, 2020) ("It is difficult—and ultimately speculative—to predict future injury from evidence of past injury.").

Further, as the district court correctly held, Plaintiffs failed to show causation and redressability because they ultimately are relying on "speculation about the unfettered choices made by independent actors." JA 2 JA000280 (quoting *Burgess*, 2024 WL 3445254, at *2); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"). Plaintiffs offered no evidence of how voters would vote if mail ballots without postmarks were not counted, and they therefore failed to show that a different interpretation of the Postmark Provision would redress their alleged injury. *See Burgess*, 2024 WL 3445254, at *3 ("Because it is 'merely speculative' that requiring mail ballots to arrive earlier will affect Republican electoral success, Organizational Plaintiffs have not met the redressability requirement either.").

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b. Plaintiffs Provided No Evidence that Mail Ballots that Arrived After Election Day Changed any Election

Plaintiffs further argue that "[t]he record evidence uniformly shows that late-arriving ballots favor Democratic candidates up and down the ballot and that such ballots have flipped the results of close elections." OB at 25. Not so.

Nevada law allows for mail ballots to be counted up to seven days after an election, even if they were, for instance, dropped in a drop box on election day, NRS 293.269931(1), so election day results are subject to change. Mail ballots can arrive by mail up to four days after an election, NRS 293.269921(1)(b), mail ballots can be cured up to six days after an election if they, for example, lack a signature, NRS 293.269927(6), and provisional ballots can be counted if validated within three days of an election, NRS 293.3085(3)(b). Just because a candidate is leading on election day, it does not mean that that candidate will win, with or without the counting of mail ballots that arrive after election day. The election-day vote tally is subject to change for many reasons unrelated to mail ballots that arrive after election day.

To support their contention that "the unrebutted evidence shows that late-arriving mail ballots in Nevada in recent elections invariably benefit Democratic candidates," OB at 28, Plaintiffs cite articles about different races. These articles do not, however, support their argument.

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Plaintiffs first refer to a Clark County Commission candidate "with a 2,700 vote lead on election night [who] lost by just 30 votes after arrival of post-election day ballots out of more than 150,000 cast." *Id.* at 25 (citing JA 1 JA00034 ¶ 69). The article they cite does not say that had mail ballots without postmarks (let alone all mail ballots that arrived after election day) not been counted, the results of the race would have been different. Instead, the article reflects only that the losing candidate was up by 2,700 votes on election day, then down by 10, and in a recount, down by 30. JA 1 JA00034 ¶ 69; Jordan Gartner, *Clark County releases recount totals for District C race between Miller, Anthony*, KTNV (Dec. 11, 2020).

In their second example, Plaintiffs cite a U.S. Senate race and claim that "media reported that late-arriving mail ballots favored the Democrat and helped swing the final election results." OB at 25 (citing Jacob Solis, *Cortez Masto defeats Laxalt in Senate race, securing majority for Democrats*, Nevada Independent (Nov. 12, 2022)). The article they rely on, however, does not say that. Instead, it states that "Cortez Masto's delayed victory became clear late Saturday after the extended process of counting mail ballots submitted through the postal service and drop boxes through Election Day." Jacob Solis, *Cortez Masto defeats Laxalt in Senate race, securing majority for Democrats*, Nevada Independent (Nov. 12, 2022). There is nothing about "late-arriving mail ballots."

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Plaintiffs also refer to two additional articles. OB at 27–28 (citing Colton Lochhead, *Joe Lombardo wins Nevada governor's race after Sisolak concedes*, Las Vegas Review Journal (Nov. 11, 2022); Megan Messerly et al., *Biden secures majority of votes in presidential race in Nevada day after being declared the victor*, Nevada Independent (Nov. 8, 2020)). These articles, like the prior two, do not say that election results changed based specifically on mail ballots that arrived after election day, as opposed to, for example, mail ballots that had been received by election day and that had not been counted either because of delays in the process or because they needed to be cured, or provisional ballots that still need to be verified.

Not only have Plaintiffs failed to show that mail ballots without postmarks that arrive after election day are more likely to favor Democratic candidates, the universe of mail ballots that arrive after election day without postmarks is vanishingly small. For the June 2024 primary election, there were *no* such ballots counted in Washoe County, and a mere *24* such ballots counted in Clark County. JA 1 JA00177–79. On these facts, Plaintiffs' assertion that they could potentially lose an election or suffer competitive harm if mail ballots received after election day without a postmark are counted is mere insufficient speculation. *See Bost v. Ill. State Bd. of Elections*, No. 23-2644, 2024 WL 3882901, at *6 (7th Cir. Aug. 21, 2024) ("The problem is that Plaintiffs do not (and cannot) allege that the majority of votes that will be received and counted after Election Day will break against them, only

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highlighting the speculative nature of the purported harm."); *Bognet v. Sec'y of Commonwealth of Pa.*, 980 F.3d 336, 351 (3d Cir. 2020), judgment vacated as moot *sub nom. Bognet v. Degraffenried*, 141 S. Ct. 2508 (2021) (finding no cognizable injury where plaintiff did not "offer any evidence tending to show that a greater proportion of mailed ballots received after Election Day than on or before Election Day would be cast for Bognet's opponent").[10] Plaintiffs fail to allege any injury that is "certainly impending" or that there is a "substantial risk" that harm will occur. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citation omitted).

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2. Plaintiffs Failed to Establish that the Secretary's Interpretation of the Postmark Provision Will Cause them to Suffer a Cognizable Diversion of Resources Injury

To claim direct organizational standing based on a diversion of resources, the Organizational Plaintiffs would need to show "both a diversion of [their] resources and a frustration of [their] mission[s]." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (citation omitted). A diversion of resources injury cannot be premised on "continuing ongoing activities" or expenditures that are part of "business as usual." *Friends of the Earth*

[10] Plaintiffs suggest that *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) supports that Plaintiff Donald J. Trump for President 2024, Inc. has standing as a political candidate. OB at 30. Under *Wood*, however, a candidate plaintiff would still need to show harm, and no Plaintiff here has done so. 981 F.3d at 1314 ("[If] Wood were a political candidate *harmed by* the recount, he would satisfy [the particularized injury] requirement because he could assert a personal, distinct injury." (emphasis added)).

v. Sanderson Farms, Inc., 992 F.3d 939, 942 (9th Cir. 2021) (citations omitted). The Organizational Plaintiffs did not establish standing based on a theory of diversion of resources.

a. Plaintiffs Provided No Evidence to Support Their Allegations That They Would Need to Divert Resources

The Organizational Plaintiffs claim that they have standing based on a diversion of resources. OB at 16–22. In particular, they argue that if mail ballots without postmarks are counted, they will have to "divert additional resources to post-election monitoring of ballot processing to accomplish their mission." *Id.* at 17. They rely on statements in declarations that were "not provided to Defendants in advance of the hearing, and which were executed by witnesses who were not made available for cross-examination." JA 2 JA000291; *see also* OB at 17–20. For this reason, the district court declined to consider or credit the declarations.[11] JA 2 JA000290.

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The declarations are inadmissible hearsay, not attached to the motion, and should not be considered by this Court. *See* NRS 51.035; NRS 51.065; *Cramer v. State*, 126 Nev. 388, 392, 240 P.3d 8, 11 (2010) ("An affidavit is generally

[11] Plaintiffs claim that the "declarations were undoubtedly admitted as evidence without objection by Defendants." OB at 17 n.2. False. Counsel for Respondents Vet Voice Foundation and Nevada Alliance for Retired Americans clearly objected. JA 2 JA000238 47:6–10.

inadmissible hearsay."); *State v. NOS Commc'ns, Inc.*, 120 Nev. 65, 69, 84 P.3d 1052, 1054 (2004) (preliminary injunctive relief properly denied where movant "did not attach affidavits containing admissible statements or admissible documents to the motion"). Plaintiffs' material allegations of diversion of resources are thus unsupported and preliminary injunctive relief was properly denied. *See Coronet Homes, Inc.*, 84 Nev. at 437, 442 P.2d at 902 ("[I]n the absence of testimony or exhibits establishing the material allegations of the complaint, . . . the application for a preliminary injunction [should be] denied.").

Plaintiffs, at best, alleged that they already "devote[] significant resources to mail-ballot-chasing operations and election integrity activities," including mail-ballot counting activities. JA 1 JA00023 ¶ 18; JA 1 JA00033–34 ¶¶ 65–66. They therefore merely allege "continuing ongoing activities" that are part of "business as usual." *Friends of the Earth*, 992 F.3d at 942 (citations omitted); *Burgess*, 2024 WL 3445254, at *5 ("Organizational Plaintiffs therefore are not engaging in additional poll watching and mail ballot counting activities to identify or counteract any harms from the Nevada mail ballot receipt deadline."); *see also id.* ("[O]rganizations who train and hire poll watchers . . . do not have standing to challenge the expansion of access to mail voting merely because it might create more work for them.").

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b. Even if the Court Credits Plaintiffs' Declarations, Plaintiffs Still Did Not Establish Standing

Even crediting the declarations, the Organizational Plaintiffs failed to show they have standing. The declarants claim Plaintiffs would need to expend additional resources based on the Secretary's interpretation of the Postmark Provision to (1) train more observers and staff to document instances where mail ballots without postmarks received after election day are counted; and (2) seek the segregation of those ballots from other ballots to preserve the ability to contest an election. *See* JA 2 JA000270–71 ¶¶ 7, 11, 12; JA 2 JA000275–76 ¶¶ 9, 11. Plaintiffs argue this is "necessary to protect the interests of Plaintiffs' federal, state, and local candidates, who will need such evidence to challenge the counting of non-postmarked ballots in post-election proceedings." OB at 20.

But the Organizational Plaintiffs would need to "show that [they] would have suffered some other injury if [they] had not diverted resources to counteracting the problem." *See La Asociacion de Trabajadores de Lake Forest*, 624 F.3d at 1088. There is no need to identify each instance where a non-postmarked ballot was counted, and Plaintiffs' anticipated expenditure counteracts no problem. A candidate can simply ask a county for the number of non-postmarked ballots counted, as Plaintiffs did here. *See* JA 1 JA00177–79. Both the Clark County and Washoe County Respondents provided Plaintiffs data on the number of non-postmarked ballots received after election day that were counted for the June 11,

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2024 primary election. *Id.* A candidate can contest an election based on the assertion that the election board "made errors sufficient to change the result of the election," NRS 293.410(2)(d), and an observers' tally is unnecessary.

Nor do Plaintiffs establish that an observer would even be able to accurately tally the non-postmarked mail ballots received after election day that were counted. Plaintiffs claimed that during the June 2024 primary election, "observers representing the Republican National Committee and the Nevada Republican Party personally observed officials in Clark County and Washoe County count numerous mail ballots *without a postmark* received by the counties after election day." JA 1 JA00030 ¶ 46 (emphasis in original). But Washoe County in fact counted *no* such ballot. JA 1 JA00177.

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Plaintiffs' claim that they would need to seek segregation of mail ballots received after election day without a postmark also finds no support in the law. Plaintiffs cite nothing that would allow observers to make any such demand, and they provide no explanation for how a county clerk would be able to do so without violating the secrecy of the ballot.[12] *See* NAC 293.356(2)(a)(1) (persons observing the processing and counting of ballots cannot "[t]alk[] to workers within the central

[12] To the extent the Organizational Plaintiffs are purporting to divert resources to litigate requiring the segregation of mail ballots, organizations cannot "manufacture [an] injury by incurring litigation costs." *La Asociacion de Trabajadores de Lake Forest*, 624 F.3d at 1088 (citation omitted).

counting place other than the county or city clerk or a person designated by the county or city clerk to address questions from observers"); NRS 293.269933(5) (voted mail ballots to be separated from their envelopes). Plaintiffs' intended diversion of resources to engage in futility cannot support standing. *See FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 394 (2024) ("[A]n organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to . . . advocate against the defendant's action. An organization cannot manufacture its own standing in that way.").

An organizational plaintiff cannot simply "spend its way into standing" because that "would mean that all the organizations in America would have standing to challenge almost every . . . policy that they dislike, provided they spend a single dollar opposing those policies." *Id.* at 394–95. It is not enough to "divert[] resources in response to a defendant's actions." *Id.* at 395 (citation omitted). And it is also not enough for an organizational plaintiff to "have only a general legal, moral, ideological, or policy objection to a particular government action." *Id.* at 381.

c. Plaintiffs Failed to Establish That Their Core Business Activities Would Be Perceptibly Impaired Based on the Secretary's Interpretation of the Postmark Provision

There is also a further, independent basis to reject Plaintiffs' diversion of resources claim if the Court credits the declaration statements relating to the supposed need to identify each instance where a non-postmarked mail ballot

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received after election day was counted. Organizational standing is found only in "unusual case[s]," and it requires that an organizational plaintiff's core business activities be "perceptibly impaired." *FDA*, 602 U.S. 395–96 (citation omitted). The Organizational Plaintiffs' missions and core business activities relate to electing Republican candidates. *See* JA 1 JA00022 ¶ 14; JA 1 JA00023 ¶ 22; JA 1 JA00024 ¶ 25; OB at 21. But for the same reasons that the Organizational Plaintiffs failed to establish any competitive harm, they also failed to establish a direct effect or interference with their core activities.

"[O]rganizations must satisfy the usual standards for injury in fact . . . that apply to individuals." *FDA*, 602 U.S. at 393–94 (citation omitted). And plaintiffs do not "have standing because they incur[] certain costs as a reasonable reaction to a risk of harm" if that harm "is not certainly impending." *Clapper*, 568 U.S. 398, 416 (2013). It is speculative that the Organizational Plaintiffs would suffer harm if they are unable to count the instances where non-postmarked mail ballots received after election day are counted because it is speculative that they will be disadvantaged by such mail ballots. The Organizational Plaintiffs' core activities are therefore not "directly" and "perceptibly impaired." *FDA*, 602 U.S. at 395 (citation omitted). Instead, the "links in the chain of causation" are "too speculative or too attenuated" to confer standing. *Id.* at 384 (citations omitted).

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3. Issue Preclusion Bars the Organizational Plaintiffs' Claims

Although the district court did not reach the issue of whether the Organizational Plaintiffs are precluded from re-litigating standing, the Court may affirm on the independent basis that issue preclusion bars the Organizational Plaintiffs' attempt in this lawsuit to again argue that they have standing.[13] Because Plaintiffs have not challenged the district court's determination that the individual plaintiff does not have standing based on a theory of vote dilution, *see* JA 2 JA000283, a holding that the Organizational Plaintiffs are precluded from re-litigating standing would require affirming the district court's decision.

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a. The Issue of Standing Has Already Been Decided Against the Organizational Plaintiffs

The Organizational Plaintiffs already litigated the issue of standing to challenge Nevada's laws on counting mail ballots received after election day in the 2020 *Cegavske* case. *See generally Cegavske*, 488 F. Supp. 3d 993. They are thus precluded from re-litigating the issue again here. "Federal law governs the [issue preclusion] effect of a case decided by a federal court." *Clark v. Columbia/HCA Info. Servs., Inc.*, 117 Nev. 468, 481, 25 P.3d 215, 224 (2001). Under federal law, issue preclusion applies where "(1) the issue at stake was identical in both

[13] The Government Respondents argued that the Organizational Plaintiffs were precluded from re-litigating standing in opposition to Plaintiffs' motion for preliminary injunction. JA 1 JA00120–22.

proceedings; (2) the issue was actually litigated and decided in the prior proceeding; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits." *Janjua v. Neufeld*, 933 F.3d 1061, 1065 (9th Cir. 2019) (citations omitted). All four factors are met here.

In *Cegavske*, the Organizational Plaintiffs challenged AB 4 § 20(2)'s mail ballot deadline, and AB 4 § 20(2) is identical to NRS 293.269921(2). *See* 488 F. Supp. 3d at 996–97. The *Cegavske* court held that (1) the organizations did not have associational standing, *id.* at 1001; (2) the organizations failed to assert a cognizable injury based on a diversion of resources, *id.* 1001–03; (3) the organizations' alleged vote dilution injury was generalized and speculative, *id.* at 1000; and (4) the organizations did not have competitive standing, *id.* at 1003. These are the same theories of injury the Organizational Plaintiffs advanced before the district court. *See* JA 1 JA00110–13; JA 1 JA00183–84. "Because the factual and legal context in which the issues of this case arise has not materially altered since [*Cegavske*], normal rules of preclusion should operate to relieve the [Secretary] of 'redundant litigation [over] the identical question of'" standing. *Montana v. United States*, 440 U.S. 147, 162 (1979) (citation omitted).

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Standing was actually litigated and decided in *Cegavske* after a full and fair opportunity to litigate the issue, and the *Cegavske* court's decision on standing formed the basis for dismissal. *See Cegavske*, 488 F. Supp. 3d at 1004. There can

be no question that issue preclusion applies where a case is dismissed for lack of standing, even if the decision finding a lack of standing was erroneous. *Love v. Villacana*, 73 F.4th 751, 755 (9th Cir. 2023). It also applies if the Organizational Plaintiffs claim they are raising new arguments to support standing. *See Paulo v. Holder*, 669 F.3d 911, 918 (9th Cir. 2011) ("If a party could avoid issue preclusion by finding some argument it failed to raise in the previous litigation, the bar on successive litigation would be seriously undermined. . . . The issue sought to be relitigated in this case is Paulo's eligibility for § 212(c) relief, which was decided in the previous proceeding by the district court.").

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Together with claim preclusion, the purpose of issue preclusion is to "protect against 'the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (citation omitted). The Organizational Plaintiffs' attempt to continue litigating the question of standing should be rejected.

b. Issue Preclusion Applies to All of the Organizational Plaintiffs

Issue preclusion applies to Plaintiff Donald J. Trump for President 2024, Inc., even though the plaintiff in *Cegavske* was Donald J. Trump for President, Inc. Both organizations have been "the principal committee for President Donald J. Trump's"

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campaign. JA 1 JA00024 ¶ 23; *Cegavske* Am. Compl. ¶ 11. They are therefore in privity with each other.

"[P]rivity is a flexible concept dependent on the particular relationship between the parties in each individual set of cases." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 322 F.3d 1064, 1081–82 (9th Cir. 2003) (citation omitted). It "exists between parties who adequately represent the same legal interests. It is the identity of interest that controls in determining privity, not the nominal identity of the parties." *Va. Sur. Co. v. Northrop Grumman Corp.*, 144 F.3d 1243, 1247 (9th Cir. 1998) (citation omitted). Indeed, "it has come to be recognized that the privity label simply expresses a conclusion that preclusion is proper." C. Wright, A. Miller, & E. Cooper, 18A Fed. Prac. & Proc., Juris. § 4449 (3d ed.). Because the interests between the two Trump campaigns are identical, issue preclusion applies to Plaintiff Donald J. Trump for President 2024, Inc.

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B. Plaintiffs' Interpretation of the Postmark Provision Fails as a Matter of Law

Even if Plaintiffs had standing to bring this action, the district court properly concluded that their interpretation of the Postmark Provision fails as a matter of law. JA 2 JA000284. Plaintiffs' interpretation of the Postmark Provision flouts all canons and tools of construction. As the Secretary interprets it, the Postmark Provision allows, and in fact requires, county clerks to count a mail ballot that (1) is received up to three days after election day and (2) lacks a discernible postmark, if it has one

at all. Unlike Plaintiffs' interpretation, the Secretary's interpretation is consistent with the Provision's clear, plain text and finds further support in both the structure of NRS 293.269921 and the "spirit" guiding application of *all* Nevada election laws. Even if the Provision's text were ambiguous, both the canon of constitutional avoidance and the legislative history of NRS 293.269921 confirm that the Secretary's interpretation is the only acceptable interpretation.

1. Nothing in the Postmark Provision's Plain Text, Structure, or Purpose Imposes the Restrictions Advanced by Plaintiffs

Generally, when Nevada courts interpret statutes, the "analysis begins with the text." *Sierra Nev. Adm'rs. v. Negriev*, 128 Nev. 478, 481, 285 P.3d 1056 (2012) (citation omitted). The Court "construe[s] a plain and unambiguous statute according to its ordinary meaning." *Id.* (citation omitted). In other words, the Court "look[s] to the statute's plain language" to "ascertain" and "'give effect to the Legislature's intent,'" which is "[t]he goal of statutory interpretation." *Williams v. State Dep't of Corr.*, 133 Nev. 594, 596, 402 P.3d 1260, 1262 (2017) (citation omitted).

a. Plaintiffs' Interpretation Would Lead to Absurd Results

"[S]tatutory construction should always avoid an absurd result." *Lofthouse v. State*, 136 Nev. 378, 382, 467 P.3d 609, 613 (2020) (citation omitted). But that is exactly what Plaintiffs' interpretation of the Postmark Provision would lead to.

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Nevada law provides a comprehensive scheme for counting mail ballots sent by mail. First, if a postmark date can be determined, a mail ballot is counted if postmarked by election day and received within four days after an election. NRS 293.269921(1)(b). Second, if a postmark date cannot be determined—for any reason, whether it is because the postmark is illegible or missing altogether—a mail ballot is counted if received within three days after an election. NRS 293.269921(2). Under Plaintiffs' interpretation, all mail ballots without postmarks, whether received before election day or shortly thereafter, would need to be rejected. *See* JA 2 JA000287.

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Plaintiffs seek, however, only to enjoin the counting of mail ballots without postmarks received after election day. *See, e.g.*, OB at 2. They thus appear to recognize that it would be absurd to reject mail ballots without postmarks received on or before election day, but they offer no explanation for how their reading of the Postmark Provision allows for pre-election day mail ballots to be treated differently than post-election day mail ballots. In fact, they argue that NRS 293.269921(1) requires that all mail ballots, no matter when received, must be rejected if not postmarked. OB at 36 (NRS 293.269921(1) "requires rejection of [ballots that do not have a postmark at all] because they are not 'postmarked on or before election day.'"). Despite arguing this, they persist in their fiction that the Postmark Provision can be read to allow the counting of mail ballots without postmarks received on or

before election day because "the purpose of the postmark requirement [is] to give some indicia that the ballot was cast before the polls closed." *Id.* at 38 n.4.

Plaintiffs cite no authority that would allow a provision to be applied differently based on a temporal distinction that is nowhere in statute. Plaintiffs' interpretation "would insert words into the statute that are not there." JA 2 JA000286. Further, Plaintiffs ignore that there is no difference between a mail ballot with an illegible postmark date as opposed to no postmark; both provide the exact same indicia of when the mail ballot was cast. Rejecting a mail ballot based solely on the arbitrary failure of the USPS to apply a postmark is absurd.

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b. Plaintiffs' Interpretation Misses the Textual Forest for the Trees

At base, Plaintiffs' interpretation of the Postmark Provision hinges on two cherry-picked words—"the postmark"—to concoct extra requirements that appear nowhere in the plain text. The Provision, Plaintiffs contend, requires that "there must first be a postmark." OB at 32. Yet nothing in the Provision's text bakes in the extra requirement to distinguish, much less reject, a mail ballot when it has no postmark. Whether smudged, torn, or absent altogether, the postmark date still "cannot be determined" in all scenarios. "When a statutory provision lays out specific requirements, but makes no mention of others, Nevada courts presume that such 'omissions' by the Legislature were intentional." JA 2 JA000285 (citing *In re Lowry*, 140 Nev. Adv. Op. 38, 549 P.3d 483, 485–86 (2024); *Dep't of Tax'n v.*

DaimlerChrysler Servs., N. Am., LLC, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005); *City of Reno v. Yturbide*, 135 Nev. 113, 115–16, 440 P.3d 32, 35 (2019)).

Structurally, Plaintiffs' interpretation also falters. "When interpreting a statute, a court should consider multiple legislative provisions as a whole." *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 122 Nev. 132, 152, 127 P.3d 1088, 1102 (2006). In doing so, courts "give those words their plain and ordinary meanings unless . . . a different meaning is apparent from the context." *Lofthouse*, 136 Nev. at 380, 467 P.3d at 611 (citation omitted). The words "the date of the postmark"—namely, the use of "the"—should not be cherry-picked. *See Blackburn v. State*, 129 Nev. 92, 97, 294 P.3d 422, 426 (2013) ("A statute cannot be dissected into individual words, each one being thrown onto the anvil of dialectics to be hammered into a meaning which has no association with the words from which it has violently been separated."). Plaintiffs' hyper-fixation misses the textual forest for the trees. *See* OB at 32–33. Examining NRS 293.269921 as a whole reveals how county clerks are to treat all mail ballots received by mail. *See Williams*, 133 Nev. at 596, 402 P.3d at 1262 (explaining that whenever possible, the Court "will interpret a rule or statute in harmony with other rules or statutes")

One rule applies if there is a legible postmark (NRS 293.269921(1)(b)), and the other applies if there is not a legible postmark (NRS 293.269921(2)). The structural context of NRS 293.269921 itself makes it apparent that, in relation to "the

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date of the postmark," the Legislature did not intend to distinguish, let alone require rejection of, timely cast mail ballots without postmarks. *See Lofthouse*, 136 Nev. at 381–82, 467 P.3d at 612–13 (considering both plain text and statutory context to ascertain Legislative intent and avoid "absurd results").

Plaintiffs attempt to avoid this by claiming that counting mail ballots without postmarks renders NRS 293.269921(1)(b)'s requirement that mail ballots be "[p]ostmarked on or before the day of the election" superfluous. *See* OB at 36. Nothing about their argument refutes the district court's conclusion that NRS 293.269921(1)(b) and (2) "are plainly intended to cover all ballots delivered to election officials by mail." JA 2 JA000285–86. Mail ballots without postmarks are encompassed within NRS 293.269921(2) as being "deemed to have been postmarked on or before the day of the election" if received within three days after an election, meaning they meet the requirements of NRS 293.269921(1)(b)(1). The district court's interpretation does not render any part of NRS 293.269921(1)(b) superfluous.

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Further, Plaintiffs' argument about the "deeming clause of NRS 293.269921(2)" boils down yet again to the importance that should be ascribed to the word "the" in the phrase "the postmark." *See* OB at 36–37. Contrary to Plaintiffs' assertions, the deeming clause makes perfect sense if it is interpreted to encompass mail ballots that are not postmarked as opposed to only mail ballots that

have illegible postmarks. Distinguishing between mail ballots with no postmark and those with illegible postmarks is absurd because in both cases, there is no written confirmation that a mail ballot was postmarked on or before election, and the distinction would be made based on an arbitrary failing of the USPS to postmark the mail ballot, not anything the voter did. Because absurd results "should always [be] avoided," *Lofthouse*, 136 Nev. at 382, 467 P.3d at 613 (citation omitted), Plaintiffs semantic quibbles about the words "indeterminate" and "non-visible," OB at 34–35, 37–38, are particularly unpersuasive.

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c. The Secretary's Interpretation Harmonizes with the Spirit of Nevada's Election Laws and Does Not Render Any Part of the Postmark Provision Superfluous

Moreover, as the district court correctly recognized, the Secretary's interpretation of the Postmark Provision "harmonizes with the purpose and 'spirit' of Nevada's election laws." JA 2 JA000286. "[W]henever possible, [courts] will interpret a rule or statute in harmony with other rules or statutes." *Id.* (quoting *Williams*, 133 Nev. at 596, 402 P.3d at 1262). "The language of a statute should be given its plain meaning unless, in so doing, the spirit of the act is violated." *Id.* (quoting *Int'l Game Tech., Inc.*, 122 Nev. at 152, 127 P.3d at 1102). The spirit of NRS Chapter 293 is codified in NRS 293.127(1)(c) and requires that NRS Chapter 293 "be liberally construed to the end that: . . . [t]he real will of the electors is not defeated by any informality or by failure substantially to comply with

the provisions of this title with respect to the giving of any notice or the conducting of an election or certifying the results thereof."

Plaintiffs argue that NRS 293.127(1)(c) only "protects electors against the failures of elections officials in giving notice, or conducting or certifying an election." OB at 41. They disregard, however, that this Court has already held that "NRS 293.127(1)(c) expresses the state's public policy that election laws, enumerated in NRS Chapter 293, should be liberally construed to effectuate the will of the people." *Univ. & Cmty. Coll. Sys. of Nev.*, 120 Nev. at 734, 100 P.3d at 195. And the Court did not limit application of NRS 293.127(1)(c) solely to "giving notice, or conducting or certifying an election." Instead, the Court relied on NRS 293.127(1)(c) in concluding that "any time, place, or manner restriction" on use of government buildings to gather petition signatures "must not work unreasonably, in light of the totality of the circumstances, so as to deny a petition circulator his or her right to gather signatures." *Id.* The same logic applies here. The Postmark Provision must not work unreasonably to deny voters their fundamental right to vote; and interpreting the Postmark Provision to require that mail ballots without postmarks be rejected simply because of the USPS' failing would make the Provision work unreasonably.

Finally, Plaintiffs' argument that the Secretary's interpretation of the Postmark Provision reads requirements out, making them meaningless, is fatally

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flawed. *See* OB at 33–34. They argue that the Secretary's reading deletes "and the date of the postmark cannot be determined." *Id.* at 34. But if that language were deleted, there would be a direct conflict with NRS 293.269921(1)(b): the deletion would mean that mail ballots with legible postmarks dated *after* election day would be counted if received within three days after an election. Plaintiffs' deletion in no way aligns with the Secretary's interpretation, which does not permit mail ballots that are mailed after election day to be counted and honors all words in the statute.

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2. Even if the Postmark Provision Were Ambiguous, Legislative History and the Canon of Constitutional Avoidance Support the Secretary's Reading

"Where a statute lacks plain meaning, this [C]ourt will consult legislative history, related statutes, and context as interpretive aids." *Nev. State Democratic Party v. NVGOP*, 256 P.3d 1, 7 (Nev. 2011) (citations omitted); *but see also A.J. v. Eighth Jud. Dist. Ct.*, 133 Nev. 202, 206, 394 P.3d 1209, 1213 (2017) (noting that "ambiguity is not always a prerequisite to using extrinsic aids"). The meaning of words in an ambiguous statutory provision is also determined by "examining the context and the spirit of the law or the causes which induced the Legislature to enact it. The entire subject matter and policy may be involved as an interpretive aid." *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007). Further, Legislative intent is determined "by evaluating the legislative history and construing the statute in a manner that conforms to reason and public policy. *A.J.*, 133 Nev. at 207, 394

P.3d at 1213 (citation omitted). The district court concluded that the Postmark Provision was not ambiguous, but correctly ruled in the alternative that "[e]ven if the plain text of the Postmark Provision were ambiguous," Plaintiffs' interpretation would still fail.[14] *See* JA 2 JA000287–89.

First, to accept Plaintiffs' argument that sound policy and the Legislature's intent require rejection of mail ballots without postmarks—but not mail ballots with illegible postmarks—would be an exercise in cognitive dissonance. *See* OB at 40–41, 43–44. If there is no written confirmation that a mail ballot was postmarked by election day, as would be the case whether there is no postmark or the postmark date is illegible, there is no basis to claim that one scenario "ensures that only ballots cast on or before election day are counted" but not the other. *See id.* at 41; *see also* JA 2 JA000288 ("An illegible postmark provides election officials with no information that a ballot delivered by mail without a visible postmark lacks."). The portion of the Postmark Provision that actually safeguards against counting mail ballots that are mailed after election day is the limitation that mail ballots must be received within three days following an election, and that safeguard would apply to a mail ballot with no postmark just as it would to a mail ballot with an illegible postmark.

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[14] Plaintiffs appear to have a very heartfelt grievance about the district court ruling in the alternative, though they cite nothing suggesting it was improper. *See* OB at 45.

Second, the district court's decision to "shun" Plaintiffs interpretation was correct. JA 2 JA000288 (citation omitted); *see also* OB 42–45. The canon of constitutional avoidance did not require that the district court "determine[e] the constitutionality" of the Postmark Provision. *See* OB at 44. Rather, "[u]nder the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that *raises serious constitutional doubts* and instead may adopt an alternative that avoids those problems." *Degraw v. Eighth Jud. Dist. Ct.*, 134 Nev. 330, 333, 419 P.3d 136, 139 (2018) (citation omitted and emphasis added). The Government Respondents identified two serious constitutional doubts that flow from Plaintiffs' interpretation.

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1. Plaintiffs' interpretation would "treat[] similarly situated [voters] differently," based solely on a third party's actions (i.e., the USPS's failure to postmark), implicating equal protection. *See* JA 1 JA00137 (quoting *In re Candelaria*, 126 Nev. 408, 416, 245 P.3d 518, 523 (2010)). Neither Plaintiffs nor any other party have articulated any adequate reason for treating voters whose mail ballots have illegible postmarks and voters whose mail ballots were not postmarked differently.

2. Plaintiffs' interpretation would burden voters' rights by disenfranchising only select voters based on nothing more than the arbitrary failure of the USPS to postmark some ballots. *See* JA 1 JA00125–26; *see also* JA 2

JA000288 (citing *DCCC v. Kosinski*, 614 F. Supp. 3d 20, 56–57 (S.D.N.Y. 2022) (finding that application of state law rejecting post-election day ballots without postmarks "likely constitute[d] a severe burden on the right to vote" because it "disenfranchise[d] voters who *do* meet the deadlines imposed by state law by invaliding their ballots that, through no fault of their own, are not postmarked and are delivered two or more days after Election Day"))). At bottom, their interpretation would make it harder for voters to vote.

While Plaintiffs attempt to minimize *DCCC*'s persuasive value, their arguments fail. *See* OB at 44–45. Plaintiffs recognize that burdens on the right to vote can be unconstitutional. *See* OB at 42 (citing the "*Anderson-Burdick* test, which governs the constitutionality of election procedures"). It does not matter, then, that there is no constitutional right "to have a mail ballot counted *after* election day." *See id.* at 44. And it does not matter that the district court did not conduct an in-depth analysis of the burden. *See id.* at 42. Whether the burden is severe or minimal, there must still be some justification for it. *See Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1187 (9th Cir. 2021). Plaintiffs' alleged justification is nonsensical, and no other party has advanced one. *See* JA 2 JA000288 ("An illegible postmark provides election officials with no information that a ballot delivered by mail without a visible postmark lacks."). An interpretation of the Postmark Provision that would disenfranchise certain voters whose mail ballots were arbitrarily not postmarked by

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the USPS, while allowing other voters whose mail ballots have illegible postmarks to have their votes counted, raises serious constitutional doubts.[15]

Third, Plaintiffs' references to other states' laws represents, if anything, wishful thinking of what they want Nevada law to be one day. *See* OB at 39–40, 44. As they recognize, "Nevada is not California," *Id.* at 40, or indeed any other state. Plaintiffs' hopes for a statutory change are better directed toward the Legislature. *See Holiday Ret. Corp. v. State*, 128 Nev. 150, 154, 274 P.3d 759, 761 (2012) ("It is the prerogative of the Legislature, not this court, to change or rewrite a statute.").

Finally, contrary to Plaintiffs' assertions, the legislative history supports that the Postmark Provision applies to mail ballots without postmarks. *See* OB 45–46. In adopting Assembly Bill 321 of the 81st (2021) Legislative Session ("AB 321"), which is the bill that enacted the Postmark Provision, the bill's primary sponsor, Assemblyman Jason Frierson, explained:

> To the extent that there were [ballot] envelopes that were not postmarked or the postmark was illegible, smudged, or otherwise damaged to where it could not be read—I think similar to the postmark requirement of three days—any of those that came in within that same period of time would be counted and anything that came in after that would not be counted. . . . Again, with respect to the postmark issue, I would defer to our election officials.

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[15] It is also irrelevant what relief the *DCCC* court ultimately granted because that relief was tailored to address New York's statutory scheme. *See* OB at 44–45. There is no Postmark Provision in New York law. *See DCCC*, 614 F. Supp. 3d at 35.

Minutes of the Meeting of the Assemb. Comm. on Legis. Operations & Elections, 2021 Leg., 81st Sess. at 21 (Nev. 2021).[16] Plaintiffs try to introduce confusion into Assemblyman Frierson's straightforward explanation that mail ballots that "were not postmarked" would be treated exactly the same as mail ballots where the postmark was "illegible, smudged, or otherwise damaged to where it could not be read." *Id.*; *see* OB at 45–46. They argue that Assemblyman Frierson's answer "appears to rely on a common misconception, namely, that prepaid postage envelopes are—as a rule—not postmarked because they are prepaid." OB at 46. They do not explain why that would change the Legislature's intent; the Legislature intended that under the language of NRS 293.269921(2), mail ballots without postmarks would be counted if received within three days following an election, regardless of whether the USPS normally applied a postmark.

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In any event, Assemblyman Frierson was laboring under no such misconception. He clearly understood that others might mistakenly believe that mail ballots would not be normally postmarked, Minutes of the Meeting of the Assemb. Comm. on Legis. Operations & Elections, 2021 Leg., 81st Sess. at 21 (Nev. 2021) ("I think there are a lot of folks who objectively see a prepaid postage envelope and believe that because of that, it will not be postmarked."), and he stated that "[i]t is simply inaccurate to reflect that there is not a postmark date." *Id.* His subsequent

[16] *Available at*: https://bit.ly/4fYWcuc.

statement that mail ballots without postmarks would be treated "similar to the postmark requirement of three days—any of those that came in within the same period of time would be counted" was addressing the reality that the USPS *should* postmark each mail ballot. *See id.*

Moreover, as the district court explained, Assemblyman Frierson's statement that emphasized the need to *expand* voting rights in Nevada provides further evidence of a Legislative intent to count mail ballots without postmarks if received within three days after an election. *See* JA 2 JA000289 (citing Minutes of the Meeting of the Assemb. Comm. on Legis. Operations & Elections, 2021 Leg., 81st Sess. at 8 (Nev. 2021)). The district court's decision was entirely consistent with all evidence of Legislative intent, including, as described above, NRS 293.127(1)(c). *See A.J.*, 133 Nev. at 206, 394 P.3d at 1213 ("[E]ven the most basic general principles of statutory construction must yield to contrary evidence of legislative intent.").

Because Plaintiffs' exclusionary interpretation of the Postmark Provision untethers itself from the plain text, structure, purpose, legislative history, and public policy of NRS 293.269921 and NRS Chapter 293 overall, Plaintiffs have no likelihood of succeeding on the merits.

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C. The Secretary Properly Issued Guidance on the Postmark Provision

Plaintiffs complain that the district court's rejection of their APA claim was "abbreviated" and did not cite any case law. OB at 47. That's because this is a straightforward issue, despite Plaintiffs' attempts to complicate it. *See id.* at 47–51.

As the district court explained, "[a] 'regulation' subject to the notice and hearing requirements of the [APA] 'does not include . . . [a]n interpretation of an agency that has statutory authority to issue interpretations." JA 2 JA000290 (quoting NRS 233B.038(2)(h)). And "[t]he Legislature authorized the Secretary of State to 'provide interpretations and take other actions necessary for the effective administration of the statutes and regulations governing the conduct of primary, presidential preference primary, general, special and district elections in this State.'" *Id.* (quoting NRS 293.247(4)). While the Secretary is authorized to adopt regulations on any "matter[] as determined necessary by" him, NRS 293.247(3)(j), he was well within his statutory authority to issue the interpretation of the Postmark Provision in the Memorandum. Plaintiffs essentially improperly seek a ruling that the Legislature's grant of authority in NRS 293.247(4) is meaningless. *See Nev. Dep't of Corrs. v. York Claims Servs.*, 131 Nev. 199, 203, 348 P.3d 1010, 1013 (2015) ("In conducting a plain language reading, we avoid 'an interpretation that renders language meaningless or superfluous.'").

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The Legislature's decision to allow the Secretary to issue interpretations is particularly important because the Secretary must adopt permanent regulations for primary, general, special, or district elections "before the last business day of February immediately preceding" those elections. NRS 293.247(1). And the Secretary would be unable to issue a temporary regulation between the last business day of February and August 1 of a primary or general election year. *See* NRS 233B.063(3); NRS 293.12755 (general election held in November of even-numbered years); NRS 293.175 (primary election held in June of even-numbered years). Absent the interpretation process, the Secretary would be dramatically limited in responding to a new development for a June primary election.[17] This is untenable for the Secretary who is the "Chief Officer of Elections for this State" and "responsible for the execution and enforcement of the provisions of title 24 of NRS and all other provisions of state and federal law relating to the elections in this State."[18] NRS 293.124(1).

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None of Plaintiffs' arguments contradict that the Secretary properly issued the Memorandum.

[17] The Secretary has, in the past, needed to issue temporary regulations for elections. *See ACLU of Nev. v. County of Nye*, Case No. 85507, 2022 WL 14285458, at *1 n.1 (Nev. Oct. 21, 2022) (unpublished disposition).

[18] While the APA allows for adoption of emergency regulations, the Governor would need to endorse an agency's statement of the emergency, and there is no guarantee the Secretary would in fact be able to adopt an emergency regulation. NRS 233B.0613(1).

First, *Nevada State Democratic Party v. NVGOP*, 256 P.3d at 7 does not suggest that the Secretary cannot issue interpretations. *See* OB 47–48. There, the Court declined to afford deference to then-Secretary of State Ross Miller's interpretation on "Nevada's election laws governing the proceedings for conducting [a] special election to fill a vacancy in the United States House of Representatives" because the Secretary "was required to adopt regulations to conduct" such special elections. *Id.* at 3, 6–7. The Secretary has not asked for deference here, and in fact, he intends to submit the interpretation "as a regulation following the conclusion of the 2024 election cycle." JA 1 JA00092. The Secretary issued the Memorandum on May 29, 2024, when he could not adopt a permanent or temporary regulation, and there is no indication that the Secretary was trying to skirt the regulatory process. JA 1 JA00091.

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Second, Plaintiffs' cases finding statements of general applicability that effectuated policy constituted rulemaking are readily distinguishable because none of the agencies in those cases claimed to have statutory authority to issue interpretations. *See* OB at 48–50 (citing *Coury v. Whittlesea-Bell Luxury Limousine*, 102 Nev. 302, 721 P.2d 375 (1986); *Las Vegas Transit Sys., Inc. v. Las Vegas Strip Trolley*, 105 Nev. 575, 780 P.2d 1145 (1989); *Dunning v. Nev. State Bd. of Physical Therapy Examiners*, No. 67322, 2016 WL 3033742 (Nev. May 26, 2016) (unpublished disposition); *State Farm Mut. Auto. Ins. Co. v. Comm'r of Ins.*, 114

Nev. 535, 958 P.2d 733 (1998); *S. Nev. Operating Eng'rs Cont. Compliance Tr. v. Johnson*, 121 Nev. 523, 119 P.3d 720 (2005)).

Finally, as described above, the Secretary's interpretation in the Memorandum is consistent with the Postmark Provision. *See* OB at 50–51.

D. Plaintiffs Failed to Join a Necessary Party

Pursuant to NRCP 19(a)(1)(B)(i), a party must be joined where that party "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest." A failure to join a party under NRCP 19 warrants dismissal pursuant to NRCP 12(b)(6). This is because the Court cannot enter a final judgment absent necessary parties. *Univ. of Nev. v. Tarkanian*, 95 Nev. 389, 396, 594 P.2d 1159, 1163 (1979) ("If the interest of the absent parties '"may be affected or bound by the decree, they must be brought before the court, or it will not proceed to a decree."'"); *see also Schwob v. Hemsath*, 98 Nev. 293, 294, 646 P.2d 1212, 1212 (1982) ("Failure to join an indispensable party is fatal to a judgment and may be raised by an appellate court sua sponte.").

In the event that the Court finds the Organizational Plaintiffs have standing based on competitive injury, to quote Plaintiffs, "what is sauce for the goose is sauce for the gander." OB at 25. Plaintiffs claim that they have vital interests in ensuring "Republican voters [can] cast, and Republican candidates [can] receive, effective

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votes in Nevada elections," as well as interests in ensuring their candidates compete in a "legally structured environment" and "preventing irreparable harm . . . that would result from counting mail ballots received after election day that lack a postmark." JA 1 JA00023 ¶¶ 15, 17, 18, 22; JA 1 JA00037 ¶ 90. They claim that these are "legally protected interest[s]." *See* JA 1 JA00037 ¶ 83. It follows, then, that the Democratic party would have the exact same legally protected interests, and a ruling that would, as Plaintiffs claim, specifically harm Democratic voters and candidates would "as a practical matter impair or impede the [Democratic party's] ability to protect the interest." NRCP 19(a)(1)(B)(i).

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Should the Court reverse the district court's ruling on competitive injury, either the Democratic National Committee or the Nevada State Democratic Party would be necessary to protect the same interests their counterparts from the opposite side of the aisle—the RNC and NVGOP—assert here. In *Tarkanian*, the Court explained that joinder of a third party was necessary where the third party would be unable to protect its interest, and future litigation of the controversy would be likely in the third party's absence. *See* 95 Nev. at 396–97, 594 P.2d at 1163–64. That is the same situation the Secretary faces here. If the Democratic party is unable to sue the Secretary based on any ruling in this litigation, it would "be unable to protect its interest" in seeing that its members' votes are counted and its candidates receive the maximum number of votes possible. *Id.*, 95 Nev. at 397, 594 P.2d at 1164.

Conversely, if the Democratic party *can* sue the Secretary based on any ruling in this litigation to prevent the disenfranchisement of its members and loss of votes for its candidates, the Democratic party must be made a party. *Id.*, 95 Nev. at 396, 95 Nev. at 1163 ("If a defendant before the court may be subject to future litigation, . . . the absent party must be made a party.").

Plaintiffs cite no case that holds otherwise. For instance, their reliance on *Fulani v. MacKay*, No. 06 Civ. 3747 (GBD), 2007 WL 959308 (S.D.N.Y. Mar. 29, 2007) is misplaced. OB at 14. At issue there was an alleged in interest in a general law governing constitution of county committees where no one party was disproportionately impacted, *Fulani*, 2007 WL 959308, at *1, 3, which contrasts starkly with Plaintiffs' purpose through this lawsuit to directly impair Democratic candidates' ability to win elections. And in *Las Vegas Police Protective Association v. Eight Judicial District Court*, 138 Nev. Adv. Op. 59, 515 P.3d 842, 848 (2022), the Court found that an alleged necessary party did not have a valid interest, but Plaintiffs have conceded here that ensuring their candidates receive votes is a protected interest, which is an interest that would apply equally to the Democratic party. *See* OB at 13. If the Court finds that the Organizational Plaintiffs have competitive standing, Plaintiffs' failure to join a Democratic party requires dismissal, and Plaintiffs have not established a likelihood of success on the merits.

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II. Plaintiffs Failed to Show Irreparable Harm

Plaintiffs claim irreparable harm based on (1) the potential loss of an election; and (2) vote dilution. *See* OB at 51–53. Plaintiffs have failed, however, to show any reasonable probability that they will suffer these harms in the absence of an injunction. *See Univ. & Cmty. Coll. Sys. of Nev.*, 120 Nev. at 721, 100 P.3d at 187.

As the district court correctly held, "[b]oth harms depend on the Court finding that counting mail ballots without postmarks violates NRS 293.269921(2)." JA 2 JA000290. But as described above, there is no basis for so finding. Moreover, "Plaintiffs failed to provide admissible evidence to support their allegations of irreparable harm." *Id.* This further precludes any showing of a reasonable probability that they will suffer irreparable harm.

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Regardless, as described above, Plaintiffs do not so much as adequately allege that the potential loss of an election is anything more than speculative. Plaintiffs' supposed interest in accurate vote tallies is also not a cognizable harm. While vote dilution is cognizable as a harm where there are "irrationally favored" voters, such as where voters from one county are disfavored based on malapportionment, *see, e.g.*, *Baker v. Carr*, 369 U.S. 186, 207–08 (1962), a "veritable tsunami of decisions" confirms that vote dilution as alleged here is not cognizable. *O'Rourke v. Dominion Voting Sys. Inc.*, Civil Action No. 20-cv-03747-NRN, 2021 WL 1662742, at *9 (D. Colo. Apr. 28, 2021), *aff'd* No. 21-1161, 2022 WL 1699425

(10th Cir. May 27, 2022); *see also Election Integrity Project Cal., Inc. v. Weber*, No. 23-55726, 2024 WL 3819948, at *6 (9th Cir. Aug. 15, 2024) ("A vote dilution claim requires a showing of *disproportionate* voting power for some voters over others . . . ."); *Wood*, 981 F.3d at 1314–15 (vote dilution where "'no single voter is specifically disadvantaged' if a vote is counted improperly" is "a paradigmatic generalized grievance that cannot support standing"); *Bognet*, 980 F.3d at 359 ("[I]t [does] not follow that every such 'false' or incorrect tally is an injury in fact for purposes of an Equal Protection Clause claim.").

Finally, as the district court explained, "[p]articularly given the very small number of ballots apparently at issue—just 24 in the recent primary election—any possible injury to Plaintiffs is entirely speculative and hypothetical." JA 2 JA000291.

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III. The Public Interest Favors Denying the Preliminary Injunction

The public interest favors "ensuring that the maximum number of legitimate votes are counted." JA 2 JA000291 (citing 52 U.S.C. § 20501(a)(1)–(2) ("The Congress finds that . . . the right of citizens of the United States to vote is a fundamental right [and] it is the duty of the Federal, State, and local governments to promote the exercise of that right . . . .")). Plaintiffs provided no evidence that late-arriving mail ballots without postmarks were not cast by election day. Further, there

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is no public interest in disenfranchising voters, particularly where they followed all legal requirements for casting their mail ballots.

Plaintiffs' arguments that the public interest supports issuance of a preliminary injunction all rely on a finding that non-postmarked mail ballots received after election day cannot be counted. OB at 53–55. However, as the district court held, "the Postmark Provision allows certain mail ballots without postmarks to be counted." JA 2 JA000291. Because the district court rejected Plaintiffs' interpretation of the Postmark Provision, Plaintiffs' public interest arguments all failed, and there was no "reversible error" in the district court's supposedly "circumscribed analysis." OB at 55.

IV. Plaintiffs' Requested Relief Is Barred by the Doctrine of Laches

Although the district court did not reach the argument in its decision, the Government Respondents raised that Plaintiffs' requested relief was precluded by the doctrine of laches,[19] and the Court can affirm on this independent basis.

"Laches is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable." *Miller v. Burk*, 124 Nev. 579, 598, 188 P.3d 1112, 1124 (2008). It can apply to preclude issuance of a preliminary injunction. *Carson City v. Price*, 113 Nev. 409, 411–12,

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[19] JA 1 JA00138–39.

934 P.2d 1042, 1043–44 (1997). And it can apply in the election context, including where there is a request for prospective injunctive relief. *See Miller*, 124 Nev. at 597–99, 188 P.3d at 1124–25 (applying laches to Legislature's challenge to language adopted through initiative petition); *Paher v. Cegavske*, Case No. 3:20-cv-00243-MMD-WGC, 2020 WL 2748301, at *5–6 (D. Nev. May 27, 2020) (applying laches to request for prospective injunctive relief to stop the implementation of an all-mail election).

This Court considers three factors in determining whether to apply laches: "(1) whether the party inexcusably delayed bringing the challenge, (2) whether the party's inexcusable delay constitutes acquiescence to the condition the party is challenging, and (3) whether the inexcusable delay was prejudicial to others." *Miller*, 124 Nev. at 598, 188 P.3d at 1125. In the election context, prejudice to voters warrants application of laches. *See id.*, 124 Nev. at 599, 188 P.3d at 1125 (applying laches where there would be prejudice to voters who had been relying on an approved ballot initiative).

As described above, the Organizational Plaintiffs have known about (and even agreed with) the Secretary's interpretation of the language in NRS 293.269921(2) as requiring the counting of mail ballots without postmarks since 2020 when they litigated the *Cegavske* action. Now, four years later, Plaintiffs sought preliminary

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injunctive relief to prevent the counting of mail ballots without postmarks only four months before the November 5, 2024 general election.

Nevada had a presidential preference primary election on February 6, 2024, NRS 298.650(1), and a primary election on June 11, 2024, NRS 293.175(1). The interpretation that NRS 293.269921(2) includes mail ballots without postmarks has already been in effect for two elections in 2024. Yet Plaintiffs waited until June 4, 2024 to file this action, and another month still, until July 3, 2024, to file their preliminary injunction motion. *See* JA 1 JA00003; JA 1 JA00042. They ask that the Government Respondents change horses midstream and be enjoined from effecting the statutory interpretation that the Organizational Plaintiffs have known about since 2020.

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If Plaintiffs' requested relief is granted, voters may not learn that their mail ballots will be processed differently than in the last two recent 2024 elections. This is information that could impact how a voter decides to vote; voters may rely on mail ballot acceptance rules that have been recently applied and choose to vote by mail, not knowing that their ballot would be rejected if the USPS fails to postmark it. In essence, Plaintiffs' requested relief runs the substantial risk of prejudicing voters who vote by mail. Had Plaintiffs successfully brought their motion before the passage of two elections this year, the Secretary and county clerks could have devoted resources to informing the public that their mail ballot might not be counted,

even if timely cast. The Court should therefore affirm the district court based on Plaintiffs' inexcusable delay.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's order.

Dated this 13th day of September, 2023.

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Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 13th day of September, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing GOVERNMENT RESPONDENTS' ANSWERING BRIEF in accordance with this Court's electronic filing system and consistent with NEFCR 9 on this 13th day of September, 2024.

Participants in the case who are registered with this Court's electronic filing system will receive notice that the document has been filed and is available on the court's electronic filing system.

<u>/s/ Aaron D. Van Sickle</u>
AG Legal Secretary

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