

IN THE SUPREME COURT OF THE STATE OF NEVADA

PROGRESSIVE LEADERSHIP
ALLIANCE OF NEVADA,

Appellant,

vs.

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

Respondent.

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APPELLANT'S OPENING BRIEF

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N.R.A.P. 26.1 DISCLOSURE

Pursuant to N.R.A.P. 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in N.R.A.P. 26.1(a) that must be disclosed.

The law firms whose partners or associates have or are expected to appear for Appellant are Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP and Elias Law Group LLP.

Dated this 4th day of October, 2022.

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I. JURISDICTIONAL AND ROUTING STATEMENT

Appellant Progressive Leadership Alliance of Nevada (“Plaintiff”), by and through its undersigned counsel, appeals the Order denying its Motion for Preliminary Injunction entered on September 27, 2022 (“Motion”).

This Court has jurisdiction pursuant to NRAP 3A(b)(3) and NRS 2.090(2). Notice of Entry of the Order denying Appellant’s Motion occurred on September 28, 2022, and Plaintiff timely filed a notice of appeal on September 29. *See* Joint Appendix (“JA”) JA112–14. This case is presumptively assigned to the Supreme Court under NRAP 17(a)(2), as this case involves an election question; and under NRAP 17(a)(11) and (12), as this case involves “a question of first impression” under the Nevada Constitution and “a question of statewide public importance”: Issue A, the legal validity of a regulation that will govern the counting of votes in the upcoming election. *See* JA33–46.

II. ISSUES PRESENTED

A. Whether the Secretary of State’s temporary regulation authorizing the hand counting of ballots violates Nevada law or the U.S. Constitution’s Equal Protection Clause.

B. Whether the district court abused its discretion by determining that Plaintiff would not suffer irreparable harm absent a preliminary injunction of the temporary regulation.

C. Whether the district court abused its discretion by determining that the balance of equities and public interest favored denying a preliminary injunction.

III. STATEMENT OF THE CASE

This is a challenge to a temporary regulation that the Secretary of State issued on August 26, 2022, which authorizes Nevada counties to hand count ballots in the 2022 election instead of using electronic or mechanical tabulators. JA49–62. Plaintiff filed suit five days later, on August 31, JA1–14, and moved for a preliminary injunction prohibiting the Secretary from authorizing the use of hand counting via the temporary regulation or otherwise in order to maintain the status quo of machine vote tabulation in Nevada and to protect Nevadans’ constitutional and statutory rights, JA33–46. The Secretary opposed the motion, JA71–86, and on September 27, without holding a hearing, the district court adopted the Secretary’s proposed order in full denying preliminary injunctive relief. JA95–100. Plaintiff commenced this appeal the next day, JA112–14, and the parties stipulated to an extraordinarily expedited briefing schedule, *see* Stipulated Br. Schedule and Emergency Mot. to Expedite (Sept. 30, 2022), to allow for a decision before the November election.

IV. STATEMENT OF FACTS

For many years, all Nevada counties have counted votes using mechanical voting systems, defined as “a system of voting whereby a voter may cast a vote”

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

Recently, and particularly following the 2020 presidential election, some groups in Nevada and elsewhere have become suspicious of electronic voting systems. Those suspicions are unfounded. The Secretary of State’s office itself has refuted them, explaining, “[t]he NV Gaming Control Board tests and certifies our systems. The post-election audits and recounts conducted in Nevada confirmed that the machines accurately tabulated the votes cast” in the 2020 general election. Nevada Sec’y of State, *Facts vs. Myths: Nevada 2020 Post-General Election* at 4, <https://www.nvsos.gov/sos/home/showpublisheddocument?id=9191> (last visited Sept. 28, 2022). Indeed, to be used in Nevada, all voting systems must “meet[] or exceed[] the standards for voting systems established by the United States Election Assistance Commission.” NRS 293B.063. Nevada law further requires that mechanical voting systems provide a printed paper record of all votes cast on the system, NRS 293B.082, and that such systems be tested for accuracy before the first

day of early voting, immediately before the start of the official count, and within 24 hours after the end of the official count, NRS 293B.150, NRS 293B.165, among many other safeguards.

In contrast, hand counting—the alternative to electronic voting systems—is time consuming and unreliable. Studies have found that “vote counts originally conducted by computerized scanners were, on average, more accurate than votes that were originally tallied by hand.” Stephen Ansolabehere, Barry C. Burden, Kenneth R. Mayer, & Charles Stewart III, *Learning from Recounts*, 17 Elec. L. J. 100, 115 (2018), <https://www.liebertpub.com/doi/epdf/10.1089/elj.2017.0440> (last visited Sept. 28, 2022). And as scholars have explained, “[t]his finding should not be surprising,” because “[c]omputers tend to be more accurate than humans in performing long, tedious, repetitive tasks” and “[t]he demanding election night environment only drives a bigger wedge between human and machine performance.” *Id.* Hand counting multiple contests on a single ballot is also exceptionally time consuming. For example, it took Esmerelda County more than seven hours to hand count just 317 ballots from the June 14, 2022 primary. Ken Ritter, Gabe Stern, & Scott Sonner, *Last Nevada County Approves Primary Results After Hand Count* (June 25, 2022), Associated Press, <https://apnews.com/article/2022-midterm-elections-new-mexico-nevada-voting-presidential-652df50bc2b535d2303ddd4c5fd a6ea5> (last visited Sept. 28, 2022).

Despite these issues with hand counting ballots, on August 26, 2022, the Secretary promulgated a temporary regulation expressly authorizing county clerks to conduct a hand count for (1) all contests on the ballot; (2) a specified number of contests on the ballots; or (3) a specified sample of the precincts in the county. JA50 § 2. The regulation further directs that county clerks “may,” but need not, “use an electronic tabulator to invalidate the results of the hand count.” *Id.* § 3. If counties wish to proceed with a “hand count” as the primary means of counting ballots, the temporary regulation requires them to submit a plan for doing so to the Secretary at least 30 days before election day and to follow certain counting procedures. JA50–55 §§ 3–6.

Perhaps worse, the temporary regulation also leaves counties free to conduct hand counts even without following the regulation’s requirements, so long as they conduct those hand counts alongside a machine count and not as the “*primary* method of counting the votes cast” in an election. JA56 § 7 (emphasis added). Deputy Secretary of State Mark Wlaschin has explained that the amendment means that “[i]f a county election official decides they’re interested in conducting a hand count audit, or a hand count tabulation, but are going to use as the primary method of tabulation a mechanical system, then these regulations are in essence recommendations, but not required.” See Sean Golonka, *State Adopts Regulation for Hand Counting Ballots, But It Won’t Affect Nye County*, The Nev. Indep. (Aug. 26,

2022), <https://thenevadaindependent.com/article/state-adopts-regulation-for-hand-counting-ballots-but-it-wont-affect-nye-county> (last visited Sept. 28, 2022). As a result, Nye County Clerk Mark Kampf has stated that he will engage in a “‘parallel tabulation’ process that involves running paper ballots through the typical mechanical tabulators and checking the results with an additional hand count of all ballots.” *Id.* Nye County’s election plan incorporates the results of this standardless hand count into the precinct total. *See* Nye Cnty., *2022 General Election Process* at 7, www.nyecountynv.gov/DocumentCenter/View/41992/Item35 (last visited Sept. 28, 2022).

Under the temporary regulation, the deadline for counties to submit hand-counting plans to the Secretary is October 9, thirty days before election day. JA50–52, 58–59. Plaintiff understands that no county has yet submitted such a plan and has been informed that the Secretary does not expect that any county will do so. Regardless, the temporary regulation remains significant, because it allows Nye County, and potentially other counties, to engage in hand counts alongside machine tabulation. Nye County plans to do just that. At a recent meeting of the Board of Commissioners for Nye County, one of the Commissioners explained, “Hopefully this process will either eliminate the tabulator or let us know that the tabulator is any good or not. That’s part of the exercise.” The Nye County Clerk responded, “That’s exactly right.” Nye Cnty., *Board of County Commissioners Regular Meeting* (Sept.

20, 2022), https://nyecounty.granicus.com/MediaPlayer.php?view_id=4&clip_id=1722, at 2:08:24. In fact, the Nye County Clerk has it exactly backwards: studies show that in the event of a discrepancy, the machine count is far more likely to be correct than the hand count is. *E.g.*, Ansolabehere et al., *supra*, at 115.

V. SUMMARY OF THE ARGUMENT

The Secretary's temporary regulation courts electoral chaos by authorizing Nevada counties to count ballots cast in the November election using untested, unreliable, and antiquated hand counting procedures, either alongside or in lieu of modern tabulation machines. The district court erred in denying a temporary injunction, and this Court should reverse.

Plaintiff is likely to succeed on the merits. Nevada law requires that any "voting system" used in a Nevada election must "[m]eet[] or exceed[] the standards for voting systems established by the United States Election Assistance Commission, including, without limitation, the error rate standards." NRS 293.2696(5). The Secretary's temporary regulation authorizes a voting system to be used in the upcoming general election—hand-counting paper ballots—that does not and cannot meet this standard. The district court held that hand counting is exempt from this requirement by conflating "voting system[s]" with "*mechanical* voting system[s]," but if the Legislature had wanted to limit the requirement to "mechanical voting systems," it would have used that term, which is already a defined term under

Nevada law. The district court’s narrow reading would irrationally exempt the *least* accurate form of tabulation—hand counting—from Nevada law’s accuracy standards, and it would torpedo the provision’s remedial purpose of improving election administration and avoiding tabulation disputes.

The temporary regulation also violates voters’ constitutional and statutory right to a “uniform, statewide standard” for counting and recounting votes. Nev. Const. art. 2, § 1A(10); *see also* NRS 293.2546(5). The district court thought that right was limited to “what qualifies as a vote,” but the statutory and constitutional text is not so limited, and as the district court itself explained, Nevada law elsewhere addresses that issue. Order 3. Nevada law may not require a *single* statewide method of counting votes, but it cannot tolerate the temporary regulation’s authorization of dramatically different, and less accurate, counting methods in some counties, some precincts, and some contests, either alongside electronic tabulators or alone. The temporary regulation violates the U.S. Constitution’s Equal Protection Clause for similar reasons. *Bush v. Gore*, 531 U.S. 98, 104–05 (2000).

The district court also erred in finding no irreparable harm. There is unrefuted evidence that at least Nye County will conduct a hand count as a result of the temporary regulation, which intentionally carves out of its requirements—and therefore authorizes—hand counts that are conducted in parallel with electronic tabulation. Allowing Nye County officials to move forward with non-uniform, *non-*

regulated, and unreliable vote-counting procedures threatens irreparable harm to the constitutional and statutory rights of Nevada voters, including of members of Plaintiff's member organizations. And other counties may decide to do the same, or to conduct a hand count under the temporary regulation's procedures.

Finally, the equities and the public interest weigh in Plaintiff's favor. The district court erred in finding that cities and counties are already permitted to use hand counting. Nevada law provides otherwise. And the temporary regulation is against the public interest because it creates a non-uniform standard of counting votes in Nevada.

Accordingly, this Court should reverse the district court's order and grant a preliminary injunction.

VI. ARGUMENT

A court should issue a preliminary injunction if a movant shows "(1) a likelihood of success on the merits; and (2) a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy." *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004) (quotation marks and citations omitted). Courts also weigh the equities and the public interest. *Id.*

In reviewing the district court's denial of Plaintiffs' preliminary injunction

motion, this Court reviews questions of law de novo. *Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. 347, 351, 351 P.3d 720, 722 (2015). Questions of statutory construction, “including the meaning and scope of a statute, are questions of law[.]” *PERS v. Reno Newspapers Inc.*, 129 Nev. 833, 836, 313 P.3d 221, 223 (2013). The Court must reverse a district court’s decision when “the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact.” *Gilmore*, 131 Nev. at 351, 351 P.3d at 722.

A. Plaintiff is likely to succeed on the merits because the Secretary’s authorization of hand-counting is unlawful.

Plaintiff is likely to succeed on the merits because the Secretary’s authorization of hand counting violates Nevada law and the U.S. Constitution. By authorizing hand counting, either in accordance with the temporary regulation’s procedures or as a secondary means of counting votes that is exempt from those procedures, the temporary regulation “violates constitutional [and] statutory provisions [and] exceeds the statutory authority of the agency.” NRS 233B.110(1). The district court erred in holding otherwise.

1. The temporary regulation violates the Secretary’s duty to ensure that all voting systems exceed U.S. Election Assistance Commission standards.

Nevada law requires the Secretary of State and county officials to “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). The temporary regulation violates this requirement by authorizing hand counting without any showing that it meets or exceeds those standards.

The district court held that this requirement is restricted to *mechanical* voting systems and therefore does not apply to hand counting. JA97. The Court reviews this question of statutory interpretation *de novo*. *PERS*, 129 Nev. at 836, 313 P.3d at 223. It should reverse. “Mechanical voting system” is a defined term in Nevada law:

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

1. On a device which mechanically or electronically compiles a total of the number of votes cast for each candidate and for or against each measure voted on; or
2. By marking a paper ballot which is subsequently counted on an electronic tabulator, counting device or computer.

NRS 293B.033. That definition makes clear that “mechanical voting system[s]” are a subset of all “system[s] of voting.” Had the Legislature wished to restrict NRS 293.2696(5)’s requirement that all “voting systems” comply with U.S. Election Assistance Commission standards to *mechanical* voting systems, it would have used that defined term. “It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that [the legislature] intended to convey a different meaning for those words.” *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003). The “decision to use one word over another in drafting

a statute is material and should not be presumed to be random or devoid of meaning.” *Id.*

Confirming this point, the Legislature *also* specifically provided, in the separate chapter of the Nevada Revised Statutes that is devoted exclusively to mechanical voting systems, that “[n]o mechanical voting system may be used in this State unless it meets or exceeds the standards for voting systems established by the United States Election Assistance Commission.” NRS 293B.063. Under the Secretary’s and the district court’s interpretation, this provision would be co-extensive with NRS 293.2696(5), even though NRS 293.2696(5) refers to *all* “voting system[s]” while NRS 293B.063 refers only to “mechanical voting systems.” The Legislature adopted those two provisions at the same time, in the same piece of legislation. *See* 2003 Nevada Laws Ch. 382, §§ 5, 34. If NRS 293.2696(5) applied only to mechanical voting systems, then these provisions would be redundant, contrary to traditional rules of statutory construction. *State Dep’t of Bus. & Indus. Fin. Insts. Div. v. Dollar Loan Ctr., LLC*, 134 Nev. 112, 115, 412 P.3d 30, 33 (2018) (“[S]tatutory interpretation must not ‘render any part of the statute meaningless . . .’” (quoting *Orion Portfolio Servs. 2, LLC v. Cnty. of Clark ex rel. Univ. Med Ctr. Of S. Nev.*, 126 Nev. 397, 403, 245 P.3d 527, 531 (2010))).

The fact that the Legislature adopted these requirements in response to the federal Help America Vote Act (“HAVA”) does nothing to change this. JA97. It is

true that HAVA contains its own definition of “voting system.” *See* 52 U.S.C. § 21081(b). But the Nevada legislature did not enact that federal-law definition for purposes of Nevada law when it enacted NRS 293.2696(5). It chose instead to leave “voting system” undefined, in a statutory context where the existence of “*mechanical* voting system” as a separate defined term makes clear that “voting system” alone has a broader meaning.

Regardless, hand counting procedures qualify as a “voting system” even under HAVA’s federal law definition. HAVA defines “voting system” as including “[t]he total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used . . . to cast and count votes,” along with “the practices and associated documentation used . . . to test the system during its development and maintenance,” to “maintain records of system errors and defects,” and “to make available any materials to the voter.” 52 U.S.C. § 21081(b). As a matter of plain meaning, that includes the detailed hand-counting process authorized by the temporary regulation, which includes the use of specified forms and writing devices, and detailed procedures. *See* JA50 § 2(2)(c); JA55 § 6. Any doubt is removed by HAVA’s provision specifically exempting “paper ballot voting system[s]” from a single federal requirement, confirming that methods of voting involving paper ballots are otherwise covered as “voting systems.” 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 ballot voting system to meet the requirements of such subsection or to be modified to meet such requirements.”).

Any remaining ambiguity under NRS 293.2696(5)’s text is resolved by the provision’s purpose. “[A] fundamental rule of statutory interpretation is that the unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another that would produce a reasonable result.” *Int’l Game Tech., Inc. v. Second Jud. Dist. Ct. ex rel. Cnty. of Washoe*, 124 Nev. 193, 202, 179 P.3d 556, 561 (2008). And “remedial statutes . . . should be liberally construed to effectuate the intended benefit.” *Id.* at 201, 179 P.3d at 560–61. Both HAVA and NRS 293.2696(5) were enacted in the wake of the contested 2000 Presidential election, as part of a nationwide effort to modernize state election procedures and avoid future disputes. It would make no sense in that context for Congress and the Nevada Legislature to impose stringent accuracy requirements only on mechanical and electronic voting machines while permitting votes to be counted via antiquated hand counting procedures that are even *less* accurate, and there is no indication that Congress or the Nevada Legislature intended to do so.

Thus, hand counting is a “voting system” that is fully subject to NRS

293.2696(5)'s mandate that the Secretary 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). The temporary regulation violates that mandate. When the Legislature adopted NRS 293.2696(5) in 2003, then-applicable Election Assistance Commission standards required that "[f]or each processing function" undertaken by a voting system, "the system shall achieve a target error rate of no more than one in 10,000,000 ballot positions, with a maximum acceptable error rate in the test process of one in 500,000 ballot positions." Election Assistance Comm'n, *Voting System Standards: Vol. 1 – Performance Standards* at 3-51 (Apr. 2002), https://www.eac.gov/sites/default/files/eac_assets/1/28/Voting_System_Standards_Volume_I.pdf (last visited Sept. 28, 2022). The current standards impose a mathematically equivalent requirement. *See* U.S. Election Assistance Commission, *Voluntary Voting System Guidelines: Vol. 1* at 79–80 (Version 1.1 2015), https://www.eac.gov/sites/default/files/eac_assets/1/28/VVSG.1.1.VOL.1.FINAL1.pdf (last visited Sept. 28, 2022).

In authorizing a hand-counting procedure in the temporary regulation, and in authorizing counties to engage in other hand-counting procedures as a secondary vote-counting method, the Secretary did not take any steps to determine whether that procedure would produce a sufficiently low error rate to comply with the Election

Assistance Commission's error rate standard. The Secretary therefore violated NRS 293.2696(5)'s requirement that the Secretary "*ensure*" that every voting system used in the state meets those standards. There is considerable reason for doubt that a hand-counting procedure would meet this statutorily required standard. As explained above, studies have shown that mechanical and electronic voting systems are significantly more reliable in tabulating the results of multiple contests on a single ballot than humans are. Ansolabehere et al., *supra*, at 115. The temporary regulation, and any regulation or policy that authorizes or permits counties to engage in hand counting, therefore violates NRS 293.2696(5).

2. The temporary regulation violates Nevada constitutional and statutory provisions mandating a "uniform-statewide" vote counting standard.

The temporary regulation also violates provisions of both the Nevada Constitution and the Nevada Revised Statutes giving each registered voter "the right . . . to a uniform, statewide standard for counting and recounting all votes accurately," Nev. Const. art. 2, § 1A(10); *see also* NRS 293.2546(5), and the statutory requirement that the Secretary "adopt regulations establishing uniform, statewide standards for counting a vote cast by each method of voting used in this State" other than optical-scan machines, which are separately regulated by statute. NRS 293.3677(3)(b).

The temporary regulation violates those provisions by imposing the antithesis of a "uniform, statewide standard": it authorizes each county to decide for itself

whether to use hand counting of ballots (1) not at all, (2) for all contests on all ballots, (3) for only some contests on all ballots, or (4) for only ballots in some precincts. JA50 § 2(1). Moreover, counties that choose to hand count may also decide for themselves whether to validate those counts using an electronic tabulator. *Id.* § 2(3). Even worse, while the temporary regulation includes detailed hand-counting procedures, JA50–55 §§ 3–6, it leaves counties free to ignore those procedures and count however they wish, so long as they use hand counting as a means of purportedly verifying electronic tabulations rather than a “primary” tabulation method, JA56 § 7(3). If the temporary regulation remains in place, different Nevada voters will therefore have their votes counted in drastically different ways depending on where they reside, despite their right to a “uniform, statewide standard” and the Secretary’s duty to adopt regulations providing for such a standard for all methods of voting in the State.

In holding otherwise, the district court misinterpreted Nevada law in finding that “the right to a uniform, statewide standard relates to the determination of *what qualifies as a vote*” rather than how votes are counted. JA97 (emphasis added). This Court reviews this statutory construction ruling de novo, and it should reverse. *PERS*, 129 Nev. at 836, 313 P.3d at 223. The district court’s cramped reading appears nowhere in the statutory and constitutional text, which broadly protects voters’ rights to a uniform standard “for counting and recounting all votes

accurately.” Nev. Const. art. 2, § 1A(10); *see also* NRS 293.2546(5). Indeed, as the district court admits, Nevada law *elsewhere* addresses “what qualifies as a vote,” JA97 (citing NRS 293.3677(2)(a)), so interpreting the right to a “uniform, statewide standard for counting and recounting all votes accurately” as only covering that question would improperly render it surplus. *State Dep’t of Bus. & Indus.*, 134 Nev. at 115, 412 P.3d at 33.

It is true, of course, that every city and county need not count votes in exactly the same way. JA97. But while counties may, and do, use different tabulation hardware and software to count votes, all of that hardware and software must comply with the same set of Nevada-law standards, including complying with the error rate and other standards from the Election Assistance Commission. NRS 293.2696(5). The temporary regulation, in contrast, authorizes the use of a counting method—hand counting—that does not comply with those standards, and that research shows is fundamentally less reliable and more error-prone than machine counting. JA36–37. It therefore violates voters’ statutory and constitutional right to a uniform statewide standard for accurate vote-counting.

3. The temporary regulation violates the U.S. Constitution’s Equal Protection Clause.

The temporary regulation also violates the U.S. Constitution’s Equal Protection Clause by authorizing counties in Nevada to count ballots differently, and even allowing diverging counting methods within individual counties. “Having once

granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush*, 531 U.S. at 104–05. It is therefore unconstitutional for states to "accord[] arbitrary and disparate treatment to voters in . . . different counties," and for counties to "use[] varying standards to determine what was a legal vote." *Id.* at 107; *see also League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476 (6th Cir. 2008) (plaintiffs plausibly stated equal protection claim in alleging Ohio's voting system deprives its citizens of the right to vote or severely burdens that right depending on where they live); *Black v. McGuffage*, 209 F. Supp. 2d 889, 899 (N.D. Ill. 2002) (plaintiffs stated equal protection claim where votes in some counties were statistically less likely to be counted than votes in other counties depending on local authorities' choice of voting system and the accuracy of that system); *Common Cause S. Christian Leadership Conf. of Greater L.A. v. Jones*, 213 F. Supp. 2d 1106, 1109 (C.D. Cal. 2001) (denying judgment on the pleadings where plaintiff alleged that Secretary of State's permission for counties to adopt different voting procedures was unreasonable and discriminatory). And the Equal Protection Clause prohibits vote-counting procedures that fail to provide "specific standards to ensure . . . equal application." *Bush*, 531 U.S. at 106.

The district court rejected this argument because it concluded that Plaintiff did not "show that the regulation would in fact disenfranchise any voters." JA98.

But no such requirement applies—a legal question that this Court reviews *de novo*. The Secretary’s temporary regulation violates the Equal Protection Clause because 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. By authorizing counties to count ballots in sharply different ways, and without any basis for concluding that the hand-counting procedures being authorized are accurate, the temporary regulation violates the Equal Protection Clause and puts Nevada voters at risk of disenfranchisement depending on where they reside. Nothing requires Plaintiff to identify a specific disenfranchised voter in order to succeed with such a claim.

B. The district court erred in finding that Plaintiff did not face irreparable harm absent a preliminary injunction.

The district court also committed legal error in finding that Plaintiff does not face irreparable harm absent an injunction. The district court reasoned that there “is no evidence that hand counting will be used as the primary method of tabulating the votes in the November 2022 general election” in any county. JA98. But absent a preliminary injunction, whether or not hand counting will be used as the *primary* method of tabulating votes anywhere, at least one County Clerk (in Nye County) plans to conduct a hand-count of ballots in November in a manner that is specifically carved out of the Secretary’s temporary regulation. *See Michael Lyle, Election deniers win the day, Nye County exempted from rule for hand-counting ballots* (Aug.

26, 2022), Nev. Current, www.nevadacurrent.com/2022/08/26/election-deniers-win-the-day-nye-county-exempted-from-rule-for-hand-counting-ballots/. (last visited Sept. 28, 2022). In fact, at a recent meeting of the Board of Commissioners for Nye County, one of the Commissioners explained, “Hopefully this process will either eliminate the tabulator or let us know that the tabulator is any good or not. That’s part of the exercise.” The Nye County Clerk responded, “That’s exactly right.” Nye Cnty., *Board of County Commissioners Regular Meeting* (Sept. 20, 2022), https://nyecounty.granicus.com/MediaPlayer.php?view_id=4&clip_id=1722, at 2:08:24. Nye’s election plan will incorporate the results of this standardless hand count into the precinct total. See Nye Cnty., *2022 General Election Process* at 7, <https://www.nyecountynv.gov/DocumentCenter/View/41992/Item35> (last visited Sept. 22, 2022).

Further, given that the Secretary has expressly authorized hand counting, other counties are likely to do the same. However, because plan submissions are not due to the Secretary of State until 30 days before the election, it will likely be too late to adjudicate Plaintiff’s claims in time, threatening issues with election administration and potentially affecting the integrity of the election. In addition, a parallel, unregulated count is sure to cause disputes and uncertainty over election results, particularly in the current environment.

Allowing county officials to move forward with non-uniform, non-regulated,

and unreliable vote-counting procedures threatens irreparable harm to the constitutional and statutory rights of Nevada voters, including members of Plaintiff's member organizations. This violation is impossible to remedy after the election. *See City of Sparks v. Sparks Mun. Ct.*, 129 Nev. 348, 357, 302 P.3d 1118, 1124 (2013); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1310 (N.D. Ga. 2018) (“[I]t is axiomatic that there is no post hoc remedy for a violation of the right to vote.”).

In contrast, the Secretary of State will suffer no harm if prohibited from implementing the new temporary regulation or from authorizing or permitting hand counting until this case is adjudicated. A preliminary injunction would simply maintain the status quo and the current ballot-counting requirements for ballot counting, which involve machine counting that is more accurate, less expensive, and less time consuming than hand-counting.

C. The district court's finding that the equities and public interest favored denial of the preliminary injunction was based on a mistake of law.

Finally, the district court's determination that the equities and public interest weigh in favor of denying the preliminary injunction is based on its erroneous legal conclusion that “[c]ities and counties may already use hand counting.” JA98. This finding, therefore, should be reviewed de novo. As discussed above, *supra* Section VI.A.1, Nevada law does not permit the use of hand counting—an unreliable vote counting mechanism—because the temporary regulation violates the Secretary's duty to ensure that all voting systems meet Election Assistance Commission

standards, including error-rate standards, as required by NRS 293.2696(5). Therefore, contrary to the district court's assertion, the temporary regulation does not "promote uniformity and accuracy". *Id.* Instead, it authorizes each county to decide for itself whether to hand count ballots, either as a primary or secondary method. *See supra* Section VI.A.2, A.3. The temporary regulation creates a non-uniform standard of counting votes in Nevada, in violation of both state and federal law.

The public has an interest in protecting the right to vote and ensuring orderly administration of elections. *Mi Familia Vota v. Hobbs*, 977 F.3d 948, 954 (9th Cir. 2020); *see generally* NRS 293.2546 ("Legislative declaration of voters' rights"). The movement toward hand counting ballots is based on entirely unfounded (and repeatedly disproven) concerns of fraud associated with machine counting in the 2020 election. *See, e.g.,* Riley Snyder, *Cegavske: No "Evidentiary Support" Among NV GOP Claims that 2020 Election Was Plagued by Widespread Fraud*, The Nev. Indep. (Apr. 21, 2021), <https://thenevadaindependent.com/article/cegavske-no-evidentiary-support-among-nv-gop-claims-that-2020-election-was-plagued-by-widespread-fraud> (last visited Sept. 28, 2022). There is no public interest in the use of a less accurate method of vote counting that is contrary to Nevada law.

VII. CONCLUSION

For all of the foregoing reasons, the district court's Order denying the Motion

for Preliminary Injunction must be reversed.

Dated this 4th day of October, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in size 14 font, Times New Roman.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event

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that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 4th day of October, 2022.

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I certify that I am an employee of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and that on this 4th day of October, 2022, I electronically filed and served by electronic mail a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** properly addressed to the following:

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