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FIRST JUDICIAL DISTRICT COURT
IN AND FOR CARSON CITY, STATE OF NEVADA

REPUBLICAN NATIONAL COMMITTEE; NEVADA REPUBLICAN PARTY; DONALD J. TRUMP FOR PRESIDENT 2024, INC.; SCOTT JOHNSTON,

Plaintiffs,

v.

FRANCISCO AGUILAR, in his official capacity as Nevada Secretary of State; State of NEVADA; CARI-ANN BURGESS, in her official capacity as the Washoe County Registrar of Voters; JAN GALASSINI, in her official capacity as the Washoe County Clerk; LORENA PORTILLO, in her official capacity as the Clark County Registrar of Voters; LYNN MARIE GOYA, in her official capacity as the Clark County Clerk,

Defendants,

and

VET VOICE FOUNDATION; NEVADA ALLIANCE FOR RETIRED AMERICANS,

Intervenor-Defendants

Case No.: 24 OC 00101 1B
Dept. No.: 1

MOTION TO DISMISS AMENDED COMPLAINT

Pursuant to Nevada Rule of Civil Procedure 12(b)(1) and (5), Intervenor-Defendants Vet Voice Foundation and the Nevada Alliance for Retired Americans hereby submit this motion to dismiss Plaintiffs' Amended Complaint in the above-titled action.[1]

This Motion is based on the Memorandum of Points and Authorities below, all papers and pleadings on file, and any oral argument this Court sees fit to allow at the hearing on this matter.

DATED this 16th day of July, 2024.

By: _____

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[1] Intervenor-Defendants' motion to dismiss Plaintiffs' original complaint, filed on July 8, 2024, was mooted by the filing of Plaintiffs' Amended Complaint on July 3, 2024. Intervenor-Defendants received service of the Amended Complaint only after the filing of their first motion to dismiss.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs' Amended Complaint asks the Court to impose an arbitrary distinction between two categories of postal service errors affecting mail ballot return envelopes: envelopes with postmarks that lack a legible postmark date, and envelopes that lack a visible postmark at all. Nevada law requires mail ballots returned by mail to be "[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." NRS 293.269921(1)(b). But Nevada law also recognizes that sometimes "the date of the postmark cannot be determined," and provides that in those cases, the ballot "shall be deemed to have been postmarked on or before the day of the election" so long as it is delivered by "5 p.m. on the third day following the election." NRS 293.269921(2). Plaintiffs ask the Court to hold that this provision applies only if there is a visible postmark without a date, and not if there is no visible postmark at all. There is no basis in Nevada law for that distinction, and Plaintiffs lack standing to ask for it. The Court should dismiss the Amended Complaint.

BACKGROUND

Nevada voters can return mail ballots by hand to their county clerk, via a designated drop box, or by mail. NRS 293.269921(1). Ballots returned by mail must be: "(1) [p]ostmarked on or before the day of the election; and (2) [r]eceived by the clerk not later than 5 p.m. on the fourth day following the election." NRS 293.269921(1)(b). Nevada law also recognizes, however, that for some ballots returned by mail, "the date of the postmark cannot be determined." NRS 293.269921(2). In such cases, "[i]f a mail ballot is received by mail not later than 5 p.m. on the third day following the election, . . . the mail ballot shall be deemed to have been postmarked on or before the day of the election." *Id.*

Plaintiffs—the Republican National Committee, the Nevada Republican Party, Donald Trump's 2024 political campaign committee, and an individual voter—challenge guidance by the Secretary of State advising that NRS 293.269921(2) applies to ballots received by mail that lack any visible postmark, as well as those with a visible postmark but no legible date. Am. Compl. ¶¶ 5, 43. They allege that the guidance is contrary to statute because, according to Plaintiffs, the

provision "does not apply when the mail ballot envelope lacks any postmark whatsoever." *Id.* ¶ 55. They also allege that the Secretary's guidance constitutes "ad hoc" rulemaking in violation of the procedural requirements of the APA. *Id.* ¶¶ 95–105. They seek a permanent injunction prohibiting election officials from counting ballots received by mail after election day with no visible postmark. *Id.* at ¶¶ 86–94.

STANDARD OF LAW

A motion to dismiss under NRCP 12(b)(1) attacks the court's subject-matter jurisdiction based on "the face of the pleading." *Girola v. Roussille*, 81 Nev. 661, 663, 408 P.2d 918, 919 (1965). A plaintiff's standing to bring the underlying claims affects the court's subject matter jurisdiction. *Cotter ex rel. Reading Int'l, Inc. v. Kane*, 136 Nev. 559, 564, 473 P.3d 451, 455 (2020).

A motion to dismiss under NRCP 12(b)(5) for failure to state a claim should be granted "if it appears beyond a doubt that [the plaintiff] could prove no set of facts" that, if true, would entitle the plaintiff to relief as a matter of law. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). Courts considering dismissal under NRCP 12(b)(5) may "take into account matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint." *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).

ARGUMENT

I. Plaintiffs lack standing.

Plaintiffs lack standing because they have failed to adequately allege that they have suffered a concrete and particularized injury in fact. *Nat'l Ass'n of Mut. Ins. Cos. v. Dep't of Bus. & Indus., Div. of Ins.*, 524 P.3d 470, 476 (Nev. 2023) ("*NAMIC*"). They assert three theories of standing: organizational injury based on a diversion of resources, a competitive injury to their candidates' electoral prospects, and vote dilution. None suffices.

First, Plaintiffs do not show that the "challenged conduct frustrated their organizational missions" and that "they diverted resources to combat that conduct." *Friends of the Earth v.*

Sanderson Farms, Inc., 992 F.3d 939, 942 (9th Cir. 2021). Plaintiffs baldly allege that counting ballots without visible postmarks will require them to "divert more time and money to post-election mail ballot activities." Am. Compl. ¶ 66. But there are no facts behind that conclusory assertion, and the assertion makes little sense. Whether a mail ballot fails to get visibly postmarked is an essentially random contingency that turns on postal service procedures. There is nothing Plaintiffs, or voters, could do to cause, prevent, or respond to the fact that ballots affected by such random errors will get counted. Plaintiffs report that regardless of whether ballots without visible postmarks are counted they devote "significant resources" to mail-ballot related activities including "monitoring the processing and counting of mail ballots." *Id.* ¶ 18. Regardless of what happens in this case, mail ballots will be a central component of Nevada elections, and many of them will be counted after election day. Plaintiffs fail to allege any basis for concluding that any of their election activities are specifically attributable to ballots that arrive without a postmark.

Second, Plaintiffs lack standing based on threatened harm to their electoral prospects or those of their candidates. To invoke "competitive standing," a candidate must "make [a] showing of 'an unfair advantage in the election process.'" *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993, 1003 (D. Nev. 2020) (quoting *Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011)). But the challenged guidance applies equally to *all* candidates and to *all* voters, so no one "is specifically disadvantaged" by it." *Bost v. Ill. State Bd. of Elections*, 684 F. Supp. 3d 720, 737–38 (N.D. Ill. 2023) (quoting *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020)); *see also Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 351 (3d Cir. 2020) (noting "all candidates in Pennsylvania, including Bognet's opponent, are subject to the same rules").

Counting ballots in accordance with NRS 293.269921 therefore does not threaten Plaintiffs with any "harms that are unique from their electoral opponents." *Cegavske*, 488 F. Supp. 3d at 1003. The voters that support Plaintiffs stand to benefit as much as those who oppose them. Intervenors are unaware of any case in which a court found that it had jurisdiction because a plaintiff thought that *throwing out ballots cast by qualified voters* would likely hurt their opponent more than them. As the Third Circuit observed in *Bognet*, is it not clear "how counting *more* timely

cast votes would lead to a *less* competitive race." 980 F.3d at 351. And Plaintiffs' claim that many Democratic voters across the country vote by mail and may do so closer to election day, Am. Compl. ¶¶ 71–75, does not demonstrate that the postmark guidance threatens Plaintiffs' electoral prospects through any "unfair advantage" or "harms that are unique from their electoral opponents." *Cegavske*, 488 F. Supp. 3d at 1003. Further, any "lead" before all valid ballots are counted, Am. Compl. ¶¶ 74, 76 is an arbitrary consequence of the order in which ballots are processed. Unlike a game of musical chairs, where the winner is whoever happens to be sitting when the music stops, American elections end when all the ballots are counted.

Third, Plaintiffs lack standing based on their assertion that counting ballots without a visible postmark "dilutes the weight of timely, valid ballots." Am. Compl. ¶¶ 67–71. This exact theory has been rejected by a "veritable tsunami" of decisions that have considered it, *O'Rourke v. Dominion Voting Sys. Inc.*, No. 20-CV-03747-NRN, 2021 WL 1662742, at *9 (D. Colo. Apr. 28, 2021) (collecting cases); *see also Paher v. Cegavske*, 457 F. Supp. 3d 919, 926 (D. Nev. 2020); *Bost*, 684 F. Supp. 3d at 731–33; *Bognet*, 980 F.3d at 356–60. Any purported injury in this form is a prototypical generalized grievance. If Plaintiffs' votes are "diluted" when ballots without visible postmarks are counted, then so too are the votes of every other voter in the state. Such a generalized grievance is not the sort of "personal stake" required to confer standing. *NAMIC*, 524 P.3d at 477; *see also Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016) (holding "a party must show a personal injury and not merely a general interest that is common to all members of the public"); *Bost*, 684 F. Supp. 3d at 730, 733 (finding plaintiffs alleging same injuries lacked standing and noting that "[c]ourts faced with similar allegations have rejected plaintiffs' claims that they possessed standing").

Numerous plaintiffs attempted to secure federal jurisdiction under this very theory in litigation during and after the 2020 elections, without success, with courts uniformly finding that this type of "vote dilution argument fell into the 'generalized grievance' category." *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 608 (E.D. Wis. 2020); *see also Wood*, 981 F.3d at 1314–15 ("'[N]o single voter is specifically disadvantaged' if a vote is counted improperly, even if the

error might have a 'mathematical impact on the final tally and thus on the proportional effect of every vote.'" (quoting *Bognet*, 980 F.3d at 356)); *O'Rourke*, 2021 WL 1662742, at *6–9 (collecting over a dozen decisions from 2020 election cycle rejecting vote dilution theory). Here in Nevada, the federal district court rejected this "vote dilution" theory because "Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud" is neither concrete nor particularized to them; it "may be conceivably raised by any Nevada voter." *See Paher*, 457 F. Supp. 3d at 926. The same is true here.

With Plaintiffs' organizational, associational, and vote dilution injuries inadequate, all that is left is Plaintiffs' bare assertion that counting ballots that lack a postmark violates Nevada law. *See, e.g.*, Am. Compl. ¶¶ 3, 85, 87. Plaintiffs claim that they should not have to conform their behavior to an allegedly invalid guidance, *id.* ¶¶ 15, 66, or that their candidates' electoral prospects are harmed and their votes are diluted by the counting of allegedly invalid ballots because of the challenged law, *id.* ¶¶ 65–78. But a claim that "the law . . . has not been followed" is a "generalized grievance about the conduct of government" that is insufficient to show standing. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam); *see also Allen v. Wright*, 468 U.S. 737, 754 (1984) ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction."). For this reason, courts have repeatedly found similar plaintiffs lacked standing to pursue similar challenges based on similar theories of injury. *See Bognet*, 980 F.3d at 349; *Bost*, 684 F. Supp. 3d at 731–34. Plaintiffs provide no reason for this Court to find otherwise.

II. The Secretary's interpretation of the statute is correct.

Plaintiffs also fail to state a claim for which relief can be granted. Their claim depends on reading NRS 293.269921(2) to create an arbitrary distinction between ballots that have a visible postmark but no legible date and ballots that have no visible postmark at all, in contrast to the statute's plain terms, which apply to *all* ballots for which "the date of the postmark cannot be determined." NRS 293.269921(2). "In interpreting a statute, this court looks to the plain language of the statute and, if that language is clear, this court does not go beyond it. But when a statute is

susceptible to more than one reasonable interpretation, it is ambiguous, and this court must resolve that ambiguity by looking to the statute's legislative history and construing the statute in a manner that conforms to reason and public policy." *Valenti v. State, Dep't of Motor Vehicles*, 131 Nev. 875, 879, 362 P.3d 83, 85 (2015) (citations omitted). Plaintiffs' strained interpretation of NRS 293.269921 cannot be squared with the statute's plain text, evident purpose, or legislative history. The Court should reject it.

A. The statute's plain text does not make the distinction Plaintiffs assert.

Nothing in the text of NRS 293.269921 supports Plaintiffs' effort to distinguish between ballots with a visible postmark but no legible date and ballots with no visible postmark at all. The provision applies *whenever* "a mail ballot is 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." NRS 293.269921(2). The provision is not limited to particular *reasons* why the "date of the postmark cannot be determined," and it nowhere requires that there be a visible postmark on the ballot envelope. When a statute imposes a particular set of requirements, courts may not add additional requirements that the Legislature declined to impose. *See Dep't of Tax'n v. DaimlerChrysler Servs, N. Am., LLC*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005) ("Nevada law also provides that omissions of subject matters from statutory provisions are presumed to have been intentional."); *City of Reno v. Yturbide*, 135 Nev. 113, 115–16 (2019) ("Where the language of the statute is plain and unambiguous, a court should not add to or alter the language to accomplish a purpose not on the face of the statute or apparent from permissible extrinsic aids such as legislative history or committee reports." (cleaned up)). Yet that is what Plaintiffs ask the Court to do in demanding that only ballots with a visible postmark can be counted under this provision.

The structure of NRS 293.269921 reinforces the conclusion that no visible postmark is required for subsection 2 to apply. NRS 293.269921 carefully articulates two sets of rules for counting ballots delivered by mail to election officials. The first, in subsection (1), applies to ballots whose postmark dates *can* be determined. Such ballots may be counted only if they are postmarked on or before election day and received by 5 p.m. on the fourth day after election day.

The second, in subsection (2), applies where the date of the postmark *cannot* be determined. Such ballots may be counted only if they are received by 5 p.m. on the third day after election day. These two subsections are plainly intended to cover all ballots delivered to election officials by mail: those with determinable postmark dates, and those without. There is no third set of rules. Plaintiffs' argument would require the Court to conclude that the statute implicitly demands that election officials reject ballots with no visible postmark at all, even though no provision in the statute addresses that specific category of ballots, as distinct from the broader set of all ballots for which a postmark date cannot be determined, much less requires that such ballots be rejected where the broader set would be accepted.

Thus, Plaintiffs' argument would insert words into the statute that are not there. But the court must "look to the statute's plain language" to "ascertain the Legislature's intent." *Williams v. State Dep't of Corr.*, 133 Nev. 594, 596, 402 P.3d 1260, 1262 (2017). If the Legislature intended to demand that ballots without visible postmarks be rejected, it could easily have said so. Because "the statute's language is clear and unambiguous," the Court must "enforce the statute as written." *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 180 (2011).

Moreover, while Plaintiffs' complaint specifically targets ballots arriving after election day, their argument would lead to absurd results, putting *any* ballot that arrives in the mail at the county clerk's office without a visible postmark at risk of rejection, even if it arrives before or on election day. Subsection 1 allows for the counting of "[p]ostmarked" ballots. NRS 293.269921(1)(b)(1). It is NRS 293.269921(2) that explicitly provides for ballots without a visible postmark or legible postmark to be counted, with the only temporal limitation being the three-day post-election deadline. Yet even Plaintiffs implicitly acknowledge that rejecting such ballots that arrive by election day would be untenable: their requested relief reflects as much—they ask the Court to order that election officials throw out only ballots that arrive after election day without a visible postmark. Am. Compl. ¶ 85. But this distinction between ballots that arrive before and after election day appears nowhere in the text and would require the Court to read in language that is not there.

B. Legislative history confirms the error in Plaintiffs' interpretation.

The legislative history of NRS 293.269921 confirms the Secretary's plain text interpretation. The Nevada Supreme Court "determines the Legislature's intent by evaluating the legislative history and construing the statute in a manner that conforms to reason and public policy." *A.J. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 133 Nev. 202, 207, 394 P.3d 1209, 1214 (2017) (internal quotation marks omitted). Here, the Legislature explicitly considered the very interpretive question at issue, and the bill's sponsor directly confirmed what is apparent from the face of the statute: NRS 293.269921(2) applies equally to mail ballots lacking a postmark as to those with illegible postmarks. During debate on A.B. 321, the bill that enacted NRS 293.269921, the bill's sponsor, then-Speaker Frierson, was asked by Assemblyman Matthews: "I am wondering why you believe it is good policy for us to accept mail ballots where the postmark date cannot be determined, and I am wondering if we know how often that happens where a ballot comes back *without a postmark date*." Minutes of the Meeting of the Assemb. Comm. on Legislative Operations & Elections, 2021 Leg., 81st Session 20–21 (Nev. Apr. 1, 2021) (statement of Andy Matthews, Nev. Assemb.) https://www.leg.state.nv.us/Session/81st2021/Minutes/Assembly/LOE/Final/663.pdf (emphasis added). Speaker Frierson responded: "To the extent that there were 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." *Id.* at 21 (emphasis added).

It was thus the explicit intent of the Legislature in enacting NRS 293.269921(2) that ballots lacking a visible postmark would be counted if they arrived within three days of election day, just the same as ballots with an illegible or smudged postmark. Even in the absence of the clear textual indications described above, Speaker Frierson's clear declaration would be enough to end this case. "[E]ven the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." *A.J.*, 133 Nev. at 206, 394 P.3d at 1213 (quoting *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974)).

C. Public policy does not support Plaintiffs' interpretation.

The Secretary's interpretation also "conforms to reason and public policy," *Great Basin Water Network v. Taylor*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010), while Plaintiffs' interpretation defies common sense. NRS 293.269921 is designed to ensure that timely-cast ballots are not discarded due to circumstances—such as the smudging or omission of a postmark—that are entirely outside the voter's control. This rationale applies equally to ballots with no visible postmark as to ballots with illegible postmark dates. There is simply no rational reason to distinguish the two. An illegible postmark provides election officials with no additional information that a ballot delivered by mail without a visible postmark lacks.

Plaintiffs' interpretation, on the other hand, would lead to absurd—and potentially unconstitutional—results. As one federal court has explained, a state may not "disenfranchise[] voters who *do* meet the deadlines imposed by state law by invalidating their ballots that, through no fault of their own, are not postmarked and are delivered two or more days after Election Day." *DCCC v. Kosinski*, 614 F. Supp. 3d 20, 56–57 (S.D.N.Y. 2022); *see also Gallagher v. N.Y. State Bd. of Elections*, 477 F. Supp. 3d 19, 44 (S.D.N.Y. 2020) (similar). The Legislature could not have intended such arbitrary disenfranchisement. *See Tate v. State, Bd. of Medical Examiners*, 131 Nev. 675, 678, 356 P.3d 506, 508 (2015) ("Statutes should be construed so as to avoid absurd results."). "[W]hen 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. in & for Cnty. of Clark*, 134 Nev. 330, 333, 419 P.3d 136, 139 (2018) (quoting *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018)). The Secretary's interpretation is the only one that avoids these serious constitutional problems and "conforms to reason and public policy." *Valenti*, 131 Nev. at 879, 362 P.3d at 85.

III. The Secretary's interpretation is not subject to the Nevada Administrative Procedure Act.

Plaintiffs' procedural claim under the APA also fails because the Secretary's Memorandum is not a regulation. It is instead an interpretation that the Secretary has statutory authority to issue,

and therefore is not subject to the APA's procedural requirements. "When an agency's action is challenged as violating the APA's notice and hearing requirements, it must be determined whether the agency engaged in rulemaking, such that the APA's safeguards for promulgating regulations apply[.]" *Labor Comm'r of State of Nev. v. Littlefield*, 123 Nev. 35, 39, 153 P.3d 26, 29 (2007). An agency engages in "rulemaking" only when it "promulgates, amends, or repeals an agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure, or practice requirements of any agency," *Id.* at 39–40, 153 P.3d at 29 (cleaned up). The APA's statutory definition of "regulation" explicitly excludes "an interpretation of an agency that has statutory authority to issue [such] interpretations," NRS 233B.038(2)(h). The Secretary has statutory authority 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." NRS 293.247(4). Such "interpretations" therefore are not "regulations," which the Secretary is separately authorized to promulgate under a different subsection, NRS 293.247(1). *See Nev. State Democratic Party v. Nev. Republican Party*, 256 P.3d 1, 6-7 (Nev. 2011) (explaining the distinction between a "regulation" and an "interpretation").

The May 29 Memorandum states that it is being "provided for consistent and clear *guidance* regarding the *interpretation* of NRS 293.269921(2)." Am. Compl. Ex. 1 at 1 (emphasis added). It does nothing more than set forth the Secretary's (correct) interpretation of NRS 293.269921(2). And by explaining that the Secretary intends that the "guidance be submitted as a regulation following the conclusion of the 2024 election cycle" the Memorandum makes clear that it is currently *not* a regulation. *See id.* at 2. The procedural rulemaking requirements of the APA do not apply. *Littlefield*, 123 Nev. at 39, 153 P.3d at 29.

CONCLUSION

The Court should dismiss Plaintiffs' Amended Complaint in its entirety for lack of jurisdiction or, alternatively, failure to state a claim.

AFFIRMATION

Pursuant to NRS 239B.030 and 603A.040, the undersigned does hereby affirm that this document does not contain the personal information of any person.

DATED this 16th day of July 2024.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July 2024, a true and correct copy of **MOTION TO DISMISS AMENDED COMPLAINT** was served by depositing a true copy of the same via U.S.P.S. Mail postage pre-paid Las Vegas, Nevada and via electronic mail as follows:

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