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15 *Attorneys for Plaintiff*

16 **IN THE FIRST JUDICIAL DISTRICT COURT**
17 **OF THE STATE OF NEVADA IN AND FOR CARSON CITY**

19 PROGRESSIVE LEADERSHIP ALLIANCE
OF NEVADA,

20 Plaintiff,

21 vs.

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

24 Defendant.

Case No.: 22 OC 001011B

Dept. No.: II

**PLAINTIFF'S REPLY IN SUPPORT
OF MOTION FOR PRELIMINARY
INJUNCTION**

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INTRODUCTION

The Secretary admits “[e]ach Nevada county currently uses mechanical voting systems as the method to determine election results.” Wlaschin Decl. ¶ 2, Ex. 1. to Opp. But the temporary regulation the Secretary issued on August 26 threatens to upend that status quo by authorizing individual counties to adopt hand counting procedures in violation of Nevada law and the U.S. Constitution. Plaintiff seeks a preliminary injunction maintaining the status quo of machine vote tabulation, to protect Nevadans’ constitutional and statutory rights.

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ARGUMENT

I. Plaintiff is likely to succeed on the merits.

The temporary regulation is unlawful because Nevada law prohibits hand counting and because, in any event, the temporary regulation authorizes a non-uniform standard for counting ballots in violation of Nevada law and the U.S. Constitution.

A. Nevada law prohibits hand counting because it does not meet Election Assistance Commission standards.

Nevada law is clear: the “Secretary of State . . . shall ensure that *each voting system* used in this State . . . [m]eets or exceeds the standards for voting systems established by the United States Election Assistance Commission, including, without limitation, the error rate standards.” NRS 293.2696(5) (emphasis added). Nothing in Nevada law authorizes hand-counting of ballots or exempts hand-counting systems from the requirements established by NRS 293.2696(5). The Secretary concedes that the hand-counting system that the temporary regulation authorizes has not been shown to meet those standards. Opp. 5. The temporary regulation is therefore unlawful.

The Secretary argues that voting systems based on hand-counting are not subject to NRS 293.2696(5). Opp. 4–5, 6–8. Not so. True, the Legislature adopted NRS 293.2696(5) in response to HAVA. But HAVA exempts “paper ballot voting system[s]” from only a single federal requirement—the requirement that all voting systems used “permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted.” 52 U.S.C. § 21081(a)(1)(A)(i); *see also id.* § 21081(c)(2) (“For purposes of subsection (a)(1)(A)(i), the term ‘verify’ may not be defined in a manner that makes it impossible for a paper

1 ballot voting system to meet the requirements of such subsection or to be modified to meet such
2 requirements.”). That limitation does *not* apply to HAVA’s *separate* requirement that “[t]he error
3 rate of the voting system in counting . . . shall comply with the error rate standards established
4 under section 3.2.1 of the voting systems standards issued by the Federal Election Commission
5 which are in effect on October 29, 2002.” *Id.* § 21081(a)(5).

6 Thus, “paper ballot voting system[s]”—which the Secretary concedes “includes hand
7 counting,” Opp. 4—are fully subject to HAVA’s error-rate requirements, the federal version of
8 Nevada’s requirements under NRS 293.2696(5). And while hand-counting cannot meet those
9 requirements, other forms of “paper ballot voting system[s]” can, including electronic voting
10 systems based on optical scanning, in which voters manually complete paper ballots that are then
11 electronically tabulated. *See* 52 U.S.C. § 21081(a)(1)(A) (specifically referencing “optical
12 scanning voting system[s]”). HAVA’s limited “[p]rotection of paper ballot voting systems,” *id.*
13 § 21081(c)(2), is therefore entirely consistent with its imposition of error-rate standards that hand
14 counting does not meet, because there are other paper-ballot systems that do.

15 The Secretary also argues that hand counting is not a “voting system” at all. Opp. 7. This
16 argument is contradicted by the Secretary’s concession that “paper ballot voting systems . . .
17 includes hand counting.” *Id.* at 4. Regardless, context makes clear that the term “voting system”
18 in NRS 293.2696(5) includes hand-counting systems like those the temporary regulation
19 authorizes. Nevada law defines a different term—“*mechanical* voting system”—as:

20 a system of voting whereby a voter may cast a vote:

21 1. On a device which mechanically or electronically compiles a total
22 of the number of votes cast for each candidate and for or against
23 each measure voted on; or

24 2. By marking a paper ballot which is subsequently counted on an
25 electronic tabulator, counting device or computer.

25 NRS 293B.033 (emphasis added). That definition does exclude hand counting. “It is a well-
26 established canon of statutory interpretation that the use of different words or terms within a statute
27 demonstrates that [the legislature] intended to convey a different meaning for those words.” *SEC*
28 *v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003). The “decision to use one word over another in

1 drafting a statute is material . . . and should not be presumed to be random or devoid of meaning.”
2 *Id.* Had the Legislature wished to limit NRS 293.2696(5)’s requirements to mechanical and
3 electronic voting systems, it would have used that same defined term.

4 By instead using the broader, unmodified term “voting system” in NRS 293.2696(5), the
5 Legislature unmistakably imposed a broader requirement that is not limited to mechanical and
6 electronic devices. And the fact that the legislative history of NRS 293.2696 does not expressly
7 reference hand counting should be no surprise, because by 2003, mechanical and electronic voting
8 systems had long been used in Nevada. There was no reason for the Legislature to consider or
9 address the effect of the law’s error-rate requirements on an antiquated manual system that had
10 long since fallen out of use. Moreover, applying voting system standards to *all* voting systems, not
11 just electronic or mechanical ones, makes sense. Hand counting is more expensive, more time
12 consuming, and less accurate than machine counting. *See* Mot. for Prelim. Inj. (“Mot.”) 2–3. There
13 was no reason for the Legislature to create an exception from its voting system requirements to
14 allow counties to use such a method, and there is no textual evidence that the Legislature did so.

15 Finally, the Secretary points to a statute authorizing machine-counting. NRS 293B.050
16 (“At all statewide, county, city and district elections of any kind held in this State, ballots or votes
17 may be cast, registered, recorded and counted by means of a mechanical voting system.”). But that
18 statute just authorizes the use of “mechanical voting systems”; it is at best silent about whether
19 hand counting is allowed. And it certainly does not exempt hand counting from other Nevada law
20 requirements, including compliance with voting systems standards under NRS 293.2696(5).

21 **B. The temporary regulation creates a non-uniform standard.**

22 The temporary regulation is also unlawful because it authorizes a non-uniform standard for
23 vote counting, in violation of the Nevada Constitution, Nevada statutes, and the U.S. Constitution.
24 Under both the Nevada Constitution and the Nevada Revised Statutes, each registered voter “has the
25 right . . . to a uniform, statewide standard for counting and recounting all votes accurately.” Nev. Const.
26 art. 2, § 1A(10); *see also* NRS 293.2546(5). The Secretary argues that differences in counting
27 equipment and methods are acceptable as long as there is a single “standard” for “*what* qualifies as a
28 vote.” Opp. 8–9. But that limitation does not appear in the constitutional or statutory text. And while

1 counties may, and do, use different tabulation hardware and software to count votes, all of that
2 hardware and software must comply with the same set of Nevada-law standards, including complying
3 with the error rate and other standards from the Election Assistance Commission. NRS 293.2696(5).
4 The temporary regulation, in contrast, authorizes the use of a counting method—hand counting—that
5 does *not* comply with those standards, and that research shows is fundamentally less reliable and more
6 error-prone than machine counting. Mot. 2–3. And it authorizes that method to be used or not used on
7 a county-by-county basis, for any combination of contests and precincts that a county may select, and
8 with or without confirmation by machine tabulation. *Id.* at 6–7. That is the antithesis of a “uniform,
9 statewide standard” for vote counting. Nev. Const. art. 2, § 1A(10); *see also* NRS 293.2546(5). And it
10 violates the U.S. Constitution for the same reason. *Bush v. Gore*, 531 U.S. 98, 107 (2000) (holding it
11 unconstitutional for states to “accord[] arbitrary and disparate treatment to voters in . . . different
12 counties”).¹

13 **II. Plaintiff faces irreparable harm.**

14 The Secretary argues that Plaintiff does not face irreparable harm because no county has
15 yet said it will conduct a hand count under the temporary regulation. Opp. 10. But the Secretary
16 admits that “certain counties have expressed interest in hand counts”—indeed, that is the
17 Secretary’s asserted reason for issuing the temporary regulation. *Id.* at 3. The Secretary
18 acknowledges that Nye County has stated that it will conduct a hand count, although one that the
19 Secretary says is not subject to the regulation. *Id.* at 3 n.8. But the Secretary’s conscious decision
20 to exempt Nye County’s plans from the temporary regulation’s requirements makes matters worse,
21 not better. When drafting the regulation, the Secretary specifically defined the term “hand count”
22 to exclude systems like the one announced by Nye, leaving those systems without *any* standards
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25 ¹ The Secretary cites *Kraus v. Cegavske*, No. 20 OC 00142 1B, 2020 WL 8340238, at *6 (Nev.
26 Dist. Ct. Oct. 29, 2020), for the proposition that an Equal Protection Clause challenge cannot be
27 based on the method of voting. But the Court’s holding in *Kraus* was based on the conclusion that
28 “[v]oting in person and voting by mailing in the ballot are different and so the procedures differ.”
Id. Here, in contrast, the temporary regulation means voters who vote in the same way—even
within the same county—may have their ballots counted using vastly different methods, only some
of which have been shown to be reliable in accordance with Nevada law.

1 as to which votes are counted and how they are counted. *See* Michael Lyle, *Election deniers win*
2 *the day, Nye County exempted from rule for hand-counting ballots* (Aug. 26, 2022), Nev. Current,
3 [www.nevadacurrent.com/2022/08/26/election-deniers-win-the-day-nye-county-exempted-from-](http://www.nevadacurrent.com/2022/08/26/election-deniers-win-the-day-nye-county-exempted-from-rule-for-hand-counting-ballots/)
4 [rule-for-hand-counting-ballots/](http://www.nevadacurrent.com/2022/08/26/election-deniers-win-the-day-nye-county-exempted-from-rule-for-hand-counting-ballots/). Nye’s election plan incorporates the results of this standardless
5 hand count into the precinct total. *See* Nye Cnty., 2022 General Election Process at 7,
6 www.nyecountynv.gov/DocumentCenter/View/41992/Item35 (last visited Sept. 22, 2022). And
7 the Secretary’s insistence that Nye County’s hand count cannot impact the outcome of the election
8 ignores that a parallel, unregulated count is sure to cause disputes and uncertainty over election
9 results, particularly in the current environment. In fact, at a recent meeting of the Board of
10 Commissioners for Nye County, one of the Commissioners explained, “Hopefully this process will
11 either eliminate the tabulator or let us know that the tabulator is any good or not. That’s part of the
12 exercise.” The Nye County Clerk responded, “That’s exactly right.” Nye Cnty., Board of County
13 Commissioners Regular Meeting (Sept. 20, 2022),
14 https://nyecounty.granicus.com/MediaPlayer.php?view_id=4&clip_id=1722, at 2:08:24.

15 Further, other counties may decide to do hand counts, too. That, presumably, is why the
16 Secretary issued the temporary regulation, which is valid only for this election. But by the time
17 counties’ plans to use hand counting are due, 30 days before the general election, it will likely be
18 too late to adjudicate Plaintiff’s challenge. And the use of non-uniform, unreliable vote-counting
19 procedures threatens irreparable harm to the constitutional and statutory rights of Nevada voters,
20 including of members of Plaintiff’s member organizations. *See City of Sparks v. Sparks Mun. Ct.*, 129
21 Nev. 348, 357, 302 P.3d 1118, 1124 (2013); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1310 (N.D.
22 Ga. 2018) (“[I]t is axiomatic that there is no post hoc remedy for a violation of the right to vote.”). The
23 injunction Plaintiff seeks would avert such injury by prohibiting all such hand counts.

24 **III. The equities favor an injunction.**

25 The equities favor an injunction to protect the public interest in reliable vote-counting and
26 orderly elections. Mot. 10. The Secretary’s contrary argument assumes that Nevada law allows
27 hand counting, Opp. 10–11; as explained above, it does not, *supra* p. 2–3.

28

1 **CONCLUSION**


2 For the reasons stated above, the Court should grant Plaintiff's Motion.

3 **AFFIRMATION**

4 The undersigned hereby affirm that the foregoing document does not contain the social
5 security number of any person.

6 DATED this 22nd day of September, 2022.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 22nd day of September, 2022, a true and correct copy of the
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4 served upon all parties via electronic mailing to the following counsel of record with a courtesy
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