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2024 AUG -6 AM 9:05
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20 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
21 **IN AND FOR CARSON CITY**

22 REPUBLICAN NATIONAL
23 COMMITTEE, *et al.*,

24 Plaintiffs,

25 vs.

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

28 Defendants.

Case No.: 24 OC 00101 1B

Dept. No. I

1 ~~PROPOSED~~ ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

2 Plaintiffs the Republican National Committee (“RNC”), Nevada Republican Party
3 (“NV GOP”), Donald J. Trump for President 2024, Inc. (together with the RNC and NV
4 GOP, “Organizational Plaintiffs”), and Scott Johnston filed a Motion for Preliminary
5 Injunction (“Motion”). The Court, having considered the Motion and all briefing and
6 argument thereon, DENIES the Motion.

7 I. BACKGROUND

8 When Nevada voters return ballots by mail, the ballots must generally be “(1)
9 [p]ostmarked on or before the day of the election; and (2) [r]eceived by the clerk not later
10 than 5 p.m. on the fourth day following the election.” NRS 293.269921(1)(b). But there is
11 a fallback if “the date of the postmark cannot be determined”: if such ballots are “received
12 by mail not later than 5 p.m. on the third day following the election, . . . the mail ballot
13 shall be deemed to have been postmarked on or before the day of the election.” NRS
14 293.269921(2). This language was first adopted in Assembly Bill 4 of the 32nd Special
15 Session of the Legislature (“AB 4”) for elections held during a declared state of emergency.
16 AB 4 §§ 8(1), 20(2). It was thereafter extended, effective January 1, 2022, to all elections,
17 see Assembly Bill 321 of the 81st Sess. (Nev. 2021) (“AB 321”) 8(2), §§ 92(3), and it is codified
18 as NRS 293.269921(2) (“Postmark Provision”).

19 The Organizational Plaintiffs filed a lawsuit in 2024 challenging Nevada’s laws
20 allowing for certain mail ballots that arrive up to four days after an election to be counted,
21 including NRS 293.269921(2). See Am. Compl. for Declaratory and Inj. Relief (“Am.
22 Compl.”) ¶ 80; *RNC v. Burgess*, Case No. 3:24-cv-00198-MMD-CLB, 2024 WL 3445254, at
23 *1 (D. Nev. July 17, 2024) (“*Burgess*”). That lawsuit was dismissed because the plaintiffs
24 did not have standing. See generally *Burgess*, 2024 WL 3445254.

25 In this lawsuit, Plaintiffs seek declaratory and injunctive relief precluding the
26 counting, pursuant to the Postmark Provision, of mail ballots with no postmarks (as
27 opposed to mail ballots with, for example, illegible postmarks). They further challenge
28 “Memo 2024-015 – Indeterminate Postmark” (“Memorandum”), dated May 29, 2024, sent

1 by the Secretary of State to Nevada's county clerks and registrars of voters as violative of
2 the Nevada Administrative Procedures Act ("APA"). The Memorandum states that "a mail
3 ballot that has no visible postmark should be interpreted to have an indeterminate
4 postmark" pursuant to the Postmark Provision. Mot. Ex. 1 at 1. Plaintiffs have moved for
5 a preliminary injunction "prohibiting Nevada officials from counting mail ballots received
6 after election day that lack a postmark." Mot. at 4.

7 **II. LEGAL STANDARDS**

8 A preliminary injunction is "an extraordinary remedy that may only be awarded
9 upon clear showing that the plaintiff is entitled to such relief." *See Winter v. Nat. Res. Def.*
10 *Council, Inc.*, 555 U.S. 7, 22 (2008). It should be denied "in the absence of testimony or
11 exhibits establishing the material allegations of the complaint." *Coronet Homes, Inc. v.*
12 *Mylan*, 84 Nev. 435, 437, 442 P.2d 901, 902 (1968) (citations omitted). And the evidence
13 supporting injunctive relief must be admissible. *See State v. NOS Commc'ns, Inc.*, 120 Nev.
14 65, 69, 84 P.3d 1052, 1054 (2004). An applicant for a preliminary injunction order bears
15 the burden of showing "(1) a likelihood of success on the merits; and (2) a reasonable
16 probability that the non-moving party's conduct, if allowed to continue, will cause
17 irreparable harm for which compensatory damage is an inadequate remedy." *Univ. &*
18 *Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187
19 (2004). Additionally, courts "weigh the potential hardships to the relative parties and
20 others, and the public interest." *Id.*

21 **III. ANALYSIS**

22 **A. Likelihood of Success on the Merits**

23 **1. Standing**

24 Nevada "caselaw generally requires the same showing of injury-in-fact,
25 redressability, and causation that federal cases require for Article III standing." *Nat'l*
26 *Assoc. of Mut. Ins. Cos. v. Dep't of Bus. & Indus., Div. of Ins.*, 524 P.3d 470, 476 (Nev. 2023)
27 (citations omitted).

28 ///

1 **a. The Organizational Plaintiffs' Standing**

2 The Organizational Plaintiffs have failed to show they have standing. The U.S.
3 District of Nevada recently dismissed a similar lawsuit brought by the same Organizational
4 Plaintiffs and an individual plaintiff for lack of standing. *See Burgess*, 2024 WL 3445254.
5 The *Burgess* plaintiffs challenged Nevada's laws allowing some mail ballots that are
6 received within four days after an election to be counted, including NRS 293.269921(2). *See*
7 *id.* at *1. The Court likewise concludes that the Organizational Plaintiffs have failed to
8 show they have standing and therefore have little likelihood of success on the merits.

9 **i. Competitive Harm**

10 The Organizational Plaintiffs claim injury based on the assertion that "late-arriving
11 mail ballots that are counted will tend to disproportionately favor Democrat candidates."
12 Am. Compl. ¶ 71; *see also id.* ¶¶ 72-77. To establish competitive standing, the
13 Organizational Plaintiffs would need to either show the "potential loss of an election,"
14 *Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011) (citation omitted), or that they are
15 "forced to compete under the weight of a state-imposed disadvantage," *Mecinas v. Hobbs*,
16 30 F.4th 890, 899 (9th Cir. 2022). The Organizational Plaintiffs have submitted no
17 evidence establishing either.

18 As the *Burgess* court explained, "[a]ny harm to Organizational Plaintiffs' electoral
19 success from the Nevada mail ballot receipt deadline 'arises from the government's
20 allegedly unlawful regulation' of a third party: Nevada voters." *Burgess*, 2024 WL 3445254,
21 at *2 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992)). Because the
22 Organizational Plaintiffs could not "rely on speculation about the unfettered choices made
23 by independent actors' to establish standing," the *Burgess* court found the Organizational
24 Plaintiffs failed to establish causation and redressability with respect to a theory of injury
25 based on potential loss of an election. *Id.* (quoting *Food & Drug Admin. v. All. for*
26 *Hippocratic Med.*, 602 U.S. 367, 383 (2024)). The same holding applies here.

27 As in *Burgess*, Plaintiffs include no allegations or evidence relating to unaffiliated
28 voters, who cast around 27.6% of mail ballots in the past two general election; "[t]he

1 partisan lean of unaffiliated mail ballots is unknown.” *Id.* at *2 n.4. Thus, the
2 Organizational Plaintiffs have failed to establish that late-arriving mail ballots without
3 postmarks skew Democratic. Regardless, “it is far from guaranteed that Nevada voters
4 will” continue their same mail ballot voting trends. *Id.* at *2 (citing *O’Shea v. Littleton*, 414
5 U.S. 488, 496–97 (1974)). Thus, it is “‘inherently speculative’ that mail ballots [without
6 postmarks] received in Nevada after Election Day will favor Democratic candidates and
7 that, if they do, such votes will be ‘sufficient in number to change the outcome of the election
8 to [Republicans] detriment.’” *Id.* (quoting *Bognet v. Sec’y Commonwealth Pa.*, 980 F.3d
9 336, 351–52 (3d Cir. 2020)). And for the same reason, the “Organizational Plaintiffs have
10 not shown that any harm to their electoral prospects will ‘likely’ be redressed by enjoining
11 Nevada from counting ballots [without postmarks] received after Election Day.” *Id.* at *3
12 (citing *All. for Hippocratic Med.*, 602 U.S. at 380).

13 With respect to a state-imposed disadvantage, the Organizational Plaintiffs have not
14 established an “unfair advantage in the election process,” *Owen v. Mulligan*, 640 F.2d 1130,
15 1133 (9th Cir. 1981) (citation omitted), or that they are forced to compete on an uneven
16 playing field, *City of Los Angeles v. Barr*, 929 F.3d 1163, 1173 (9th Cir. 2019). The
17 challenged guidance applies equally to *all* candidates and to *all* voters, so no one “is
18 specifically disadvantaged” by it. *Bost v. Ill. State Bd. of Elections*, 684 F. Supp. 3d 720,
19 737–38 (N.D. Ill. 2023) (quoting *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir.
20 2020)); *see also Burgess*, 2024 WL 3445254, at *3 (“Republican candidates ‘face no harms
21 that are unique from their electoral opponents’ when all Nevada voters are uniformly given
22 greater access to the ballot box.”); *Donald J. Trump for President, Inc. v. Cegauske*, 488 F.
23 Supp. 3d 993, 1003 (D. Nev. 2020) (“Plaintiffs seek to muster ‘competitive standing,’ yet
24 their candidates face no harms that are unique from their electoral opponents.”).

25 **ii. Diversion of Resources**

26 The Organizational Plaintiffs allege that as a result of the interpretation of
27 NRS 293.269921(2) at issue here, they and their members must “divert more time and
28 money to post-election mail ballot activities.” Am. Compl. ¶ 66. A diversion of resources

1 theory of injury cannot be premised on “continuing ongoing activities” or expenditures that
2 are part of “business as usual.” *Friends of the Earth v. Sanderson Farms, Inc.*, 992 F.3d
3 939, 943 (9th Cir. 2021) (citations omitted). The Organizational Plaintiffs must instead
4 “show that [they] would have suffered some other injury if [they] had not diverted resources
5 to counteracting the problem.” *See La Asociacion de Trabajadores de Lake Forest v. City of*
6 *Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010).

7 The Organizational Plaintiffs fail to make that showing. Regardless of what
8 happens in this case, mail ballots will be a central component of Nevada elections, and
9 many of them will be counted after election day. And the Organizational Plaintiffs allege
10 that they already “devote[] significant resources to mail-ballot-chasing operations and
11 election integrity activities.” Am. Compl. ¶ 18. Plaintiffs are unable to explain how or why
12 the counting of ballots without visible postmarks, in particular, would cause them to
13 “expend[] additional resources that they would not otherwise have expended.” *Friends of*
14 *the Earth*, 992 F.3d at 942 (citation omitted). They therefore fail to specify a harm they
15 must counteract by diverting resources based on the interpretation of NRS 293.269921(2).
16 For instance, they claim that “[i]f non-postmarked ballots received after election day are
17 counted, the RNC will have to devote resources to ascertaining and ensuring that only
18 ballots mailed by election day are counted.” *Id.* But they already indicate that they
19 participate in mail-ballot counting activities, *see id.* ¶¶ 65–66, and whether NRS
20 293.269921(2) is interpreted to include mail ballots without postmarks, the same amount
21 of resources would be expended. *See Burgess*, 2024 WL 3445254, at *5 (“Organizational
22 Plaintiffs therefore are not engaging in additional poll watching and mail ballot counting
23 activities to identify and counteract any harms from the Nevada mail ballot receipt
24 deadline.”).

25 iii. Associational Standing

26 The Organizational Plaintiffs fail to show that they have standing to bring suit on
27 behalf of their members. *See* Am. Compl. ¶¶ 16, 22. They would have to have members
28 who “would otherwise have standing to sue in their own right.” *Hunt v. Wash. State Apple*

1 *Advert. Comm'n*, 432 U.S. 333, 343 (1977). For the same reasons Plaintiffs have failed to
2 show standing based on vote dilution, as described below, the Organizational Plaintiffs
3 have failed to show that they have associational standing.

4 **b. Vote Dilution**

5 Plaintiffs assert vote dilution as a basis for standing. See Am. Compl. ¶¶ 67, 70.
6 However, vote dilution where “no single voter is specifically disadvantaged’ if a vote is
7 counted improperly” “is a ‘paradigmatic generalized grievance that cannot support
8 standing.” *Wood*, 981 F.3d at 1314 (citation omitted). As the *Burgess* court explained, vote
9 dilution is “an insufficient injury in fact to support standing when the alleged harm is
10 predicated upon the counting of illegitimate or otherwise invalid ballots and equally affects
11 all voters in a state.” 2024 WL 3445254, at *6 (collecting cases). A “veritable tsunami” of
12 decisions have rejected Plaintiffs’ “vote dilution” theory that all voters are injured by the
13 counting of supposedly unlawful votes. *O’Rourke v. Dominion Voting Sys. Inc.*, No. 20-CV-
14 03747-NRN, 2021 WL 1662742, at *9 (D. Colo. Apr. 28, 2021) (collecting cases); see also
15 *Paher v. Cegauske*, 457 F. Supp. 3d 919, 926 (D. Nev. 2020). “Counting ballots [without
16 postmarks] received after Election Day does not specifically disadvantage any one voter,
17 ‘even if the error might have a “mathematical impact on the final tally and thus on the
18 proportional effect of every vote.” *Burgess*, 2024 WL 3445254, at *7 (citation omitted).
19 Accordingly, Plaintiffs have failed to establish standing based on allegations of vote
20 dilution and have little likelihood of success on the merits.

21 **2. Failure to Join a Necessary Party**

22 NRCP 19(a)(1)(B)(i) requires joinder of a party where that party “claims an interest
23 relating to the subject of the action and is so situated that disposing of the action in the
24 person’s absence may . . . as a practical matter impair or impede the person’s ability to
25 protect the interest.” Pursuant to NRCP 12(b)(6), dismissal is appropriate for failure to
26 join a party under NRCP 19. This is because the Court cannot enter a final judgment
27 absent necessary parties. *Univ. of Nev. v. Tarkanian*, 95 Nev. 389, 396, 594 P.2d 1159,
28 1163 (1979) (“If the interest of the absent parties “may be affected or bound by the decree,

1 they must be brought before the court, or it will not proceed to a decree.””); *see also Schwob*
2 *v. Hemsath*, 98 Nev. 293, 294, 646 P.2d 1212, 1212 (1982) (“Failure to join an indispensable
3 party is fatal to a judgment and may be raised by an appellate court sua sponte.”).

4 Plaintiffs allege, as a basis for their standing, that “late-arriving mail ballots that
5 are counted will tend to disproportionately favor Democrat candidates.” Am. Compl. ¶ 71.
6 Taking Plaintiffs’ allegations as true, it would follow that their requested relief would
7 directly harm Democrats by preventing the counting of some Democratic mail ballots. Just
8 as Plaintiffs claim an interest in the interpretation and application of NRS 293.269921(2),
9 *see id.* ¶¶ 15, 17, 18, 22, 25, 83, 90, the Democratic party would have the same interests, as
10 well as the interest in ensuring the maximum number of Democratic mail ballots are
11 counted. Given Plaintiffs theory of standing, they therefore should have joined at least
12 some Democratic party, such as the Democratic National Committee or the Nevada State
13 Democratic Party, in this action to protect those interests. Because Plaintiffs did not, this
14 action is subject to dismissal, and Plaintiffs have little likelihood of success on the merits.

15 3. Statutory Text

16 a. Plain Language

17 Plaintiffs are also unlikely to succeed on the merits because their challenge to the
18 Secretary’s interpretation of the Postmark Provision fails as a matter of law. Courts “look
19 to [a] statute’s plain language” to “ascertain” and “give effect to the Legislature’s intent,”
20 which is “[t]he goal of statutory interpretation.” *Williams v. State Dep’t of Corr.*, 133 Nev.
21 594, 596, 402 P.3d 1260, 1262 (2017) (citation omitted). The Secretary of State’s plain-text
22 interpretation of the Postmark Provision is consistent with traditional modes of
23 interpretation. The Postmark Provision applies to *any* cast mail ballot that (1) “is received
24 by mail not later than 5 p.m. on the third day following the election” and (2) “the date of
25 the postmark cannot be determined.” NRS 293.269921(2). The Provision applies *whenever*
26 a mail ballot is timely mailed and received by the county clerk or registrar of voters and a
27 postmark date “cannot be determined,” regardless of the *reason why* “the date of the
28 postmark cannot be determined.” The Provision does not, by its own terms, require a

1 visible postmark on the mail ballot. Nor is its application limited to specific reasons why
2 “the date of the postmark cannot be determined.” It does not matter whether a postmark
3 is illegible or absent altogether; the date of a postmark is still indeterminate in both
4 scenarios.

5 Plaintiffs’ claim, in contrast, would require reading the Postmark Provision to create
6 an arbitrary distinction between ballots that have a visible postmark but no legible date
7 and ballots that have no visible postmark at all, even though the provision applies to *all*
8 mailed ballots for which “the date of the postmark cannot be determined.” NRS
9 293.269921(2). Nothing in the text of the Postmark Provision creates such an arbitrary
10 distinction. Whether a postmark is smudged, torn, or absent altogether, the date of the
11 postmark “cannot be determined” so the statute equally applies. When a statutory
12 provision lays out specific requirements, but makes no mention of others, Nevada courts
13 presume that such “omissions” by the Legislature were intentional. *See In re Lowry*, 549
14 P.3d 483, 485 (Nev. 2024) (citation omitted); *Dep’t of Tax’n v. DaimlerChrysler Servs, N.*
15 *Am., LLC*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005) (“Nevada law also provides that
16 omissions of subject matters from statutory provisions are presumed to have been
17 intentional.”); *City of Reno v. Yturbide*, 135 Nev. 113, 115–16, 440 P.3d 32, 35 (2019)
18 (“Where the language of the statute is plain and unambiguous, a court should not add to or
19 alter the language to accomplish a purpose not on the face of the statute or apparent from
20 permissible extrinsic aids such as legislative history or committee reports.” (cleaned up)).

21 The structure of the Postmark Provision reinforces the conclusion that no visible
22 postmark is required for NRS 293.269921(2) to apply. The Provision carefully articulates
23 two sets of rules for counting ballots delivered by mail to election officials. The first, in
24 subsection (1), applies to ballots whose postmark dates *can* be determined. Such ballots
25 may be counted only if they are postmarked on or before election day and received by 5 p.m.
26 on the fourth day after election day. The second, in subsection (2), applies where the date
27 of the postmark *cannot* be determined. Such ballots may be counted only if they are
28 received by 5 p.m. on the third day after election day. These two subsections are plainly

1 intended to cover all ballots delivered to election officials by mail: those with determinable
2 postmark dates, and those without. There is no third set of rules. The Secretary's
3 interpretation therefore does not, as Plaintiffs assert, render any portion of the statute
4 superfluous. Mot. at 9. It gives effect to *both* sets of rules in NRS 293.269921.

5 Plaintiffs' argument, on the other hand, would require the Court to conclude that
6 the statute implicitly demands that election officials reject ballots with no visible postmark
7 at all, even though no provision in the statute addresses that specific category of ballots, as
8 distinct from the broader set of all ballots for which a postmark date cannot be determined.
9 Thus, Plaintiffs' argument would insert words into the statute that are not there. But the
10 court must "look to the statute's plain language" to "ascertain the Legislature's intent."
11 *Williams v. State Dep't of Corr.*, 133 Nev. 594, 596, 402 P.3d 1260, 1262 (2017). If the
12 Legislature intended to demand that ballots without visible postmarks be rejected, it could
13 easily have said so. Because "the statute's language is clear and unambiguous," the Court
14 must "enforce the statute as written." *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179
15 (2011).

16 The Secretary of State's interpretation also harmonizes with the purpose and "spirit"
17 of Nevada's election laws. The broader, overarching thrust of NRS chapter 293 favors the
18 counting, not rejecting, of votes. "[W]henver possible, [courts] will interpret a rule or
19 statute in harmony with other rules or statutes." *Williams*, 133 Nev. at 596, 402 P.3d at
20 1262 (cleaned up). "The language of a statute should be given its plain meaning unless, in
21 so doing, the spirit of the act is violated." *Int'l Game Tech., Inc.*, 122 Nev. at 152, 127 P.3d
22 at 1102 (2006). The Legislature codified the "spirit" of NRS chapter 293 at NRS
23 293.127(1)(c). This provision demands that all Nevada election laws, under Title 24, be
24 "liberally construed" to effectuate the "real will of the electors," such that it "is not defeated
25 by any informality or by failure substantially to comply with the provisions of this title with
26 respect to . . . the conducting of an election or certifying the results thereof." NRS
27 293.127(1)(c); see *Univ. & Cmty. Coll. Sys. of Nev.*, 120 Nev. at 734, 100 P.3d at 195.

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1 Moreover, while Plaintiffs' complaint specifically targets ballots arriving after
2 election day, their argument would lead to absurd results, putting *any* ballot that arrives
3 in the mail at the county clerk's office without a visible postmark at risk of rejection, even
4 if it arrives before or on election day. Subsection 1 allows for the counting only of
5 "[p]ostmarked" ballots. NRS 293.269921(1)(b)(1). Subsection 2 is the only provision of
6 Nevada law that explicitly provides for the counting of ballots returned by mail without a
7 determinable postmark date. And nothing about Subsection 2 distinguishes between
8 ballots delivered before and after election day. If Plaintiffs were right that Subsection 2
9 excludes ballots without visible postmarks, it would seem to follow that such ballots cannot
10 be counted no matter *when* they are received. Even Plaintiffs implicitly acknowledge that
11 rejecting ballots that arrive by election day would be untenable; they ask only that ballots
12 arriving after election day be discarded. But this distinction between ballots that arrive
13 before and after election day appears nowhere in the text and would require the Court to
14 read in language that is not there.

15 **b. Legislative History and Context**

16 Even if the plain text of the Postmark Provision were ambiguous, traditional canons
17 of construction further support rejecting Plaintiffs' reading. "Where a statute lacks plain
18 meaning," Nevada courts "will consult legislative history, related statutes, and context as
19 interpretive aids." *Nev. State Democratic Party v. Nev. Republican Party*, 256 P.3d 1, 7
20 (Nev. 2011) (citations omitted). Courts also may interpret an ambiguous statute by
21 "examining the context and the spirit of the law or the causes which induced the
22 Legislature to enact it. The entire subject matter and policy may be involved as an
23 interpretive aid." *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007).

24 The canon of constitutional avoidance supports the conclusion that mail ballots
25 without postmarks should be counted pursuant to the Postmark Provision. *See, e.g.,*
26 *Degraw v. Eighth Jud. Dist. Ct.*, 134 Nev. 330, 333, 419 P.3d 136, 139 (2018). The Postmark
27 Provision ensures that any voter who mails in their ballot by election day, in compliance
28 with NRS 293.266921, will have their vote rightfully counted, regardless of whether the

1 USPS applies a postmark—an act fully out of the voter’s control. *See Bush v. Hillsborough*
2 *Cnty. Canvassing Bd.*, 123 F. Supp. 2d 1305, 1317 (N.D. Fla. 2000) (noting that local
3 election officials’ “job is to accept votes, not reject them,” and that they “must diligently
4 count every vote that substantially complies with a state’s election law absent any
5 indication of fraud.”).

6 The Secretary’s interpretation also “conforms to reason and public policy.” *Great*
7 *Basin Water Network v. Taylor*, 126 Nev. 187, 196, 294 P.3d 912, 918 (2010). The no-
8 postmark-date provision is designed to ensure that timely-cast ballots are not discarded
9 due to circumstances—such as the smudging or omission of a postmark—that are entirely
10 outside the voter’s control. This rationale applies equally to ballots with no visible
11 postmark as to ballots with illegible postmarks dates. An illegible postmark provides
12 election officials with no information that a ballot delivered by mail without a visible
13 postmark lacks.

14 Plaintiffs’ interpretation, on the other hand, runs afoul of the constitutional
15 avoidance doctrine because it explicitly requires a visible postmark on all mail ballots and,
16 in turn, implicitly compels county clerks and registrars of voters to reject valid mail ballots.
17 Plaintiffs’ reading would lead to rejection of timely mail ballots—an absurd and
18 unconstitutional outcome that prevents accurate counting of votes and stymies Nevada
19 voters’ right to “a uniform, statewide standard for counting . . . all votes *accurately*.” Nev.
20 Const. art. II, § 1A(10) (emphasis added); NRS 293.2546(10); *cf. DCCC v. Kosinski*, 614 F.
21 Supp. 3d 20, 56–57 (S.D.N.Y. 2022) (finding that application of state law rejecting post-
22 election day ballots without postmarks “constitute[d] a severe burden on the right to vote”
23 because it “disenfranchise[d] voters who *do* meet the deadlines imposed by state law by
24 invalidating their ballots that, through no fault of their own, are not postmarked and are
25 delivered two or more days after Election Day”). To safeguard voters’ rights, constitutional
26 avoidance requires this Court to “shun” Plaintiffs’ interpretation of the Postmark
27 Provision. *Degraw*, 134 Nev. at 333, 419 P.3d at 139.

28 ///

1 The legislative history of NRS 293.269921, consistent with reason and public policy,
2 further supports the conclusion that the Postmark Provision applies to mail ballots without
3 postmarks. The Legislature considered this issue when adopting AB 321. Assemblyman
4 Jason Frierson, AB 321's primary sponsor, explained that timely mail ballots without
5 postmarks would also be counted under the bill:

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

10 Minutes of the Meeting of the Assemb. Comm. on Legis. Operations & Elections, 2021 Leg.,
11 81st Sess. at 21 (Nev. 2021). More broadly, Frierson emphasized the need to *expand* voting
12 rights in Nevada through A.B. 321—an expansion in which the counting of mail ballots
13 plays a central role:

14 I believe as the late U.S. Representative John Lewis did—that the
15 vote is the most powerful nonviolent tool that we have in a
16 democracy, and we must use it. . . . I am proud that Nevada has
17 led the way over the years to expand the ways in which people
18 vote, and I am proud to continue expanding our freedoms with
A.B. 321. This reflects an expansion in Nevada but not a new
concept; several states have had seamless and very successful
election processes via mail ballots, including some states that do
only mail ballot elections.

19 *Id.* at 8. Assemblyman Frierson's statement is evidence of a legislative intent (and public
20 policy) to count mail ballots lacking a visible postmark if they arrive within three days after
21 election day. See NRS 293.127(1)(c); *Univ. & Cmty. Coll. Sys. of Nev.*, 120 Nev. at 734, 100
22 P.3d at 195. And as the Nevada Supreme Courts has recognized, "even the most basic
23 general principles of statutory construction must yield to clear contrary evidence of
24 legislative intent." *A.J. v. Eighth Jud. Dist. Ct.*, 133 Nev. 202, 206, 394 P.3d 1209, 1213
25 (2017) (citation omitted).

26 Because legislative intent, public policy, and commonsense all show that timely cast
27 votes should not be thrown out due to an action completely out a voter's control—the
28 application of a postmark—Plaintiffs are not likely to succeed on the merits of their claims.

1 See *DCCC*, 614 F. Supp. 3d at 56–57.

2 **4. APA**

3 A “regulation” subject to the notice and hearing requirements of the Administrative
4 Procedure Act (“APA,” NRS chapter 233B) “does not include . . . [a]n interpretation of an
5 agency that has statutory authority to issue interpretations.” NRS 233B.038(2)(h). The
6 Legislature authorized the Secretary of State to “provide interpretations and take other
7 actions necessary for the effective administration of the statutes and regulations governing
8 the conduct of primary, presidential preference primary, general, special and district
9 elections in this State.” NRS 293.247(4). The Secretary of State therefore had statutory
10 authority to issue the interpretation of NRS 293.269921(2) in the Memorandum. Because
11 the Memorandum was not a “regulation” as defined in NRS 233B.038(2)(h), Plaintiffs have
12 no likelihood of succeeding on the merits of their APA claim.

13 **B. Irreparable Harm**

14 Plaintiffs claim irreparable harm based on (1) the potential loss of an election; and
15 (2) vote dilution. Mot. at 13–15. Plaintiffs have failed to show any reasonable probability
16 that they will suffer these harms in the absence of an injunction. See *Univ. & Cmty. Coll.*
17 *Sys. of Nev.*, 120 Nev. at 721, 100 P.3d at 187. Both harms depend on the Court finding
18 that counting mail ballots without postmarks violates NRS 293.269221(2). As set out
19 above, however, the Court does not so find. Plaintiffs therefore fail to establish any
20 reasonable probability of irreparable harm.

21 Moreover, Plaintiffs failed to provide admissible evidence to support their
22 allegations of irreparable harm. Their filings cited a total of four exhibits: the challenged
23 memorandum, two barebones declarations from election observers describing the counting
24 of ballots without visible postmarks, and a one-page Clark County “Quick Guide” that does
25 not mention postmarks. These exhibits show, at most, that Clark and Washoe Counties
26 are following the Secretary’s challenged guidance. None does anything to support
27 Plaintiffs’ allegations of injury and irreparable harm, which turn on alleged but unproven
28 diversions of resources and alleged but unproven disparities in the partisanship of late-

1 arriving mail ballots. At the hearing, Plaintiffs belatedly sought to supplement these
2 allegations with declarations from representatives of the RNC and the NV GOP. The Court
3 declines to consider or credit these declarations, which were not provided to Defendants in
4 advance of the hearing, and which were executed by witnesses who were not made available
5 for cross-examination.

6 Finally, and independently, Plaintiffs' allegations and evidence of irreparable harm
7 are inadequate in any event. For the reasons explained above in connection with standing,
8 Plaintiffs do not show that they face concrete, non-speculative harm in the absence of
9 immediate injunctive relief. Particularly given the very small number of ballots apparently
10 at issue—just 24 in the recent primary election—any possible injury to Plaintiffs is entirely
11 speculative and hypothetical.

12 **C. Public Interest**

13 The public interest is served by ensuring that the maximum number of legitimate
14 votes are counted. *See, e.g.*, 52 U.S.C. § 20501(a)(1)-(2) (“The Congress finds that . . . the
15 right of citizens of the United State to vote is a fundamental right [and] it is the duty of the
16 Federal, State, and local governments to promote the exercise of that right . . .”). As the
17 Court has explained, the Postmark Provision allows certain mail ballots without postmarks
18 to be counted. Plaintiffs therefore fail to show that it is in the public's interest to
19 disenfranchise voters.

20 Accordingly, the Court ORDERS that:


- 21 1. Plaintiffs' Motion for Preliminary Injunction is denied; and
22 2. The Attorney General will serve a notice of entry of this order on all other
23 parties and file proof of such service within 7 days after the date the Court sends this order
24 to the State Defendants' attorneys.

25 DATED August 6, 2024

26
27 
28 DISTRICT COURT JUDGE

1 Respectfully submitted:
2 Dated this ^{2nd} day of August, 2024

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCF 5(b), I certify that I am an employee of the First Judicial District
3 Court, and that on August 6, 2024, I deposited for mailing, postage paid, at Carson City,
4 Nevada, a true and correct copy of the foregoing Order addressed as follows:

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