No. 24-5071

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPUBLICAN NATIONAL COMMITTEE, et al.,
Plaintiffs/Appellants,

v.

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

VET VOICE FOUNDATION, et al.,
Intervenor-Defendants/Appellees.

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

DEFENDANTS/APPELLEES' ANSWERING BRIEF

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Defendants-Appellees ("Defendants") Francisco Aguilar, in his official capacity as Nevada Secretary of State ("Secretary"), Andrew McDonald, in his official capacity as the Washoe County Registrar of Voters,[1] Jan Galassini, in her official capacity as the Washoe County Clerk (together with McDonald, the "Washoe County Defendants-Appellees"), 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 Defendants-Appellees") submit this Answering Brief pursuant to Federal Rule of Appellate Procedure 28.

ISSUES PRESENTED

1. Did the district court properly dismiss Plaintiffs-Appellants' ("Plaintiffs")[2] Complaint because the RNC and NVGOP failed to establish standing based on theories of (1) a diversion of resources; (2) competitive injury; and (3) associational standing?

2. Are the RNC and NVGOP precluded from re-litigating standing?

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[1] Andrew McDonald has replaced Cari-Ann Burgess as the Washoe County Registrar of Voters and is therefore automatically substituted as a party. Fed. R. App. P. 43(c)(2).

[2] Plaintiffs are the Republican National Committee ("RNC"),Nevada Republican Party ("NVGOP"), Donald J. Trump for President 2024, Inc. ("Trump Campaign"), and Donald J. Szymanski.

3. Did Congress's selection of a uniform federal election day implicitly establish a requirement that all ballots be received by an election official by the close of the polls, or did Congress's silence as to the deadline for receipt by an election official leave this matter to the states, so long as voters' choices are final on election day?

4. Did the district court properly dismiss Plaintiffs' Complaint without granting leave to amend?

ADDENDUM TO BRIEF

Pertinent Nevada constitutional provisions, statutes, and ordinances are contained in the addendum included with this brief.

STATEMENT OF JURISDICTION

Defendants agree with Plaintiffs' jurisdictional statement.

STATEMENT OF THE CASE

I. The Election Day Statutes

Between 1845 and 1914, Congress adopted the election day statutes at issue in this case, setting a single day for federal elections. *See* 2 U.S.C. § 1 (date for election of Senators); 2 U.S.C. § 7 (date for election of Representatives); 3 U.S.C. § 1 (date for election of Presidential Electors). Until the mid-1800s, states held their popular elections for federal offices on different days. Congress, however, developed two concerns with this state of affairs: first, voters in later-voting states often learned results from earlier-voting states before their own elections, leading to

a "distortion of the voting process." *Foster v. Love*, 522 U.S. 67, 73 (1997). Second, the system burdened some voters, who had to turn out on two separate days to vote in federal elections. *Id.* at 73–74 (citing Cong. Globe, 42d Cong., 2d Sess., 141 (1871) (remarks of Rep. Butler)). As a result, drawing on its authority under the U.S. Constitution's Electors Clause, Congress passed the first of the election day statutes, setting a single, nationwide date for election of presidential electors. *Act of Jan. 23, 1845, ch. 1, 5 Stat. 721* ("[E]lectors of President and Vice President shall be appointed in each State on the Tuesday next after the first Monday in the month of November of the year in which they are to be appointed . . . ."); U.S. Const. Art. II, § 1.

In 1872, Congress similarly imposed the same election day for members of the House of Representatives under its Elections Clause power. Act of Feb. 2, 1872, ch. 11, § 3, 17 Stat. 28 ("[T]he Tuesday next after the first Monday in November, in every second year [after 1876], is hereby fixed and established as the day for the election, in each of said States and Territories, of Representatives and Delegates to the Congress . . . ."); U.S. Const. Art. I, § 4. And, after ratification of the Seventeenth Amendment, it did the same for the election of Senators. Act of June 4, 1914, ch. 103, § 1, 38 Stat. 384 ("[A]t the regular election held in any State next preceding the expiration of the term for which any Senator was elected . . . , at

which election a Representative to Congress is regularly by law to be chosen, a United States Senator from such State shall be elected by the people thereof . . . .").

II. Absent Voting Laws When the Election Day Statutes Were Adopted

Early in this same period, with the Civil War raging, Nevada, the Battle Born State, gained statehood. From its earliest days as a state, Nevada has permitted some voters to vote outside the state and have their ballots mailed to, and counted by, their local election officials after election day. Nevada's first constitution, adopted in 1864, permitted voting by soldiers outside the state, and an election ordinance promulgated alongside the state constitution set out the process for doing so. Nev. Const. Art. II, § 3 (1864); Nev. Election Ordinance § 9 (1864). Specifically, on election day, a ballot box "or suitable receptacle for votes, shall be opened under the immediate charge and direction of three of the highest officers in command." Nev. Election Ordinance § 9 (1864). Soldiers put their ballots in the receptacle, and the commanding officer was then charged with sending the ballots to Nevada's governor, "by mail or otherwise," following the election. *Id.* § 11. Shortly afterwards, Nevada's Legislature adopted substantially this process in legislation. 1866 Nev. Stats., 215. Nevada re-adopted similar provisions in 1899 and 1917. 1899 Nev. Stats., 109–10; 1917 Nev. Stats., 385–86.

Nevada was not alone in this practice. During the Civil War, many other states permitted soldiers in the field to vote outside their home states and precincts.

While the methods varied, several states allowed ballots to be cast in the field and sent back to the state after election day for inclusion in the canvass. *E.g.*, Nev. Election Ordinance §§ 9, 11; Josiah Henry Benton, *Voting in the Field*, 186–87 (1915), http://bit.ly/3TOWdYl (Rhode Island). These laws also recognized the reality that it would take time after election day for local election officials to receive these ballots. For example, in Maryland, results were expressly delayed for fifteen days to allow soldiers' votes to return from the field. Maryland Const. Art. XII, §§ 11–16 (1864)[3].

While some states that permitted this sort of absentee voting designated officials in the field as election officers, or sent election officials into the field themselves, others did not. Nevada's law, for example, simply relied on officers in the field to facilitate the vote and convey the election materials to the appropriate election official for canvass. 1866 Nev. Stats., 215; *see also* Cal. Stats. 1863-64, 279–83[4]. In some states, the fact that these laws called for the involvement of military authorities who had no civil role occasioned significant dispute—and, in at least one case, a finding that the law was unconstitutional under the state constitution. *See, e.g.*, *Chase v. Miller*, 41 Pa. 403, 427 (1862).

[3] *Available at* https://tinyurl.com/2fse4zmr.
[4] *Available at* https://tinyurl.com/48nrnr4t.

III. Absent Voting Laws Today

Since the end of the Civil War, states have consistently expanded absentee voting, including voting by mail. Currently, all states allow at least some people to vote by mail, and the vast majority make voting by mail available to all voters. Ctr. for Election Innovation & Rsch., Options to Vote Before Election Day, 2000–2024 (July 2024), https://electioninnovation.org/research/expansion-voting-before-election-day/. Of these, more than twenty states and territories permit election officials to count ballots that are cast on or before election day but received after election day. *See, e.g.*, Nat'l Conf. of State Legislatures, Table 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots (June 12, 2024), https://www.ncsl.org/elections-and-campaigns/table-11-receipt-and-postmark-deadlines-for-absentee-mail-ballots. As described below, Nevada has followed a similar path.

IV. Voting in Nevada

In 2020, in the wake of the COVID-19 pandemic, Nevada conducted its first emergency all-mail ballot general election.[5] *See* Assembly Bill 4, Nev. 32nd Special Sess. ("AB 4"), §§ 8(1), 20(1)(b), 20(2) (2020)[6]. For voters choosing to vote by mail, the Nevada Legislature required that mail ballots be mailed by election day but provided for mail ballots to be counted only if (1) they were postmarked by election

[5] An "all-mail ballot" state sends all active voters a mail ballot, though voters generally may still vote in person.

[6] *Available at* https://tinyurl.com/4cte7rwv.

day and received within seven days after election day; or (2) they did not have an identifiable postmark but were received within three days after election day based on the presumption that they were mailed by election day. *See id.* § 20.

In 2021, Nevada joined the many states that encourage voter participation through a permanent all-mail ballot system. Assembly Bill 321, Nev. 81st Sess., §§ 3–17, 51–63 (2021). The Legislature has continued to allow the counting of mail ballots arriving after election day so long as they were mailed by election day and (1) they were postmarked by election day and received within four days after election day; or (2) they did not have an identifiable postmark but were received within three days after election day. Nev. Rev. Stat. ("NRS") 293.269921(1)–(2).

Today, Nevada voters use two primary methods to vote. First, voters can vote in person early or on election day. *See* NRS 293.3072, 293.3564. This is true even if they have not registered to vote beforehand; a Nevada voter can register and vote in person up to and including on election day. NRS 293.5842, 293.5847. Second, all active registered voters generally receive a mail ballot between 45 and 14 days before an election. *See* NRS 293.269911(1), 293.269911(3)(b), 293.269911(5)(a); NRS 293D.320(1). Voters can then deliver their mail ballots to a county clerk or a drop box by election day, or they can mail their ballot by election day. NRS 293.269921(1). Voters can also have someone else deliver their mail

ballots to a county clerk or drop box or mail it for them by election day. NRS 293.269923(1).

Between 15 days before an election and up to seven days following an election, counties may count mail ballots. *See* NRS 293.269931(1). The period after election day to count mail ballots accounts for, among other things, potentially high volumes of ballots to count and the fact that mail ballots can be cured up to six days after an election if they, for example, lack signatures. NRS 293.269927(6).

V. Prior Lawsuit

In 2020, Donald J. Trump for President, Inc., the RNC, and the NVGOP sued then Nevada Secretary of State Barabra K. Cegavske in the U.S. District Court for the District of Nevada in connection with the implementation of AB 4. *See* Am. Compl. for Decl. and Inj. Relief, *Donald J. Trump for President, Inc. v. Cegavske*, Case No. 2:20-cv-01445-JCM-VCF (D. Nev. Aug. 20, 2020), ECF No. 29 ("Cegavske Amended Complaint"). As described above, AB 4 included nearly identical mail ballot receipt deadlines. AB 4 §§ 20(1)–(2).

The plaintiffs in the 2020 action claimed, among other things, that AB 4 §§ 20(1)(b) and 20(2) "require[d] counties to accept and count ballots received after Election Day—including ballots that may have been mailed after Election Day," in violation of the right to vote. *See* Cegavske Am. Compl. ¶ 167. Secretary Cegavske moved to dismiss, and the court granted dismissal 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).

VI. This Lawsuit

Plaintiffs assert three claims challenging Nevada's laws providing for the counting of mail ballots mailed by election day but received up to four days after election day. *See* ER-21; ER-32–34. They request a declaratory judgment and injunctive relief. ER-35.

Defendants and the Intervenor-Appellees moved to dismiss Plaintiffs' Complaint based on lack of subject-matter jurisdiction and for failure to state a claim. *See generally* Intervenor-Defs.' Mot. to Dismiss Pls.' Compl., *RNC v. Burgess*, Case No. 3:24-cv-00198-MMD-CLB, ECF No. 59 (D. Nev. May 30, 2024); Def. Sec'y of State's Mot. to Dismiss, *RNC v. Burgess*, Case No. 3:24-cv-00198-MMD-CLB, ECF No. 60 (D. Nev. May 30, 2024); Intervenor-Defs.' Mot. to Dismiss, *RNC v. Burgess*, Case No. 3:24-cv-00198-MMD-CLB, ECF No. 71 (D. Nev. May 30, 2024). The district court granted dismissal based on Plaintiffs' lack of standing. ER-4–18.

STANDARD OF REVIEW

This Court reviews a district court's grant of a motion to dismiss for lack of standing de novo. *Mont. Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 979 (9th Cir. 2013). Dismissal is warranted if the complaint's jurisdictional or

merits-based factual matter does not "state a claim to relief that is plausible on its face." *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012). The Court may affirm the district court's decision on any ground supported by the record, even if the district court relied on different grounds or reasoning. *See Jones v. Allison*, 9 F.4th 1136, 1139 (9th Cir. 2021); *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998).

SUMMARY OF THE ARGUMENT

Plaintiffs seek to enjoin the counting of mail ballots received by mail shortly after election day. This isn't the first time they have tried to do so. The organizational Plaintiffs sued the Nevada Secretary of State in 2020 challenging the counting of mail ballots received after election day, and lost because they did not have standing. Undeterred, they are trying again now. But the 2020 decision precludes them from re-litigating standing, and the district court's decision should be affirmed.

Even if issue preclusion doesn't apply, Plaintiffs do not have standing, as the district court here (and the district court in 2020) correctly concluded. Plaintiffs' appeal concerns the standing of only the RNC and NVGOP. Each of their various theories of standing for those Plaintiffs fails to pass muster.

First, Plaintiffs do not grapple with the requirements for pleading competitive standing and try to expand it in untenable ways. Their arguments would require the

Court to accept that cognizable injuries can be based on any generalized illegality in a competitive environment or on any speculative new competitive tactics that a competitor would have to anticipate. None of this Court's competitive standing precedents in the elections context applies such boundless theories. At bottom, Plaintiffs' competitive standing theory fails because they do not adequately allege that they could potentially lose an election because of the mail ballot receipt deadlines, or that the facially neutral, equally available voting opportunities create any cognizable disadvantage.

Second, Plaintiffs claim that their pre-existing activities relating to in-person voter turnout efforts and election integrity are directly injured by the mail ballot receipt deadlines because they must divert resources to mail ballot chase programs and post-election ballot processing observation activities. The mail ballot receipt deadlines, however, have no impact on Plaintiffs' pre-existing activities, apart from their purported decision to divert some amount of money away from them in response to the deadlines. That is not enough to constitute an injury in fact.

Third, Plaintiffs posit standing based on an interest in an accurate vote tally. All voters and candidates would have such an interest, and without more, it is too generalized to confer standing.

In addition to Plaintiffs' failure to establish standing, dismissal should be affirmed because Plaintiffs' claim that the mail ballot receipt deadlines are unlawful

fails as a matter of law. Federal law does not preempt a state from extending the deadline to receive and count mail ballots cast by election day but received shortly thereafter. Congress has never indicated any intention of preempting such laws. Nor do the statutory text, historical background, or purpose of the federal election day statutes indicate an intention to require all ballots to be received by election day. Setting a ballot receipt deadline shortly after election day is well within a state's purview to regulate the mechanics of elections.

ARGUMENT

I. Plaintiffs Do Not Have Standing

To establish the irreducible constitutional minimum of standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). The injury in fact must be "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 339 (citation omitted).

None of the RNC or NVGOP's remaining[7] alleged bases for standing suffices. As a preliminary matter, a federal court has already rejected these bases in a case

[7] On appeal, Plaintiffs do not contest the district court's holding that the individual plaintiff does not have standing, and they concede that the Trump Campaign no longer has a cognizable injury. *See* Opening Br. ("OB") at 14 n.2.

challenging Nevada's laws allowing mail ballots received shortly after election day to be counted. And though Plaintiffs raise a variety of speculative harms on appeal—including competitive injuries, harm to pre-existing core activities due to diverted resources, and a generalized interest in the vote tally on behalf of their candidates—none meets the requirements of concreteness, particularization, traceability, and redressability. As a result, Plaintiffs fail to meet Article III's standards.

A. The RNC and NVGOP Are Precluded from Re-Litigating Standing to Challenge the Mail Ballot Receipt Deadlines

Although the district court did not reach whether the RNC and NVGOP are precluded from re-litigating standing,[8] the Court may affirm on the independent basis that issue preclusion bars their attempt in this lawsuit to again argue that they have standing.

Issue preclusion applies where: "(1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (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). The doctrine further applies where a case is dismissed for lack of

[8] The Secretary argued in his motion to dismiss that the RNC and NVGOP are precluded from re-litigating standing. Def. Sec'y of State's Mot. to Dismiss at 7–8, *RNC v. Burgess*, Case No. 3:24-cv-00198-MMD-CLB, ECF No. 60 (D. Nev. May 30, 2024).

standing, even if the standing decision was erroneous. *Love v. Villacana*, 73 F.4th 751, 755 (9th Cir. 2023). All four issue preclusion factors are met here.

The RNC and NVGOP already litigated the identical issue of standing to challenge Nevada's laws allowing the counting of mail ballots received after election day in the 2020 *Cegavske* case.[9] *See generally Cegavske*, 488 F. Supp. 3d 993. The RNC and NVGOP argued, and the *Cegavske* court declined to find, that they had (1) associational standing on behalf of their candidates, *id.* at 1003; (2) standing based on a diversion of resources, *id.* at 1001–03; and (3) standing based on competitive injury, *id.* at 1003. While the *Cegavske* court's analysis applied to AB 4's mail ballot receipt deadlines, under AB 4 § 20, county clerks counted (1) ballots with postmarks if received within seven days after election day and (2) ballots with no or illegible postmarks if received no more than three days after election day. NRS 293.269921(1)(b) and (2) are identical in all material aspects and applications.

The RNC and NVGOP here and in *Cegavske* challenged the counting of mail ballots received at any point after election day, and it does not matter that the receipt deadlines are slightly different now; there have been no "*major* changes in the law"

[9] It is irrelevant that slightly different claims were asserted in *Cegavske*. Issue preclusion still applies when different claims are brought, so long as the issue to be precluded is the same. *See Hansen v. Musk*, 122 F.4th 1162, 1173 (9th Cir. 2024) ("The point of the [issue preclusion] doctrine is to bar relitigation of an issue already litigated and resolved 'even if the issue recurs in the context of a different claim.'").

that would bar application of issue preclusion.[10] *Montana v. United States*, 440 U.S. 147, 161 (1979) (emphasis added).

Nor have there been major changes in facts since *Cegavske*.[11] The same arguments in support of standing were equally available in the 2020 litigation as now. For instance, Plaintiffs argue that Democrats tend to vote by mail more than Republicans. *See*, *e.g.*, OB at 11; ER-31. The RNC and NVGOP could have made the same argument based on the results of the June 9, 2020 primary election, which had already taken place by the time they filed the *Cegavske* lawsuit. *See* Office of Nev. Sec'y of State, *2020 Primary Election Turnout*, https://tinyurl.com/5m75xnny.[12] And, at the time they filed the August 20, 2020 Cegavske Amended

[10] To the extent the Court finds there has been a major change in the law of direct organizational standing with respect to a diversion of resources, issue preclusion would still apply to their theories of associational and competitive injury standing. *See Howard v. City of Coos Bay*, 871 F.3d 1032, 1044 (9th Cir. 2017) (applying issue preclusion to claim for economic damages but not for non-economic and punitive damages).

[11] The Nevada Supreme Court concluded, in dictum, that issue preclusion would not bar the RNC's challenge to one portion of the mail ballot receipt deadlines under state law. *See RNC v. Aguilar*, No. 89149, 2024 WL 4601602, at *2 n.3 (Nev. Oct. 28, 2024) (unpublished disposition). However, the court's dictum was not necessary to decide the merits and would have no preclusive effect. *See Frei ex rel. Litem v. Goodsell*, 129 Nev. 403, 407, 305 P.3d 70, 72 (2013) ("[F]or issue preclusion to apply . . . , the issue . . . must have been necessary for resolution of the . . . action.")

[12] The Court can take judicial notice of this government agency document. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1001 (9th Cir. 2018); Fed. R. Evid. 201(b)(2). This is particularly true here where Plaintiffs rely on similar data from the same agency to support their claims, *see* ER-31, thereby acknowledging the agency's data is not subject to reasonable dispute, *see United States v. Esquivel*, 88 F.3d 722, 726–27 (9th Cir. 1996) (taking judicial notice of U.S. Census Bureau

Complaint, they could have cited the same source they rely on for the proposition that Democratic voters' mail ballots tend to arrive late. *See* OB at 11; ER-31 (quoting Ed Kilgore, *Why Do the Last Votes Counted Skew Democratic?*, Intelligencer (Aug. 10, 2020), https://perma.cc/R78D-3Q58).

"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 parties of 'redundant litigation [over] the identical question of'" standing. *See Montana*, 440 U.S. at 162 (citations omitted). This is true even if Plaintiffs claim they are raising new arguments to support standing. The issue the RNC and NVGOP seek to re-litigate is standing, and standing was finally and necessarily decided by the *Cegavske* court after a full and fair opportunity to litigate it. *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.").

Factors the Court has considered in determining whether issues are identical also all weigh in favor of preclusion: (1) the argument and evidence that would be

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documents because they met the requirements of Fed. R. Evid. 201(b) and were "of the same type and taken from the same source" as the defendant's own data).

advanced in the two cases would be identical; (2) the evidence and argument involve the application of the same standing laws; (3) pretrial preparation and discovery in *Cegavske* would have embraced the matters asserted here; and (4) the RNC and NVGOP claimed in *Cegavske* and claim here that they have standing to challenge the counting of mail ballots received after election day. *See Steen v. John Hancock Mut. Life Ins. Co.*, 106 F.3d 904, 912 (1997).

Together with claim preclusion, the purpose of issue preclusion is to "protect against 'the expense and vexation attending multiple lawsuits, conserve[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decision." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (citation omitted). The RNC and NVGOP chose to sue over Nevada's laws allowing for the counting of mail ballots received after election day back in 2020. They lost because they failed to establish standing, and they should not be permitted to re-litigate the same issue in the hopes they may get a decision they finally like.

B. Plaintiffs Do Not Have Competitive Standing Because They Fail to Adequately Allege the Possible Loss of an Election or a State-Imposed Disadvantage

As the district court correctly recognized, "Plaintiffs asserting competitive standing in the Ninth Circuit have two means through which they may fulfill the injury-in-fact requirement." ER-6. "First, they can allege that they have been injured by the 'potential loss of an election.'" *Id.* (quoting *Drake v. Obama*,

664 F.3d 774, 783 (9th Cir. 2011)). "Or, alternatively, their alleged injury may simply be that they are 'forced to compete under the weight of a state-imposed disadvantage . . . .'" *Id.* (quoting *Mecinas v. Hobbs*, 30 F.4th 890, 899 (9th Cir. 2022)). This Court has recognized competitive standing in cases where Plaintiffs alleged a tilted policy or statute that advantaged certain candidates over others. *See, e.g.*, *Mecinas*, 30 F.4th at 895 (finding standing to challenge a statute dictating ballot order because of the alleged "primacy effect"); *Owen v. Mulligan*, 640 F.2d 1130, 1133 (9th Cir. 1981) (finding standing to challenge the U.S. Postal Service allowing political opponents to use a preference mailing rate that "arguably promote[d] [the opponents'] electoral prospects).[13]

Neither theory rescues Plaintiffs here. Regardless of which path they attempt to follow—the potential harm to electoral outcomes or the burden of a state-imposed disadvantage—Plaintiffs cannot establish a competitive injury. Fundamentally, their theory fails because Plaintiffs are subject to no unique harms or uneven playing field. Nevada's ballot deadlines simply expand the franchise in a facially neutral way; the opportunity to pursue ballots is equally open to both Plaintiffs and their opponents.

[13] Plaintiffs also rely on *Planned Parenthood of Greater Washington & North Idaho v. HHS*, 946 F.3d 1100 (9th Cir. 2020). OB at 20–22. But that non-elections case also fits within the state-imposed disadvantage category. The *Planned Parenthood* plaintiffs alleged a plausible injury because HHS' funding announcements "impermissibly tilted the playing field" toward competitors who implemented specific tools. 946 F.3d at 1109.

1. Plaintiffs Do Not Establish that the Mail Ballot Receipt Deadlines Cause any Potential Loss of an Election

Plaintiffs claim that Nevada's ballot deadlines could cause them to lose elections because, they say, Democratic voters vote more by mail than Republican voters and are more likely to vote late. OB at 18–19. But their factual allegations fall short. The facts they recite in support of this claim do not even reliably suggest this conclusion, much less support a reasonable inference in their favor. And, in any case, even if their facts did show they might lose an election or that Democratic voters are more likely to vote later and by mail, Plaintiffs fail to establish that any injury to their interests would be traceable to Nevada's mail ballot deadlines.

a. Plaintiffs Do Not Plead Sufficient Facts Establishing the Plausibility of a Potential Loss of an Election Based on the Mail Ballot Receipt Deadlines

Plaintiffs' claim of a potential loss of an election hinges on the idea that Democratic voters are more likely to have mail ballots arrive after election day. *See* ER-31. But such allegations of Democratic voting patterns are the type of "[c]onclusory allegations and unreasonable inferences [that] are insufficient to defeat a motion to dismiss." *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1163 (9th Cir. 2017). This Court does not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations, and, most especially, where [its] jurisdiction is at stake, . . . cannot construe the complaint so liberally as

to extend [its] jurisdiction beyond its constitutional limits." *Id.* (internal quotation marks and citation omitted). Under this standard, the factual content that Plaintiffs allege does not fairly lead to the conclusion that "late-arriving mail ballots that are counted disproportionately break for Democrats." *See* ER-31.

First, Plaintiffs cite data on Nevada's turnout for the 2020 and 2022 general elections and the 2024 presidential preference primary election. ER-31. But that data only provides information on whether a voter voted *by mail ballot*. *See id.* (discussing Nev. Sec'y of State, *2022 General Election Turnout*, https://perma.cc/N7G7-RUQ9; Nev. Sec'y of State, *2020 General Election Turnout*, https://perma.cc/Z6F3-SM4N; Nev. Sec'y of State, *2024 Presidential Preference Primary Turnout: Cumulative Presidential Preference Primary Election Turnout – Final*, https://perma.cc/7USY-5NMY ("Voter Turnout Reports")). The data does not differentiate between the three methods by which a mail ballot can be cast: (1) drop box; (2) delivery to a county clerk; and (3) mail. NRS 293.269921(1). There is nothing suggesting that Democratic voters vote more *by mail*.

Second, Plaintiffs' data says nothing about whether mail ballots, and in particular those cast by mail, are more likely to break for Democrats. Instead, in each instance of voting in Nevada cited by Plaintiffs, the number of unaffiliated voters voting by mail ballot more than covers the gap between Republican and Democratic voters. *See* Voter Turnout Reports. Plaintiffs include no allegation of

how unaffiliated voters, and specifically those who vote by mail, are likely to vote. Similarly, Plaintiffs' citation to a study about the proportion of Democratic and Republican voters who vote by mail is irrelevant because it is not contextualized to establish that, in Nevada, votes for Democrats are more likely to come by mail than votes for Republicans. ER-30–31 (citing Charles Stewart III, *How We Voted in 2022*, at 10, https://perma.cc/444Z-58ZY).

More egregiously, Plaintiffs' leap that ballots that arrive after election day in particular favor Democrats is unsupported. *See* ER-31. Their only support for this is an article from 2020 that does not say that mail ballots that arrive after election day favor Democrats. *See id.* (citing Ed Kilgore, *Why Do the Last Votes Counted Skew Democratic?*, Intelligencer (Aug. 10, 2020), https://perma.cc/R78D-3Q58). 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), https://perma.cc/444Z-58ZY. 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 voters who vote for Democrats disproportionately mail ballots that arrive after election day. *See id.*

Taken together, and "discount[ing] conclusory statements, which are not entitled to the presumption of truth," Plaintiffs' assertion of a potential loss of election is not plausible. *See Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1130 (9th Cir. 2013) (citation omitted). "The problem is that Plaintiffs . . . cannot . . . allege that the majority of the votes that will be received and counted after Election Day will break against them, only highlighting the speculative nature of the purported harm." *Bost v. Ill. State Bd. of Elections*, 114 F.4th 634, 643 (7th Cir. 2024), *cert. petition docketed*. No. 24-568 (2024). Plaintiffs' factual allegations are not "enough to raise a right to relief above the speculative level," and do not "nudge[] their claims across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007).

b. Plaintiffs Fail to Adequately Establish that any Harm Will Be Caused by the Mail Ballot Receipt Deadlines or Would Be Redressed by a Favorable Decision Because How Voters Will Vote Requires Guesswork

Even if Plaintiffs had plausibly alleged that mail ballots that arrive after election day break for Democrats, they still fail to adequately allege causation and redressability. Plaintiffs must establish a "line of causation between the illegal conduct and injury," and the "'links in the chain of causation' . . . must not be too speculative or too attenuated." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 383 (2024) (citation omitted). Moreover, "plaintiffs attempting to show causation generally cannot 'rely on speculation about the unfettered choices made by

independent actors not before the courts.'" *Id.* (citation omitted). Courts generally will not "endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413 (2013).

Redressability, on the other hand, "analyzes the connection between the alleged injury and requested relief." *Mecinas*, 30 F.4th at 899 (citation omitted). Where independent parties' unfettered choices are at issue, it follows that it is unlikely that a plaintiff's injury will be redressed by judicial action; causation and redressability are, after all, "often 'flip sides of the same coin.'" *See All. for Hippocratic Med.*, 602 U.S. at 380 (citation omitted); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) ("[C]ausation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well.").

Here, Plaintiffs must establish that the mail ballot receipt deadlines cause their potential loss of an election, and its revision would address that alleged injury. They must also account for independent decisionmakers' choices because the mail ballot receipt deadlines do not regulate Plaintiffs; they regulate Nevada voters. The chain of causation between the mail ballot receipt deadlines and Plaintiffs' potential loss of an election therefore includes Nevada voters' choices as an intervening link.

This all proves too much for Plaintiffs' standing theory. How Nevada voters will exercise their judgment requires guesswork, and Plaintiffs fail to carry their burden of "show[ing] that the third parties will likely react in predictable ways that in turn will likely injure [P]laintiffs." *All. for Hippocratic Med.*, 602 U.S. at 383 (internal quotation marks and citation omitted).

Plaintiffs cannot simply rely on prior voter turnout data to establish causation; "[p]ast wrongs . . . are insufficient on their own to support standing for prospective relief." *Bolden-Hardge v. Off. of Cal. State Controller*, 63 F.4th 1215, 1220 (9th Cir. 2023). Apart from that data, Plaintiffs fail to include *any* allegation that would demonstrate that Nevadans' future voting patterns are anything but "inherently speculative." *See* ER-8 (quoting *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 351–52 (3d Cir. 2020), *cert. granted* 131 S. Ct. 2508 (2021) (dismissed as moot)). Voters' "broad and legitimate discretion" to choose "whether, when, and how they cast their votes" is "informed by a cacophony of influences from political parties, candidates, voter advocacy groups, media outlets, friends, family, neighbors, and countless others." ER-7–8 (quoting *Lujan*, 504 U.S. at 562). There is no way to predict the political climate in future elections, and the mail ballot receipt deadlines' effect "'is not sufficiently predictable' to meet Article III's causation requirement." ER-8 (quoting *All. for Hippocratic Med.*, 602 U.S. at 383).

Relatedly, Plaintiffs do not establish that they likely would not be equally open to a potential loss of an election absent the mail ballot receipt deadlines and thus fail to establish redressability. *See Townley v. Miller*, 722 F.3d 1128, 1134 (9th Cir. 2013) ("The proposition that plaintiffs must seek relief that actually improves their position is a well-established principle."). For instance, if Nevada's laws were not in place, political parties and advocacy groups might counsel voters differently, and voters might choose to vote differently. Because voters' behavior is not "sufficiently predictable," it is "merely speculative" that a favorable decision would cause fewer votes to be cast for Democratic candidates than Republican candidates. *See* ER-8 (citations omitted). This contrasts sharply with *Mecinas*, for example, where the plaintiffs had alleged that the challenged ballot ordering statute would cause a predictable shift in voting preferences. *See* 30 F.4th at 895.

2. The Facially Neutral and Equally Available Mail Ballot Deadlines Impose No Disadvantage

Under this Court's precedent, a state-imposed disadvantage injury occurs when a candidate or party retains an "unfair advantage" that "makes the competitive landscape worse for a candidate or that candidate's party." *Mecinas*, 30 F.4th at 897. As the district court cogently explained, the mail ballot receipt deadlines are equally available to all parties. ER-10. Thus, because "Republican candidates 'face[d] no harms that are unique from their electoral opponents," the district court reasoned that

the mail ballot receipt deadlines had no "particularized effects upon" Plaintiffs. *Id.* (citation omitted).

Plaintiffs, however, seek to extend competitive standing to instances where a state's election law might impose no disadvantage at all. *See* OB at 18–19. They claim that the mail ballot receipt deadlines advantage Democrats because "Democrats are more likely to engage in[] mail voting." *Id.* at 18. Even if one assumed without factual support, *see* § I.B.1.a *supra*, that mail ballots received after election day break for Democratic candidates, any resulting disadvantage is too remote and indirect to support causation.

More fundamentally, however, Plaintiffs ignore that any such disadvantage is not "state-imposed" as required under the competitive standing doctrine. The fact that Plaintiffs have, in recent history, made a decision to focus their turnout efforts on other forms of voting does not mean that a state's decision to expand mail voting favors a particular party. Plaintiffs are the ones who have made their strategic decisions regarding resource allocation. To the extent accepting mail ballots from eligible voters constitutes a disadvantage for Plaintiffs, it is *self*-, not state-, imposed.

Additionally, Ninth Circuit precedent finding competitive standing provides no support for Plaintiffs because those cases addressed the unfairness of an unequal disadvantage that provides a direct benefit to a candidate or group of candidates. *Mecinas* concerned a direct, unfair, and unequal advantage to candidates who were

placed at the top of the ballot because the challenged law allegedly improved those candidates' odds of receiving votes. 30 F.4th at 904 (challenged statute allegedly "conferr[ed] an unfair political advantage on certain candidates solely because of their partisan affiliation"). And in *Owen*, the U.S. Postal Service allegedly enabled certain candidates to obtain "an unfair advantage in the election process through abuses of mail preferences." 640 F.2d at 1132–33. In these instances, harm and causation were far less abstract than here. Both cases provided a particular candidate or party with a set advantage that was unavailable to others. There is no way in which the mail ballot receipt deadlines can be said to provide a direct benefit to certain candidates that other candidates could not also take advantage of.

This case is much more akin to *McConnell v. FEC*, which confirms that Plaintiffs' theory fails. 540 U.S. 93 (2003), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). As discussed further below, the plaintiffs in *McConnell* did not have standing to challenge the Bipartisan Campaign Reform Act's ("BCRA") increased hard-money campaign limits based on allegations of discriminatory impact due to economic status and preference. 540 U.S. at 227–28. Plaintiffs similarly cannot establish competitive standing based on the indirect, facially neutral, and equally available mail ballot receipt deadlines that they have historically chosen not to vigorously pursue.

3. Plaintiffs' "Illegal Structuring of a Competitive Environment" Theory of Competitive Standing Is Impermissibly Broad

Perhaps recognizing that they cannot fit within established limitations on standing, Plaintiffs attempt to stretch those limits. Relying on a case from the D.C. Circuit, *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005),[14] Plaintiffs claim that competitive standing exists where there is an "illegal structuring of a competitive environment." OB at 15 (quoting *Shays*, 414 F.3d at 85). They boldly assert that they have standing "regardless of whether the post-election deadline actually favors one party over another" because it's enough that they would have to "anticipate and respond to a broader range of competitive tactics than federal law would otherwise allow." *Id.* at 16–17 (quoting *Shays*, 414 4.3d at 86). This untenably broad approach to standing sweeps aside the precedent and logic governing standing doctrine, and the district court properly rejected it. *See* ER-9. This Court should do the same.

a. An Allegedly Illegally Structured Competitive Environment, Without More, Does Not Confer Standing

Contrary to Plaintiffs' assertions, an illegally structured competitive environment, without more, would not show a sufficiently concrete and particularized harm. It would, instead, be "precisely the kind of undifferentiated,

[14] While this Court cited *Shays* favorably in *Mecinas*, 30 F.4th at 898, the Court found that the injury to the *Mecinas* plaintiffs was "the burden of being forced to compete under the weight of a state-imposed disadvantage," *id.* at 899.

generalized grievance about the conduct of government that [the Supreme Court has] refused to countenance in the past." *Lance v. Coffman*, 549 U.S. 437, 442 (2007). As the Supreme Court has explained in the context of competitive injury to market participants, the argument that standing exists "whenever a competitor benefits from something allegedly unlawful" must be rejected as a "boundless theory." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 99 (2013). Standing must be "based on an injury more particularized and more concrete than the mere assertion that something unlawful benefited the plaintiff's competitor." *Id.*

Plaintiffs' selective quoting of *Shays* also divorces it from its context. In *Shays*, the plaintiffs faced an impossible choice: they could either violate the BCRA by taking advantage of regulatory loopholes as their opponents might, or they would not be able to play on an even playing field. *See Shays*, 414 F.3d at 89. Here, Plaintiffs do not allege that chasing mail ballots later in an election cycle would cause them to violate any law. Instead, Plaintiffs' position is far more similar to the plaintiffs' position in *McConnell*. That lawsuit challenged the BCRA, and *Shays* was careful to distinguish it. *See, e.g.*, *Shays*, 414 F.3d at 88–90.

In *McConnell*, the plaintiffs claimed injury because the BCRA increased hard-money campaign limits. *McConnell*, 540 U.S. at 227. The plaintiffs advanced two theories of injury, both of which were rejected. First, the plaintiffs claimed that the BCRA "deprive[d] them of an equal ability to participate in the election process

based on their economic status." *Id.* That alleged injury failed because "[p]olitical 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources." *Id.* (citation omitted).

The *McConnell* plaintiffs also alleged competitive injury because they did "not wish to solicit or accept large campaign contributions as permitted by BCRA" due to optics. *Id.* at 228 (citation omitted). The plaintiffs claimed their opponents could raise more money and the plaintiffs' "ability to compete or participate in the electoral process [was] diminished" as a result. *Id.* But that injury was not "fairly traceable" to the BCRA because it was not based on its operation, but on the plaintiffs' "personal choice." *Id.* (citation omitted). The Court declined to find standing, a holding that reflects that a bare assertion of an illegally structured competitive environment is insufficient. Like the *McConnell* plaintiffs, and unlike the *Shays* plaintiffs, Plaintiffs *can* pursue mail ballots throughout the election without violating any law. Plaintiffs thus fail to establish that *Shays* is persuasive here.

b. Competitors Cannot Establish Standing Merely Because They Might Have to Do More Work to Be Competitive

Plaintiffs' argument that anticipating and responding to a broader range of competitive tactics establishes standing also fails. *See* OB at 22 (quoting *Shays*, 414 F.3d at 87). Plaintiffs claim that having to spend resources to compete for mail ballots is an independent competitive injury. *See* OB at 21–22.

In essence, Plaintiffs are arguing that, under *Shays*, they can claim injury by adapting to new election laws that might alter the most advantageous allocation of resources. In other words, they may decide to avoid the speculative harm of losing out on mail ballots that arrive after election day by choosing to dedicate resources to pursuing those ballots. But as with the diversion of resources theory described in § I.C, *infra*, Plaintiffs do not suffer any injury when, regardless of the mail ballot receipt deadlines, they continue their basic, core activity of engaging in competition for votes. And any need to respond to changes is generalized amongst all the candidates.

Plaintiffs also fail to support this theory of competitive harm with adequate factual allegations that they would have to chase mail ballots differently to remain competitive. *See* § I.C.1, *infra*. There is no distinction between a mail ballot vote and an in-person vote, and mail ballots remain in play through election day, regardless of the mail ballot receipt deadlines. Plaintiffs also do not plausibly plead that mail system monitoring is needed given the up to four days after election day that a mail ballot can take to arrive. *See* NRS 293.269921(1)–(2).

These deficiencies are fatal to Plaintiffs' claims because standing does not exist when a plaintiff "incur[s] certain costs as a reasonable reaction to a risk of harm" if that harm "is not certainly impending." *Clapper*, 568 U.S. at 416. Mere "speculation or 'subjective apprehension' about future harm [does not] support standing." *Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010)

(citation omitted). This conclusion was recently confirmed by the Seventh Circuit in another case challenging the counting of mail ballots received after election day. There, the Seventh Circuit rejected a similar argument, explaining, "expenditures to insure against a result that may or may not come . . . are not 'fairly traceable' to the . . . ballot receipt procedure." *See Bost*, 114 F.4th at 643 (citation omitted).

C. Plaintiffs Cannot Establish Organizational Standing Simply by Diverting Resources

The RNC and NVGOP argue that they have organizational standing because they must divert resources from other activities to (1) mail-ballot chase programs; and (2) post-election observation activities. *See, e.g.*, OB at 12. Neither of these alleged diversions is adequate to establish organizational standing.

1. Plaintiffs Have Not Adequately Alleged a Direct Injury to their Pre-Existing Core Activities

Organizational standing only exists in "unusual case[s]." *All. for Hippocratic Med.*, 602 U.S. at 396. An organization cannot simply "claim that [it] diverted resources in response to government action that does not directly affect [its] existing core activities." *Ariz. All. for Retired Ams. v. Mayes*, 117 F.4th 1165, 1172 (9th Cir. 2024) (citation omitted). Instead, organizational standing requires a "direct[] injur[y to] the organizations' pre-existing core activities, apart from the plaintiffs' response to that provision." *Id.* at 1180. Here, Plaintiffs state that their

pre-existing core activities are in-person voting activities, election-integrity measures, mail ballot chase programs, and post-election activities. OB at 28.

But nothing about Nevada's mail ballot receipt deadlines harms Plaintiffs' core activities. Plaintiffs cast the choice of encouraging in-person voting and chasing mail ballots as an either/or proposition. *See, e.g.*, *id.* at 35, 37. This is a conclusory assertion that does not stand up to scrutiny. *See Navajo Nation*, 876 F.3d at 1163.

The reality in Nevada is that there is no meaningful distinction between an in-person vote and a mail ballot vote. Plaintiffs seek to turn out Republican voters, and in Nevada, all active voters can generally vote either by mail ballot or in person by election day and no later. If Plaintiffs reach out to a voter to encourage them to vote, it does not matter if they encourage them to vote in person or by mail ballot. In both instances, the value of the vote remains the same; bonus votes are not awarded to voters who vote by mail ballot. Plaintiffs articulate no plausible reason why they must abandon one method of encouraging voters in favor of another. Plaintiffs can, "in other words, continue their core activities that they have always engaged in." *Ariz. All. for Retired Ams.*, 117 F.4th at 1178.

Plaintiffs' conclusory assertion of needing to chase mail ballots through election day only because of the mail ballot receipt deadlines, *see* OB at 21, 29, also does not stand up to scrutiny, *see Navajo Nation*, 876 F.3d at 1163. Mail ballots remain in play through election day, regardless of the mail ballot receipt deadlines.

Voters can vote by mail ballot by delivering their mail ballots to a drop box or to the county clerk through election day, *see* NRS 293.269921(1), and voters can even have someone else, including an organization, family member, or friend, deliver their mail ballots to a drop box or the county clerk by election day, *see* NRS 293.269923(1). Plaintiffs do not plead facts making it plausible that in the absence of the mail ballot receipt deadlines, they would forego mail ballot chase programs prior to election day.

Nor do Plaintiffs explain why they can't simply encourage a voter they contact to vote either by mail ballot or in person. Again, the opportunity is fully available to them. Far from harming their ability to turn out voters, the extended mail ballot receipt deadlines make it *easier* for Plaintiffs to obtain Republican votes. At best, Plaintiffs are claiming that they must explain additional methods of voting to voters for a longer period of time. But that is not a cognizable injury.

As the district court held, "[e]ngaging in the same mail ballot collection push with slightly different timing is a 'continuation of existing advocacy,' not an 'affirmative diversion of resources.'"[15] ER-11 (quoting *Friends of the Earth v.*

[15] While the district court suggested that Plaintiffs might be collecting mail ballots as part of their mail-ballot-chase programs, *see* ER-11, Plaintiffs do not claim as much. To the extent Plaintiffs collect mail ballots, there is certainly no indication that they do so *to mail them in*. *See* ER-29 ("Nevada's law also requires the [Plaintiffs] to maintain mail-ballot-specific get-out-the-vote operations to encourage mail ballots voters *to return their mail ballots* through Election Day." (emphasis added)). In any event, Plaintiffs can collect mail ballots and deliver them to a county clerk or dropbox

Sanderson Farms, Inc., 992 F.3d 939, 943 (9th Cir. 2021)). Moreover, just as the *Arizona Alliance for Retired Americans* plaintiffs could not claim injury when they alleged they would have to "ask constituents additional questions in response to the" challenged law, 117 F.4th at 1178, Plaintiffs cannot claim that having to explain additional voting methods for a longer period of time causes them harm. "[S]pending money voluntarily in response to a governmental policy cannot be an injury in fact." *Id.*

The same problem dooms Plaintiffs' theory of injury based on post-election observation activities. They allege nothing that would injure their pre-existing core activities directly, apart from the potential need to expend additional resources on training and observation in response to it. But again, any resource burden hits all candidates equally, and "spending money voluntarily in response to a governmental policy cannot be an injury in fact." *Id.*

2. Plaintiffs Cannot Spend their Way into Standing

Plaintiffs also must establish causation, "that is, link[] their asserted injuries to the government's regulation . . . of someone else." *All. for Hippocratic Med.*, 602 U.S. at 382. Again, Plaintiffs must establish that the mail ballot receipt

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by election day regardless of the mail ballot receipt deadlines challenged here. NRS 293.269921(1), 293.269923(1).

deadlines directly causes injury to their pre-existing core activities. *See Ariz. All. for Retired Ams.*, 117 F.4th at 1180. In a case where direct organizational standing was properly found, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the direct interference was Havens' racial steering practices that led Havens to wrongfully lie to HOME's Black employees about housing availability. *Ariz. All. for Retired Ams.*, 117 F.4th at 1174, 1180. This wrongful lie directly impacted HOME's pre-existing core activity of helping Black clients obtain housing. *Id.* at 1180. And in response, HOME had to "devote significant resources to identify and counteract" Havens' practices. *Havens Realty Corp.*, 455 U.S. at 379. This case is nothing like *Havens*.

Plaintiffs' alleged harm of having to shift resources to post-election ballot observation activities and mail ballot chase programs lacks such direct interference with core activities or need for counteracting. What Plaintiffs essentially complain of is having to potentially expend additional resources in support of those activities. "But this is a diversion-of-resources theory by another name." *Ariz. All. for Retired Ams.*, 117 F.4th at 1180. "The only way in which the" mail ballot receipt deadlines "arguably affects" their pre-existing core activities "is by causing [them], in response to the provision[s] to decide to shift some resources from one set of pre-existing activities in support of their overall mission to another, new set of such activities." *Id.* "[S]pend[ing] 'considerable resources' to the detriment of other spending

priorities," however, is insufficient for standing. *See All. for Hippocratic Med.*, 602 U.S. at 394. That is all that Plaintiffs allege here.

Moreover, as the district court correctly explained, and Plaintiffs do not dispute, "Plaintiffs have made no allegations that the Nevada mail ballot receipt deadline harms the integrity of the mail ballot counting process, such as by increasing the risk of error or fraud." ER-13. There is thus nothing that Plaintiffs would allegedly have to counteract by devoting additional resources to ballot processing observation. Plaintiffs "cannot manufacture the injury by . . . simply choosing to spend money fixing a problem that otherwise would not affect [them] at all." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). The same is true of in-person activities vis-à-vis mail ballot chase programs; the mail ballot receipt deadlines do not make an in-person vote any less valuable than a mail ballot vote. Plaintiffs have failed to allege that courting mail ballot votes instead of in-person votes counteracts anything; they are just two means to the same end. At bottom, there is no alleged direct injury to Plaintiffs' core activities, apart from Plaintiffs' response to the mail ballot receipt deadlines.

Plaintiffs also claim that their actions in response to the deadlines are "sufficiently predictable" to support causation. *See* OB at 36 (quoting *All. for Hippocratic Med.*, 602 U.S. at 383). In the same breath, however, they concede that candidates make their own assessment of their own campaigns. *See id.* (quoting

Becker v. FEC, 230 F.3d 381, 387 (1st Cir. 2000)). Nevada doesn't have a crystal ball to predict that Plaintiffs would shift resources in response to a law that does not regulate them—and standing doctrine doesn't require it to develop one.

More to the point, however, predictability is not the only measure required for causation: "[t]he causation requirement also rules out attenuated links—that is, where the government action is so far removed from its distant (even if predictable) ripple effects that the plaintiffs cannot establish Article III standing." *All. for Hippocratic Med.*, 602 U.S. at 383. That is the case here. To the extent the mail ballot deadlines impact Plaintiffs' core activities, intervening factors—namely, Plaintiffs' own decision—make the causal chain too attenuated.

In *Alliance for Hippocratic Medicine*, it may well have been predictable that the plaintiff organizations would expend resources to oppose FDA's actions. But that was not sufficient. *See id.* at 394. As the Supreme Court explained, a doctor wouldn't have standing to challenge the constitutionality of a "middle school football league . . . because she might need to spend more time treating concussions." *Id.* at 391. And "a law school professor who teaches election law would [not] have standing to challenge [a new election law] because she would have

to expend resources to change her curriculum and further educate her students about the state of the law." *Ariz. All. for Retired Ams.*, 117 F.4th at 1181.[16]

The Supreme Court and this Court have recently cautioned against organizations' attempts to spend their way into standing. *See All. for Hippocratic Med.*, 602 U.S. at 394; *Ariz. All. for Retired Ams.*, 117 F.4th at 1178. It is not enough to spend money, even to the detriment of other spending priorities, *All. for Hippocratic Med.*, 602 U.S. at 394; a government action must directly affect an organization's pre-existing core activities, *Ariz. All. for Retired Ams.*, 117 F.4th at 1180. Apart from alleging an insufficient drain on resources, Plaintiffs offer nothing to show that the mail ballot receipt deadlines directly injure their pre-existing core activities.

D. Plaintiffs' Candidates Cannot Claim Standing Based on a Generalized Interest in an Accurate Vote Tally

Plaintiffs claim that the RNC and NVGOP have associational standing as representatives of their candidate members. OB at 40. Their candidates, Plaintiffs claim, are necessarily harmed any time there is an incorrect vote tally. *See id.* at 41

[16] Plaintiffs attempt to distinguish *Arizona Alliance for Retired Americans* by analogizing elections to college admissions and claiming both are "zero-sum." *See* OB at 35 (quoting *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 218–29 (2023)). Elections are not, in fact, zero-sum; Republicans, for instance, can gain by convincing a voter who would not otherwise vote to vote for their candidates, or a voter who would vote third party to vote for Republicans, without peeling away any votes from Democrats. More importantly, though, *Students for Fair Admission* addressed a situation where a "benefit" was provided "to some . . . but not to others," 600 U.S. at 218–29, but the mail ballot receipt deadlines confer equal benefit. There is no preferential treatment.

(quoting *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020)).[17] This argument is an untenably generalized grievance. Candidates and voters alike would have a similar interest in an accurate vote tally. But a party cannot assert an injury based on their interest in "requir[ing] that the Government be administered according to law." *Lance*, 549 U.S. at 440. It is "precisely the kind of undifferentiated, generalized grievance about the conduct of government" that fails to confer standing. *Id.* at 442; *see also Bost*, 114 F.4th at 643 (questioning *Carson*'s validity in light of *Lance*); *Carson*, 978 F.3d at 1063 (Kelly, J., dissenting) (noting that the claimed injury "appears to be 'precisely the kind of undifferentiated, generalized grievance about the conduct of government' that the Supreme Court has long considered inadequate for standing").

For the same reason, courts across the nation, including this Court recently, have rejected standing based on a theory of vote dilution. *See, e.g.*, *Election Integrity Project Cal., Inc. v. Weber*, 113 F.4th 1072, 1089 n.13 (9th Cir. 2024) ("[T]he mere fact that some invalid ballots have been inadvertently counted, without more, does not suffice to show a distinct harm to any group of voters over any other."); *Wood v. Raffensperger*, 981 F.3d 1307, 1314–15 (11th Cir. 2020) (vote dilution where "'no single voter is specifically disadvantaged' if a vote is counted

[17] Plaintiffs incorrectly cite *Carson* as a Ninth Circuit decision, OB at 41; it's an Eighth Circuit decision.

improperly" is a "paradigmatic generalized grievance that cannot support standing"). Even though vote dilution would result in an inaccurate tally, dilution that does not impact any voter disproportionately cannot be a basis for standing. The same logic applies to Plaintiffs' candidates.

To be sure, if a candidate could show *some other kind of cognizable harm* resulting from an inaccurate vote tally, such as a loss of an election, that would suffice. *See Wood*, 981 F.3d at 1314 (explaining "a political candidate harmed by [a] recount . . . could assert a personal, distinct injury"). But for the reasons explained above, Plaintiffs' candidates are not able to allege a distinct, particularized injury. Plaintiffs therefore fail to show that they have members who "would otherwise have standing to sue in their own right," *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977), and cannot establish associational standing.

II. The Election Day Statutes Do Not Require States to Set an Arbitrary Deadline for Ballots to Be Delivered to Election Officials

The district court did not reach whether Plaintiffs failed to state a claim, but the Court may affirm on the independent basis that the mail ballot receipt deadlines are lawful.[18] To prevail on the merits, Plaintiffs must establish that Congress, in setting out to ensure that the states conduct their federal elections on the same day,

[18] The Secretary argued in his motion to dismiss that Plaintiffs failed to state any claim. Def. Sec'y of State's Mot. to Dismiss at 15–21, *RNC v. Burgess*, Case No. 3:24-cv-00198-MMD-CLB, ECF No. 60 (D. Nev. May 30, 2024).

also established an extremely specific—but utterly silent—requirement for how ballots must be received. Specifically, they must establish that, in setting the day for federal elections, Congress intended to preempt any state law that did not require ballots to be in the hands of an election official before the close of polls on the day set for the election. They face the challenge that Congress never said so contemporaneously and hasn't since. And they must show that Congress intended this result although the purported requirement isn't responsive to any of the concerns that animated passage of the election day statutes in the first place.

They cannot. There is nothing in the text, purpose, or history of the election day statutes suggesting that, in setting the date for the election, Congress intended to adopt Plaintiffs' arbitrary deadline governing the minute details of when a ballot is delivered to a local election office. Neither purpose behind the election day statutes—the influence of results on later cast votes or the burden on citizens facing multiple election days, *see Foster*, 522 U.S. at 73—is served by cutting off the counting of cast ballots. Instead, the election day statutes fix the date on which voters' choices must be finalized and submitted according to the processes adopted by the states. Congress has historically, and still today, generally left to the states the details of those processes—whether by mail, dropbox, in-person voting, or otherwise. There is simply no evidence Congress established a single, implicit

exception requiring ballots to arrive at the office of a local election official by the end of election day. All of Plaintiffs' claims fail for this reason.

A. There Is Nothing in the Text, History, or Purpose of the Election Day Statutes that Suggests Ballots Must Be Received by Election Officials on Election Day

Congress promulgated the election day statutes under the Electors and Elections Clauses of the U.S. Constitution. Preemption under these clauses has proceeded under the understanding that they are "default provision[s]" that "invest[] the States with responsibility for the mechanics of congressional elections . . . so far as Congress declines to preempt state legislative choices." *Foster*, 522 U.S. at 69. In other words, "[u]nless Congress acts, Art. I, s 4, empowers the States to regulate" those mechanics. *See Roudebush v. Hartke*, 405 U.S. 15, 24 (1972). Congress's power to regulate the "Times, Places and Manner" of federal elections supersedes "inconsistent" State laws "so far as it is exercised, *and no farther*." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013) (citation omitted) (emphasis added). Federal statutes "alter" state election laws only when the state and federal laws cannot "operate harmoniously in a single procedural scheme." *Gonzalez v. Arizona*, 677 F.3d 383, 394 (9th Cir. 2012), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc*., 570 U.S. 1 (2013).

The question of whether Congress has preempted a state time, place, or manner restriction of course begins with the text of the federal law.

"[T]he reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent." *Inter Tribal Council of Arizona, Inc.*, 570 U.S. at 14. And the text of the election day statutes says nothing about the deadline for delivery of cast ballots to election officials. To the contrary, the text of each statute merely sets out the day for the election. *See* 2 U.S.C § 7 ("[T]he day for the election" is the "Tuesday next after the 1st Monday in November, in every even numbered year . . ."); 2 U.S.C. § 1 (Senators are elected "[a]t the regular election held in any State next preceding the expiration of the term for which any Senator was elected."); 3 U.S.C. § 1 ("The electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day.").

While it is true that, in setting the day for the election, Congress required a "final act of selection," to occur on election day, *see Foster*, 522 U.S. at 72, there is no evidence in the text that Congress set the extremely specific event identified by Plaintiffs as the exclusive and preemptive mechanism for that final selection. Plaintiffs' importation of an exceptionally specific requirement for ballot delivery stretches the text too far. "[T]he plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925) (citation omitted).

This is consistent with the Court's approach in *Foster*. *Foster* found that, "[w]hen the federal statutes speak of 'the election' of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make a final selection of an officeholder." 522 U.S. at 71. But *Foster* did not find that any specific action was required. And historically, states have adopted a variety of approaches to the precise form of those combined actions. For example, when the election day statutes were passed, Congress was aware that states made their "final selection[s]" in different ways—a practice that has continued with minimal disruption. *See* Statement of Case § II, *supra*. There's every indication that Congress has embraced (or at least tolerated) this diversity—and none that it has been silently preempted since the mid-1800s. *See Bost*, 684 F. Supp. 3d 720, 736 (N.D. Ill. 2023), *aff'd* 114 F.4th 634 (7th Cir. 2024) ("There is a notable lack of federal law governing the timeliness of mail-in ballots."); *Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354, 372 (D.N.J. 2020) ("[T]he Federal Election Day Statutes are silent on methods of determining the timeliness of ballots.").

For instance, during the Civil War, just after the first of the election day statutes was passed, states adopted a range of statutes facilitating voting by soldiers; in these, the mode of states' "final selection" varied based on state law and practices. *See, e.g.*, Benton, *supra,* at 15–18 (describing some practices). Commissioners could be sent

into the field to retrieve ballots. *See, e.g.*, 1862 Minn. Laws 16, 14 (Extra Sess.), ch. 1 § 3[19]. In Minnesota, for example, these commissioners accepted sealed ballots and mailed or delivered them to election officials to be counted on election day. *Id.* Or commanding officers of out-of-state units could collect ballots on election day and mail them to the state election officials for canvass after election day. *See, e.g.*, 1866 Nev. Stats., 215; Benton, *supra*, at 186–87 (Rhode Island). Or military officials could act as election inspectors and canvass the vote in the field. *See, e.g.*, 1862 Wis. Sess. Laws, 20 (Extra Sess.), ch. 11 § 16[20]. Or ballots could be mailed to local proxies, who would deposit them at local election offices on election day. *See* Benton, *supra*, at 153–54. Some of these statutes were found unlawful under state constitutional laws, which imposed varying requirements as to the mechanics of how elections were conducted. *See id.* at 5–14. A state constitution could prohibit out-of-state voting altogether. *See* N.Y. Const. Art. 2, § 1 (1846)[21]. And a constitution could prohibit military officers (as distinct from civil election officials) from conducting elections. *See Chase*, 41 Pa. at 427.

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[19] *Available at* https://www.revisor.mn.gov/laws/1862/1/General+Laws/Chapter/1/.

[20] *Available at* https://docs.legis.wisconsin.gov/1862/related/acts/62ssact011.pdf.

[21] *Available at* https://history.nycourts.gov/wp-content/uploads/2019/01/Publications1846-NY-Constitution-compressed.pdf.

But none of the field voting statutes were found to be preempted by the federal election day statutes.

This diversity continues today; the methods by which election officials and voters take "combined actions" to achieve a "final selection of an officeholder" varies both across, and even within, states. *See Foster*, 522 U.S. at 71. Some states permit all eligible voters to vote by mail; others permit only certain categories of voters to vote a mail ballot. Ctr. for Election Innovation & Rsch., Options to Vote Before Election Day, 2000–2024 (July 2024), https://electioninnovation.org/research/expansion-voting-before-election-day/. Some election officials designate drop boxes for receipt of ballots; indeed, whether drop boxes are adopted by a jurisdiction can vary even within a state. *See Priorities USA v. Wis. Elections Comm'n*, 412 Wis. 2d 594, 600, 8 N.W.3d 429, 432 (2024). Some jurisdictions employ regional vote centers, others require voters to make their selections at a local precinct. *See generally* Nat'l Conf. of State Legislatures, Vote Centers (Jan. 19, 2023), https://www.ncsl.org/elections-and-campaigns/vote-centers.

Moreover, laws permitting post-election-day receipt, as discussed above, have been "in place for many years in many states, [and] Congress has never stepped in and altered the rules." *Bost*, 684 F. Supp. 3d at 736 (citation omitted). Congress's choice not to establish a ballot-receipt deadline despite a widespread practice of states permitting ballots to arrive after election day undercuts Plaintiffs' arguments.

See Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 166–67 (1989) ("The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to 'stand by both concepts and to tolerate whatever tension there [is] between them.'"); *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001) ("What persuades us of the proper outcome in this difficult case is the long history of congressional tolerance, despite the federal election day statute, of absentee balloting and express congressional approval of absentee balloting when it has spoken on the issue."); *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 776 (5th Cir. 2000) ("We are unable to read the federal election day statutes in a manner that would prohibit such a universal, longstanding practice of which Congress was obviously aware.").

Indeed, as at least one court has recognized, Nevada's and other states' practices are so well-established that Congress has even incorporated it into federal law. *See Bost*, 684 F. Supp. 3d at 737. The Uniformed and Overseas Citizens Absentee Voting Act of 1986, which addresses absentee voting in federal elections for specified voters, expressly leaves the deadline for receipt of the ballots to state law. It requires the "implement[ation of] procedures that facilitate the delivery of marked absentee ballots" not necessarily by the federal election day, but rather by "the date by which an absentee ballot must be received in order to be counted in the

election."52 U.S.C. § 20304(b)(1). If these state laws permitting post-election-day receipt were prohibited by federal law, it is difficult to imagine that Congress would have incorporated them into federal law and practice.

B. Plaintiffs Have Mischaracterized the Historical Record and the Doctrine of Original Public Meaning

Plaintiffs have attempted to distort the historical record establishing both the diversity of absentee voting statutes and the long-standing practice of counting ballots received after election day. Plaintiffs have argued that, when the election day statutes were passed, ballots were uniformly received *by election officials* on election day—though they acknowledge that, in some cases, what they characterize as "election officials," were actually soldiers, who they say were designated "election officials" through legal fiction. *See* Resp. in Opp'n to DNC's Mot. to Dismiss at 4, *RNC v. Burgess*, Case No. 3:24-cv-00198, ECF No. 73 (D. Nev. June 13, 2024) ("Plaintiffs' Opposition to DNC Motion to Dismiss"). They have maintained that Congress silently incorporated this rule into the definition of election day as part of the "original public meaning" of the statute. *See id.* at 2.

To the extent they rehash this contention here, neither the relevant text nor the laws at the time support their position. For example, some states, like Nevada, did not require election officials to receive ballots on election day—and indeed, made specific provision for military officials to collect and return ballots to the relevant election official after election day. *See* Nev. Election Ordinance § 11 (1864);

1866 Nev. Stats., 215; 1899 Nev. Stats., 109–10; 1917 Nev. Stats., 385–86. To recover their position, Plaintiffs have suggested that the military personnel facilitating the election were nonetheless *deemed* election officials equivalent to today's local election officials, so it is unimportant that such ballots would not even be postmarked by election day, much less received by voters' *actual* election officials by then. *See* Pls.' Opp'n to DNC Mot. to Dismiss at 4. Plaintiffs have cited a passage from a self-published 1915 book on voting by soldiers during the Civil War, *see id.* (citing Benton, *supra,* at 17), that does not even mention the election day statutes:

> It was claimed that if there was to be voting in the field at all, it must be under the direction of civil officers appointed by the civil power of the State and controlled by that power, and that officers or soldiers could not be authorized to open a poll or present the box to the soldier for his vote, or canvass, seal up and return the votes to the State to be counted. This was an objection to method rather than to matter, and it was avoided by the appointment in the soldiers' voting acts, of officers or soldiers to act in an election as constables, supervisors, etc., as the laws of the State might designate, would act in elections at home.

Benton, *supra*, at 17.

Plaintiffs' reliance on this passage to establish equivalence between modern local election officials and military personnel in the field is profoundly flawed. First, and most obvious, whatever the status of military officials facilitating the election in the field, soldiers from states with laws like Nevada's had actual state and

local election officials, who actually received their ballots—*after* election day. *See* 1866 Nev. Stats., 215. Second, the text cites only a single source, Benton, *supra,* at 17 (citing *Chase*, 41 Pa. 403), and doesn't even purport to articulate a rule that would have been understood at the time—much less an articulation of the original public meaning of "the day for the election." Rather, the Benton passage only notes an argument in response to an objection to a certain kind of soldier voting statute.

Nor could Plaintiffs' position have been articulated as a rule. Nevada's field-voting statute, for example, did not deem officers "election officials," and the key event for finality of the vote was not the receipt of the ballot by an "election official," but instead that it was placed in the appropriate receptacle. 1866 Nev. Stats., 215. While the officers in command of the relevant soldiers have "charge and direction" of the ballot box, there's no indication in the statute or otherwise that this somehow converted them into election officials equivalent to today's election officials; instead, they were responsible for sending the election materials, including ballots, "by mail or otherwise" to those officials. *Id.*

But even if Plaintiffs were correct that these military officials were somehow universally deemed "election officials" for purposes of Nevada and similar states' statutes, they could not prevail: this would only go to show that, at the time, state law could deem a ballot "received by an election official" in ways other than the

citizen's ballot being received by their state or local election official—just as in today's postmark context.[22]

Moreover, the supposed conversion of military officials to election officials was articulated, in the single place it is noted at all, as a response to a *state law* constraint—not a response to federal preemption. Benton, *supra*, at 17. That is, this purported conversion of military officials to election officials is never identified as a requirement of the election day statutes, or even as a means to ensure ballots are received by election officials on election day. Instead, it is identified as a requirement of state constitutional law. *See e.g., Chase*, 41 Pa. at 422 (Pennsylvania constitution distinguishes between civil and military authority, and voting is a civil institution.).

This is notable because then, as now, there were vociferous and politically motivated objections to absentee voting laws. *See* Benton, *supra*, at 306–09. But, despite identifying *state* constitutional law issues with statutes that failed to convert military officials to election officials, no contemporaneous source appears to have suggested that such a statute presented an *elections day statute* issue. One might expect, if the requirement that local election officials receive ballots on

[22] Plaintiffs have also, in another case, pointed to the fact that certain officials swore oaths before performing election-related duties, but this also cannot convert them to local election officials. Voters swear oaths before submitting their mail ballots, and postal service workers swear oaths before performing their duties. 39 U.S.C. § 1011. By Plaintiffs' logic, they are equivalent to election officials, too.

election day was so obviously required by the election day statutes, that this would have been a sound, and readily argued, basis for an objection to soldier voting laws—just as the state constitutional law issue was. But it was not.

Accordingly, the historical record from the time the election day statutes were adopted does not establish that local election officials or their equivalents received ballots on election day when the election day statutes were adopted. But even if it did, this would not establish that this practice was part of the statutes' original public meaning. Plaintiffs' prior hook for the application of original public meaning here, *see* Pls.' Opp'n to DNC Mot. to Dismiss at 2 (quoting *Wis. Cent. Ltd v. United States*, 585 U.S. 274, 276–77 (2018)), rejects their own approach. In *Wisconsin Central*, the Court rejected the notion that original public meaning seeks to "trap[]" permissible practices under a statute in a "time warp, forever limited to those [practices] commonly used" when the statute was passed. 585 U.S. at 284. That is exactly what Plaintiffs urge. They seek to convert congressional silence into a rule that voting must be conducted by the methods they say were used in the mid-1800s.

But "[w]hile every statute's meaning is fixed at the time of enactment, new applications may arise in light of changes in the world." *Id.* (emphasis omitted). For example, in *Wisconsin Central,* the Court found that "'money,' as used in [the relevant] statute, must always mean a 'medium of exchange'" for purposes of an original public meaning analysis, "[b]ut what *qualifies* as a 'medium of exchange'

may depend on the facts of the day." *Id*. The Court pointed to electronic transfers of paychecks: "Maybe they weren't common in 1937, but we do not doubt they would qualify today as 'money remuneration' under the statute's original public meaning." *Id.* So, too, here: "election day" then, as now, meant "the combined actions of voters and officials meant to make a final selection of an officeholder." *See Foster*, 522 U.S. at 73. That doesn't mean, however, that Congress limited those actions to the precise set employed in the mid-1800s. Instead, with the advent of universal mail voting, a voter receiving, completing, and postmarking their mail ballot by election day achieves "the combined actions of voters and officials meant to make a final selection of an officeholder." *See id.* at 71.

In a related matter, Plaintiffs have objected to this straightforward conclusion by arguing that it may be possible to recall a ballot through the USPS. But whether or not recall of ballot mail is, in fact, available, or has ever been attempted, a voter may not submit a new ballot after election day: ballots must be mailed by election day. NRS 293.269921(1). No voter can submit a new ballot after election day.

Plaintiffs also have asserted that the "combined actions of the voters and local election officials" must include the local election official receiving the ballot. *See* Pls.' Opp'n to DNC Mot. to Dismiss at 8. But there is no reason to think so other than Plaintiffs' failed reliance on historical statutes. Indeed, simply having a piece of mail dropped at a local election official's office does not constitute any

"action" by the election official, and Plaintiffs have conceded that no actual action by the local officials—not verifying, processing, or counting the received ballot—need be completed by the election official on election day. *Id.* at 7. The election official's part of the "combined action" required is establishing a process for the voter to send back a completed mail ballot, including sending the mail ballot. The voter's part is making a final selection and sending back the ballot.

Moreover, there is no meaningful sense in which the election is "consummated" or "final" simply by virtue of ballots being delivered to a local election office on election day; the ballots must still be processed and validated before they can even be removed from their envelopes. "[O]fficial action to confirm or verify the results of the election extends well beyond federal election day . . . ." *Millsaps v. Thompson*, 259 F.3d 535, 546 n.5 (6th Cir. 2001). Indeed, some ballots will only be valid because of action taken by the voter after election day, through cure procedures. *See* NRS 293.269927(6). "[P]laintiffs' focus on the single act of receiving a ballot from a voter presents an unnatural and stilted conception of the actions taken by officials under [state] election laws and loses sight of the fact that an official's mere receipt of a ballot without more is not an act meant to make a final selection." *Millsaps*, 259 F.3d at 546.

III. The District Court Properly Did Not Grant Leave to Amend Because Amendment Would Be Futile

The Court should affirm the district court's decision not to grant leave to amend because amendment would be futile. *See DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). As discussed above, Plaintiffs' claims fail on the merits. The claims turn on questions of law, not factual disputes, and no amendment could cure the Complaint's defects. *See id.*

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's dismissal of this action.

DATED this 20th day of February 2025.

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** Attestation: All other parties on whose behalf this filing is submitted concur in the filing's content.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
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STATUTORY ADDENDUM

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Nevada Constitution Article II, § 3 (1864)[23]

The right of suffrage shall be enjoyed by all persons otherwise entitled to the same who may be in the military or naval service of the United States; *provided*, the votes so cast shall be made to apply to the county and township of which said voters were *bona fide* residents at the time of their enlistment; and *provided further*, that the payment of a poll tax or a registration of such voters shall not be required as a condition to the right of voting. Provision shall be made by law regulating the manner of voting, holding elections, and making returns of such elections, wherein other provisions are not contained in this Constitution.

Nevada Election Ordinance § 9 (1864)[24]

Between the hours of nine o'clock, A. M., and three o'clock, P.M., on each of the election days hereinbefore named, a ballot-box, or suitable receptacle for votes, shall be opened under the immediate charge and direction of three of the highest officers in command, for the reception of votes from the electors whose names are upon said list, at each place where a regiment, battalion, squadron, or battery of soldiers from said Territory, in the army of the United States, may be on that day; at which time and place said elector shall be entitled to vote for all officers for which, by reason of their residence in the several counties in said Territory, they are authorized to vote, as fully as they would be entitled to vote in the several counties or townships in which they reside, and the votes so given by such electors, at such time and place, shall be considered, taken and held to have been given by them in the respective counties and townships in which they are resident.

Nevada Election Ordinance § 11 (1864) [25]

All the ballots cast, together with the said voting list checked as aforesaid, shall be immediately sealed up and sent forthwith to the Governor of said Territory, at Carson City, by mail or otherwise, by the commanding officer, who shall make out and certify duplicate returns of votes given, according to the forms hereinafter prescribed, seal up and immediately transmit the same to the said Governor, at

[23] *Available at* https://tinyurl.com/bdhtr2uz.
[24] *Available at* https://tinyurl.com/bdhtr2uz.
[25] *Available at* https://tinyurl.com/bdhtr2uz.

Carson City, by mail or otherwise, the day following the transmission of the ballots and the voting list herein named. The said commanding officer shall also immediately transmit to the several County Clerks in said Territory, an abstract of the votes given at the general election in November, for county officers, marked "Election Returns."

1866 Nev. Stats., 215[26]

Sec. 23. For the purpose of taking the vote of the electors of this State who may be in the army of the United States, the Adjutant-General of the State shall, in due time to carry out the provisions of this Act, make out and deliver to the Secretary of State separate lists of the names of all the electors, citizens or residents of this State, at the time of their enlistment, who shall be in the army of the United States, classified and arranged in alphabetical order, showing the number of the regiment, battalion, squadron, or battery, and company, to which said elector belongs, his residence, or the county and precinct to which he belongs, and in which he is entitled to vote.

Sec. 24. The Secretary of State shall immediately transmit, by mail, or otherwise, as he may deem proper, a copy of such lists (the proper one) to the commanding officer of each of the respective regiments, battalions, squadrons, batteries or companies.

Sec. 25. Between the hour of eight o'clock a. m., and sunset, on the day of election, a ballot box, or suitable receptacle for votes, shall be opened, under the immediate charge and direction of the three highest officers in command, for the reception of votes from the electors whose names are upon said lists, at each place where a regiment, battalion or squadron, battalion [battery] or company of soldiers from this State, in the army of the United States, may be on that day; at which time and place said electors shall be entitled to vote for all officers for which, by reason of their residence in the several counties of the State, they are authorized to vote, as fully as they would be entitled to vote in the several counties or precincts in which they resided; and the votes so given, by such electors, at such time and place, shall be considered, taken and held to have been given by them in the respective counties and precincts in and of which they were residents at the time of their enlistment.

[26] *Available at* https://www.leg.state.nv.us/Statutes/02nd1866/Stats186602.html.

Sec. 26. The name and office of the person voted for shall be plainly written or printed on one piece of paper. The name of each elector, voting as aforesaid, shall be checked upon said list, at the time of voting, by one of said officers having charge of the ballot box. The said officers having charge of the election shall count the votes, and compare them with the checked list, immediately after the closing of the ballot box or polls.

Sec. 27. All the ballots cast, together with the said voting list, checked as aforesaid, shall be immediately sealed up and sent forthwith, by mail or otherwise, by the commanding officer, to the Secretary of State, at the seat of government, according to the form hereinafter prescribed. Said commanding officer shall also make out and certify duplicate lists, checked as aforesaid, seal up and immediately transmit the same to the respective and proper Boards of County Commissioners of the several counties of the State.

1899 Nev. Stats., 108–10[27]

Section 1. For the purpose of taking the vote of the electors of this State, who may be in the service of the United States Volunteers, and at the time beyond the territorial limits of the State, the Adjutant-General of the State shall, in due time to carry out the provisions of this Act, make and deliver to the Secretary of State duly certified separate lists for each county, having soldiers in the service, of the names of all qualified electors under the laws of this State, at the time of their enlistment, who may be in the military service of the United States, classified and arranged in alphabetical order, showing the regiment, battalion, squadron, battery and company, or other division to which each elector belongs, also the county and precinct in which he is entitled to vote.

Sec. 2. The Secretary of State shall immediately transmit duly certified copies of such proper lists to the commanding officer of each of said organizations of which electors may be members.

Sec. 3. Between the hours of eight o'clock a. m. and six o'clock p. m. on the day of election, a ballot box, or other suitable receptacle, shall be opened under the immediate charge and supervision of the three officers highest in command, for the reception of votes from the electors whose names are upon said lists, at each place

[27] *Available at* https://www.leg.state.nv.us/Statutes/19th1899/Stats189901.html.

where a regiment, battalion, squadron, battery, company or other division of soldiers from this State in the military service of the United States may be on that day, at which time and place said electors shall be entitled to vote for all officers, for which by reason of their residence in the several counties of this State, they are entitled to vote, as fully as they would be entitled to vote if present in the respective counties and precincts of their residence; and the votes so given by such electors, at such time and place, shall be considered taken, held, canvassed and counted by the respective Canvassing Boards of Election in this State as if they had been given by them in the respective counties and precincts in and of which they were qualified electors at the time of their enlistment.

Sec. 4. The ballot to be cast by such electors shall be the official ballot provided by law. The name of each elector voting as aforesaid shall be checked at the time of voting, by one of said officers in charge of the ballot box, upon said list. The said officers having charge of the said election shall proceed to count the votes and compare the numbers with the checked lists immediately after the close of the polls, and on completing the count the said officers shall make and sign a return or certificate of the result, in substance as follows, to wit:

Return of soldiers' vote in the (here insert the regiment or other command as the case may be). We, the undersigned, (here insert rank and command), do hereby certify that on the ..... day of ....., the electors belonging to our said command cast the following number of votes for the several persons and the officers herein named, to wit:

For Governor (here name each person voted for for Governor, to the number of votes each received, written in full, also in figures, against and following the name of each person). For Lieutenant-Governor (here insert names of all voted for, number of votes for each, written in full, also in figures, against and following the name of such person) and so continue until the list is completed.

Witness our hands this ..... day of .....

A. B. (with rank and command).
C. D. (same).
E. F. (same).

Sec. 5. All the ballots cast, together with the said voting lists, checked as aforesaid, and said return, shall be immediately sealed up and sent forthwith by the

commanding officer to the Secretary of the State at the seat of government, on receipt of which the Secretary of State shall, in the presence of the Chief Justice of the Supreme Court, open said returns and immediately certify to the Board of County Commissioners of the proper county the soldier vote of such county for the various officers as returned to him, and such Board of County Commissioners shall canvass and count such vote, as soon as practicable after receiving the same.

1917 Nev. Stats., 385–86[28]

Electors in Military Service.
Sec. 101. Electors of the State of Nevada in the military service of the United States may, when called into such service, vote in accordance with the provisions of the act approved March 14, 1899.

[28] *Available at* https://www.leg.state.nv.us/Statutes/28th1917/Stats191703.html.