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12 *Attorneys for Plaintiff*

13
14 **IN THE FIRST JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR CARSON CITY**

15
16 PROGRESSIVE LEADERSHIP ALLIANCE
OF NEVADA,

17 Plaintiff,

18 vs.

19
20 BARBARA CEGAVSKE, in her official
capacity as Nevada Secretary of State,

21 Defendant.
22

Case No.:

Dept. No.:

**COMPLAINT FOR DECLARATORY
& INJUNCTIVE RELIEF**

Arbitration Exemption: Declaratory
and Injunctive Relief

23
24 COMES NOW Plaintiff Progressive Leadership Alliance of Nevada, by and through its
25 undersigned counsel, and files this Complaint against Defendant Barbara Cegavske, and alleges
26 and petitions this Court as follows:
27
28

1 Constitution’s Equal Protection Clause by treating different votes differently and providing too
2 little guidance to ensure uniform and accurate vote-counting.

3 5. The court should therefore declare that the temporary regulation is invalid and grant
4 associated preliminary and permanent injunctive relief.

5 **VENUE**

6 6. Venue is proper in the First Judicial District Court of Nevada under NRS 233B.110,
7 because this is a proceeding for a declaratory judgment alleging that a regulation interferes with,
8 impairs, and threatens to interfere with or impair, the legal rights or privileges of Plaintiff, and
9 under NRS 13.020, because this is an action against a public official in her official capacity for
10 actions that occurred, in whole or in part, in Carson City.

11 **PARTIES**

12 7. Plaintiff Progressive Leadership Alliance of Nevada is a non-profit organization
13 that was founded in 1994 to bring together diverse and potentially competing organizations into
14 one cohesive force for social and environmental justice in Nevada. Plaintiff is a coalition of more
15 than thirty member groups throughout Nevada. Many of those member groups, in turn, have
16 individual members of their own, including many individual Nevada voters.

17 8. As part of its mission, Plaintiff emphasizes civic engagement, combats voter
18 suppression, and seeks to ensure that all eligible Nevada voters have their votes counted. Plaintiff
19 is particularly focused on empowering and ensuring that Nevada’s historically marginalized
20 voters, including voters of color and young voters, are not denied their fundamental right to vote.
21 Those voters, unfortunately, have historically been those most likely to be the target of voter
22 suppression efforts, including harassment and voter intimidation.

23 9. Defendant Barbara Cegavske is the Secretary of State for the State of Nevada. She
24 is sued in her official capacity.

25 10. The Secretary of State is the “Chief Officer of Elections for this State” and
26 “responsible for the execution and enforcement of . . . all . . . provisions of state and federal law
27 relating to elections in this State.” NRS 293.124(1). The Secretary of State “shall adopt such
28 regulations as are necessary to carry out” that responsibility. NRS 293.124(2). The Secretary of

1 State’s regulations must “not [be] inconsistent with the election laws of this state.”
2 NRS 293.247(1).

3 **FACTUAL ALLEGATIONS**

4 **A. Nevada law requires a uniform, statewide vote-counting standard.**

5 11. For many years, Nevada counties have counted votes using mechanical voting
6 systems, defined as “any system of voting whereby a voter may cast a vote” either “[o]n a device
7 which mechanically or electronically compiles a total of the number of votes cast for each
8 candidate and for or against each measure voted on,” or “[b]y marking a paper ballot which is
9 subsequently counted on an electronic tabulator, counting device or computer.” NRS 293B.033.
10 Since 1975, Nevada statutes have expressly provided that “[a]t all statewide, county, city and
11 district elections of any kind held in this State, ballots or votes may be cast, registered, recorded
12 and counted by means of a mechanical voting system.” NRS 293B.050.

13 12. To be used in Nevada, mechanical voting systems, like any other voting systems,
14 must “meet[] or exceed[] the standards for voting systems established by the United States Election
15 Assistance Commission.” NRS 293B.063 (requirement for “mechanical voting system”); *see also*
16 NRS 293.2696 (same requirement for “each voting system” used in Nevada, not restricted to
17 *mechanical* voting systems).

18 13. Nevada law further requires that mechanical voting systems provide a printed paper
19 record of all votes cast on the system, NRS 293B.082, and that such systems be tested for accuracy
20 before the first day of early voting, immediately before the start of the official count, and within
21 24 hours after the end of the official count, NRS 293B.150, .165, among many other safeguards.

22 14. Under one form of mechanical voting system, voters cast votes using paper ballots
23 “by darkening a designated space on the ballot,” which are then read and counted by an electronic
24 device. NRS 293.3677(2). Nevada statutes provide specific standards for counting votes cast using
25 such a system. *See id.*

26 15. For any other “method of voting used in this state,” the Secretary of State “[s]hall
27 adopt regulations establishing uniform, statewide standards for counting a vote cast” by that
28

1 method, “including, *without limitation*, a vote cast on a mechanical recording device which directly
2 records the votes electronically.” NRS 293.3677(3)(b) (emphasis added).

3 **B. Some groups have recently favored hand counting, but it is flawed.**

4 16. In recent years, and particularly after the 2020 presidential election, some groups
5 in Nevada and elsewhere have become suspicious of electronic voting systems. Those suspicions
6 are unfounded. As the Secretary of State’s office has explained, “[a]ll voting machines undergo
7 extensive pre-election and post-election examinations to ensure they function as expected. The NV
8 Gaming Control Board tests and certifies our systems. The post-election audits and recounts
9 conducted in Nevada confirmed that the machines accurately tabulated the votes cast” in the 2020
10 general election. Nevada Sec’y of State, Facts vs. Myths: Nevada 2020 Post-General Election at
11 4, <https://www.nvsos.gov/sos/home/showpublisheddocument?id=9191> (last visited Aug. 30,
12 2022).

13 17. While there may be a role for hand recounts in close individual races, mechanical
14 and electronic voting systems are *significantly more reliable* in tabulating the results of multiple
15 contests on a single ballot than humans are. Studies of recounts have confirmed that electronic
16 voting systems provide significantly more accurate initial vote counts than hand counting does. As
17 one such study explained:

18 We find . . . that vote counts originally conducted by computerized
19 scanners were, on average, more accurate than votes that were
20 originally tallied by hand. This finding should not be surprising,
21 either to people who have administered elections or to those who
22 have a grasp of the extension of automation into the workplace.
Computers tend to be more accurate than humans in performing
long, tedious, repetitive tasks. The demanding election night
environment only drives a bigger wedge between human and
machine performance.

23 Stephen Ansolabehere, Barry C. Burden, Kenneth R. Mayer, & Charles Stewart III, *Learning from*
24 *Recounts*, 17 Elec. Law J. 100, 115 (2018), [https://www.liebertpub.com/doi/epdf/10.1089/](https://www.liebertpub.com/doi/epdf/10.1089/elj.2017.0440)
25 [elj.2017.0440](https://www.liebertpub.com/doi/epdf/10.1089/elj.2017.0440) (last visited Aug. 30, 2022).

26 18. Hand counting of multiple races on a single ballot is also exceptionally time
27 consuming. It took Esmerelda County more than seven hours to hand count just 317 ballots from
28 the June 14, 2022 primary. Ken Ritter, Gabe Stern, & Scott Sonner, *Last Nevada County Approves*

1 *Primary Results After Hand Count* (June 25, 2022), <https://apnews.com/article/2022-midterm->
2 [elections-new-mexico-nevada-voting-presidential-652df50bc2b535d2303ddd4c5fda6ea5](https://apnews.com/article/2022-midterm-elections-new-mexico-nevada-voting-presidential-652df50bc2b535d2303ddd4c5fda6ea5) (last
3 visited Aug. 30, 2022). Esmerelda County is the least populated county in Nevada, with just 729
4 residents according to the 2020 census.

5 **C. The Secretary of State promulgated a temporary regulation authorizing hand**
6 **counting.**

7 19. Despite these issues with hand counting ballots, on July 26, 2022, the Secretary of
8 State issued notice of her intent to promulgate a temporary regulation authorizing counties to count
9 ballots by hand for the 2022 general election. *See* Off. of the Sec’y of State, *Notice of Intent to Act*
10 *Upon a Regulation* (July 26, 2022), [https://www.nvsos.gov/sos/home/showpublisheddocument/](https://www.nvsos.gov/sos/home/showpublisheddocument/10756/637945306319570000)
11 [10756/637945306319570000](https://www.nvsos.gov/sos/home/showpublisheddocument/10756/637945306319570000) (last visited Aug. 30, 2022).

12 20. The Secretary of State held a workshop on her proposed temporary regulation on
13 August 12, 2022, and a public hearing on August 26, 2022. At both the workshop and the public
14 hearing, many commenters objected to the proposed temporary regulation, explaining that it is
15 contrary to the Nevada Constitution and Nevada statutes. *See, e.g.*, Letter from Brennan Center for
16 Justice et. al. to Mark Wlaschin (Aug. 12, 2022), [https://allvotingislocal.org/wp-content/uploads/](https://allvotingislocal.org/wp-content/uploads/BCAVLACLUSS-Public-Comment_Proposed-Hand-Count-Regulations-8-12-22.pdf)
17 [BCAVLACLUSS-Public-Comment_Proposed-Hand-Count-Regulations-8-12-22.pdf](https://allvotingislocal.org/wp-content/uploads/BCAVLACLUSS-Public-Comment_Proposed-Hand-Count-Regulations-8-12-22.pdf).

18 21. On August 26, the Secretary of State nevertheless adopted the proposed temporary
19 regulation, with only minor amendments from the initial proposed language that did not address
20 commenters’ objections that the regulation is contrary to Nevada law. *See* 2nd Revised Temp.
21 Regul. of the Sec’y of State, **Exhibit A** hereto.

22 22. The temporary regulation expressly authorizes county clerks “to conduct a hand
23 count of the ballots voted in an election.” *Id.* § 2. It defines a “hand count” as “the process of
24 determining the election results where the primary method of counting the votes cast for each
25 candidate or ballot question does not involve the use of a mechanical voting system.” *Id.* § 7(3)
26 (amending NAC 293.010). The temporary regulation authorizes county clerks to conduct a hand
27 count for “[a]ll contests on the ballot,” “[a] specified number of contests on the ballot,” or “[a]

1 specified sample of the precincts in the county.” *Id.* § 2. County clerks “may,” but need not, “use
2 an electronic tabulator to validate the results of the hand count.” *Id.* § 3.

3 23. If counties wish to proceed with a “hand count,” the temporary regulation requires
4 them to submit a plan for doing so to the Secretary of State at least 30 days before election day
5 and to follow detailed counting procedures. *Id.* §§ 3–6. Among other things, counties must use
6 four-person bipartisan counting teams of election board officers, counting using specified methods,
7 on specified shifts, with specified forms of oversight and auditing. *See id.* The temporary
8 regulation also imposes similar requirements on cities for city elections. *Id.* §§ 9–13.

9 24. The temporary regulation will not, however, apply to all forms of hand counting.
10 The Secretary of State specifically amended the initial proposed temporary regulation to restrict it
11 to scenarios in which hand counting is the “*primary* method of counting the votes cast” in an
12 election. *Id.* § 7 (amending NAC 293.010(3)) (emphasis added). Deputy Secretary of State Mark
13 Wlaschin explained that the amendment means that, “[i]f a county election official decides they’re
14 interested in conducting a hand count audit, or a hand count tabulation, but are going to use as the
15 primary method of tabulation a mechanical system, then these regulations are in essence
16 recommendations, but not required.” Sean Golonka, *State Adopts Regulation for Hand Counting*
17 *Ballots, But It Won’t Affect Nye County*, Nev. Indep. (Aug. 26, 2022),
18 [https://thenevadaindependent.com/article/state-adopts-regulation-for-hand-counting-ballots-but-](https://thenevadaindependent.com/article/state-adopts-regulation-for-hand-counting-ballots-but-it-wont-affect-nye-county)
19 [it-wont-affect-nye-county](https://thenevadaindependent.com/article/state-adopts-regulation-for-hand-counting-ballots-but-it-wont-affect-nye-county) (last visited Aug. 30, 2022).

20 25. As a result of the Secretary of State’s amendment to the temporary regulation, the
21 temporary regulation allows counties to conduct hand counts without even following the
22 procedures specified in the temporary regulation, so long as the hand count is not the “primary
23 method” of counting votes. Nye County Clerk Mark Kampf has proposed to do just that, stating
24 that he will engage in a “parallel tabulation” process that involves running paper ballots through
25 the typical mechanical tabulators and checking the results with an additional hand count of all
26 ballots.” *Id.* Nye County therefore apparently intends to conduct a hand count of ballots in the
27 2022 general election without complying with the procedures specified in the temporary
28 regulation.

1 **LEGAL PRINCIPLES**

2 26. The temporary regulation violates the Nevada Constitution and Nevada statutes and
3 exceeds the Secretary of State’s legal authority because it does not provide a uniform, statewide
4 standard for accurately counting ballots, and because it purports to authorize hand counting as a
5 voting system without first finding that it meets or exceeds the United States Election Assistance
6 Commission’s standards.

7 **A. The temporary regulation violates Nev. Const. art. 2, § 1A(10) and NRS**
8 **293.2546(10).**

9 27. Under both the Nevada Constitution and the Nevada Revised Statutes, each
10 registered voter “has the right . . . to a uniform, statewide standard for counting and recounting all
11 votes accurately as provided by law.” Nev. Const. art. 2, § 1A(10); *see also* NRS 293.2546(5)
12 (“[E]ach voter has the right . . . [t]o have a uniform, statewide standard for counting and recounting
13 all votes accurately.”).

14 28. The temporary regulation violates those provisions.

15 29. The temporary regulation authorizes each individual county to choose to use hand
16 counting either (1) not at all, (2) for all contests on all ballots, (3) for only some contests on all
17 ballots, or (4) for only ballots in some precincts. Ex. A § 2(1), (2). Counties that choose to use
18 hand counting in whole or in part may further choose whether to “use an electronic tabulator to
19 validate the results of the hand count.” *Id.* § 3. Because of the temporary regulation’s restrictive
20 definition of “hand count,” counties may also choose to primarily use electronic tabulation, while
21 conducting a hand count that is not subject to the temporary regulation’s procedures at all.

22 30. The temporary regulation therefore expressly authorizes counties across Nevada to
23 count votes in different ways, and even allows individual counties to count different votes
24 differently, in direct violation of voters’ rights to a “uniform, statewide standard” for counting
25 votes accurately under Nev. Const. art. 2, § 1A(10) and NRS 293.2546(5).

26 **B. The temporary regulation violates NRS 293.3677(3)(b).**

27 31. Nevada statutes provide that the Secretary of State “[s]hall adopt regulations
28 establishing uniform, statewide standards for counting a vote cast by each method of voting used

1 in this State” other than optical-scan machines, which are separately regulated by statute.
2 NRS 293.3677(3)(b).

3 32. The temporary regulation violates NRS 293.3677(3)(b) because it does not
4 establish a “uniform, statewide standard[]” for counting votes cast by paper ballot. Under the
5 temporary regulation, some votes cast by paper ballot may be counted solely by electronic
6 tabulator, others may be counted solely by hand, and still others may be counted by both methods.
7 That discrepancy may occur both among different counties and within individual counties.

8 33. Moreover, the temporary regulation does not establish “uniform, statewide
9 standards” even for those ballots that are counted by hand, because the temporary regulation leaves
10 counties free to “use an electronic tabulator to validate the results of the hand count” or not, and
11 entirely exempts hand counts from the procedures required by the regulation if counties do not
12 intend to use the hand count as the “*primary* method of counting the votes cast.” Ex. A §§ 2(3),
13 7(3). This is a further, independent violation of NRS 293.3677(3)(b).

14 **C. The temporary regulation violates NRS 293.2696(5).**

15 34. Nevada statutes further provide that “[t]he Secretary of State and each county and
16 city clerk shall ensure that each voting system used in the state . . . [m]eets or exceeds the standards
17 for voting systems established by the United States Election Assistance Commission, including,
18 without limitation, the error rate standards.” NRS 293.2696(5).

19 35. The temporary regulation violates NRS 293.2696(5) because it authorizes the use
20 of hand counting as a “voting system” in Nevada without any determination that the hand-counting
21 system it authorizes “[m]eets or exceeds the standards for voting systems established by the United
22 States Election Assistance Commission, including, without limitation, the error rate standards.”

23 36. NRS 293.2696(5) applies to *all* “voting systems”; it is not limited to “mechanical
24 voting systems,” a defined term in Nevada law that includes electronic tabulation systems. *See*
25 NRS 293B.033 (defining a “[m]echanical voting system” as “a system of voting whereby a voter
26 may cast a vote . . . [on] a device which mechanically or electronically compiles a total of the
27 number of votes cast for each candidate and for or against each measure voted on; or . . . [b]y
28 marking a paper ballot which is subsequently counted on an electronic tabulator, counting device

1 or computer.”). Nevada law separately regulates “mechanical voting systems” and separately
2 requires that they conform to these same standards. *See* NRS 293B.063 (“No *mechanical* voting
3 system may be used in this State unless it meets or exceeds the standards for voting systems
4 established by the United States Election Assistance Commission.” (emphasis added)).

5 37. Nevada law does not define “voting systems” as distinct from “mechanical voting
6 systems.” But the plain meaning of “voting systems” includes the detailed hand-counting system
7 established by the temporary regulation, which authorizes in considerable detail a specific means
8 of counting paper ballots by hand.

9 38. The Election Assistance Commission’s “Voting System Standards” require that
10 “[f]or each processing function” undertaken by a voting system, “the system shall achieve a target
11 error rate of no more than one in 10,000,000 ballot positions, with a maximum acceptable error
12 rate in the test process of one in 500,000 ballot positions.” Election Assistance Comm’n, *Voting*
13 *System Standards: Vol 1 – Performance Standards* at 3-51 (Apr. 2002), [https://www.eac.gov/sites/](https://www.eac.gov/sites/default/files/eac_assets/1/28/Voting_System_Standards_Volume_I.pdf)
14 [default/files/eac_assets/1/28/Voting_System_Standards_Volume_I.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/28/Voting_System_Standards_Volume_I.pdf) (last visited Aug. 30,
15 2022).

16 39. The Secretary of State adopted the temporary regulation without making any
17 finding that the error rate for the hand-counting system authorized by the temporary regulation
18 falls within the Election Assistance Commission’s standards, including the error-rate standards.

19 40. In fact, the temporary regulation does not require any procedure for assessing the
20 error rate for the hand-counting system *at all*. Rather, it merely states that a county may—but need
21 not—use an electronic tabulator to validate the results of the hand count.

22 **D. The temporary regulation violates the Equal Protection Clause**

23 41. The U.S. Constitution’s Equal Protection Clause also requires uniform procedures
24 for counting votes. Under the Equal Protection Clause, “[h]aving once granted the right to vote on
25 equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote
26 over that of another.” *Bush v. Gore*, 531 U.S. 98, 104–05 (2000). It is therefore unconstitutional
27 for states to “accord[] arbitrary and disparate treatment to voters in . . . different counties,” and for
28 counties to “use[] varying standards to determine what was a legal vote.” *Id.* at 107.

1 42. The temporary regulation violates the Equal Protection Clause because it authorizes
2 Nevada counties to count ballots in grossly divergent ways, and even authorizes individual
3 counties to count different ballots differently, such as by counting ballots cast at only some
4 precincts by hand. Ex. A § 2(1)(c).

5 43. The Equal Protection Clause also prohibits vote-counting procedures that fail to
6 provide “specific standards to ensure . . . equal application.” *Bush*, 531 U.S. at 106. The temporary
7 regulation violates this aspect of the Equal Protection Clause as well, by excluding counties that
8 conduct hand counts as a secondary method of counting votes from the temporary regulation, and
9 thereby failing to provide any standards or requirements for such hand counts.

10 **FIRST CLAIM FOR RELIEF**

11 **(Declaratory Judgment under NRS 233B.110)**

12 44. The preceding paragraphs are incorporated by reference herein.

13 45. NRS 233B.110(1) provides:

14 The validity or applicability of any regulation may be determined in
15 a proceeding for a declaratory judgment in the district court in and
16 for Carson City . . . when it is alleged that the regulation, or its
17 proposed application, interferes with or impairs, or threatens to
18 interfere with or impair, the legal rights or privileges of the plaintiff.
19 A declaratory judgment may be rendered after the plaintiff has first
requested the agency to pass upon the validity of the regulation in
question. The court shall declare the regulation invalid if it finds that
it violates constitutional or statutory provisions or exceeds the
statutory authority of the agency. . . .

20 46. The temporary regulation impairs the legal rights or privileges of Plaintiff, its
21 members, and its members’ members, which include many Nevada voters, by violating their
22 statutory and constitutional rights “to a uniform, statewide standard for counting and recounting
23 all votes accurately,” Nev. Const. art. 2, § 1A(10); *see also* NRS 293.2546(5), and their rights
24 under the U.S. Constitution’s Equal Protection Clause.

25 47. Plaintiff did not participate in the agency proceedings before the Secretary of State
26 adopted the temporary regulation. But several other voting-rights groups did, and they raised many
27 of the same statutory and constitutional objections to the temporary regulation that Plaintiff asserts
28 in this Complaint. *See* Letter from Brennan Center for Justice et. al. to Mark Wlaschin (Aug. 12,

2022), https://allvotingislocal.org/wp-content/uploads/BCAVLACLUSS-Public-Comment_Proposed-Hand-Count-Regulations-8-12-22.pdf (last visited Aug. 30, 2022). The Secretary of State adopted the temporary regulation despite those objections.

48. Because the Secretary of State adopted the temporary regulation even after other groups raised the same objections that Plaintiff raises here, it would be futile for Plaintiff to “request the agency to pass upon the validity of the regulation in question.” NRS 233B.110(1). Plaintiff is therefore excused from exhausting its administrative remedies. *Malecon Tobacco, LLC v. State*, 118 Nev. 837, 839, 59 P.3d 474, 475–76 (2002) (“[E]xhaustion is not required when a resort to administrative remedies would be futile.”). Alternatively, exhaustion is not required because the issues in this case “relate solely to the interpretation or constitutionality of a statute.” *Id.* (quoting *State v. Glusman*, 98 Nev. 412, 419, 651 P.2d 639, 644 (1982)).

49. For the reasons given above, *supra* ¶¶ 26–43, the temporary regulation violates constitutional and statutory provisions, including Nev. Const. art. 2, § 1A(10), NRS 293.2546(5), NRS 293.2696(5), and the U.S. Constitution’s Equal Protection Clause, and exceeds the Secretary of State’s statutory authority to engage in rulemaking.

50. Consistent with the requirements of NRS 233B.110(3), Plaintiff will serve a copy of this Complaint on the Attorney General.

51. The Court should therefore declare the temporary regulation invalid.

SECOND CLAIM FOR RELIEF

(Injunctive Relief)

52. The preceding paragraphs are incorporated by reference herein.

53. Courts have authority “whenever necessary or proper” to grant “[f]urther relief based on a declaratory judgment or decree,” including injunctive relief. NRS 30.100. Thus, “[an] injunction c[an] pair with a declaratory judgment under NRS 233B.110.” *Smith v. Bd. of Wildlife Comm’rs*, No. 77485, 461 P.3d 164, 2020 WL 1972791, at *3 (Nev. Apr. 23, 2020) (unpublished); *Aronoff v. Katleman*, 75 Nev. 424, 432, 345 P.2d 221, 225 (1959) (“[U]nder appropriate circumstances, a declaratory judgment may be coupled with injunctive relief.”).

1 DATED this 31th day of August, 2022

2 **WOLF, RIFKIN, SHAPIRO, SCHULMAN &**
3 **RABKIN, LLP**

4 By: _____

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