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.

Case No.: 85434

First Judicial District Court
Case No.: 22 OC 001011B

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

The Secretary's August 26 temporary regulation does two things: (1) it authorizes counties to hand count ballots as their "primary method" of tabulation if they use prescribed hand-counting procedures; and (2) it exempts counties wishing to engage in "parallel tabulation" processes involving both hand *and* machine counting from even those modest requirements by defining "hand count" to exclude such processes. JA016–29. The Secretary argues that this appeal is moot because no county took the Secretary up on the first option, to use hand counting as a primary tabulation method, by the October 9 deadline for submitting a plan to do so. *See* JA017. But the second, "parallel tabulation" option remains, and at least Nye County has stated that it will use that option to tabulate votes cast in the November 2022 election. Thus, Plaintiff's challenge to the Secretary's failure to prohibit "parallel tabulation" in the temporary regulation remains a live controversy.

The Court should therefore reach the merits, and it should reverse the District Court's denial of a preliminary injunction. By issuing the temporary regulation allowing hand counting, the Secretary violated her statutory duty 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," NRS 293.2696(5), violated voters' rights to a "uniform, statewide standard for counting and recounting all votes accurately," Nev. Const. art. II, § 1A(10); *see also* NRS

293.2546(5), and violated voters' federal due process rights.

The Secretary does not, and cannot, contend that hand counting meets Election Assistance Standards, so she is forced to argue that NRS 293.2696(5), despite requiring "*each* voting system" in Nevada to meet those standards, in fact only applies to *mechanical* voting systems. Similarly, the Secretary cannot argue that allowing some counties to conduct hand counts provides a "uniform, statewide standard" for "counting . . . all votes accurately," Nev. Const. art. II, § 1A(10); *see also* NRS 293.2546(5), so she argues instead that, despite these provisions' plain text, they regulate only what qualifies as a vote and not how votes are counted. In each case, the statutes' text, structure, and purpose refute the Secretary's efforts to minimize her statutory duties and voters' rights. The Secretary had no authority to authorize the use of unreliable, time-intensive hand counting in place of or alongside reliable mechanical tabulators. The District Court erred in holding otherwise, and the Court should reverse.

II. ARGUMENT

A. This appeal is not moot because the temporary regulation authorizes Nye County to undertake a parallel hand count of ballots.

The Secretary argues that this appeal is moot because, under the temporary regulation, any county wishing to use hand counting as its primary vote-counting method had to submit a plan to the Secretary by October 9, and no county did so. Resp. Br. 10. But the Secretary's argument ignores Nye County, which plans to

undertake 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." 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.[1]

The temporary regulation is directly responsible for Nye County's plan. By drafting the temporary regulation with a narrow definition of "hand count"—"the process of determining the election results where the *primary method* of counting the votes cast for each candidate or ballot question does not involve the use of a mechanical voting system" JA023 (emphasis added)—the Secretary ensured that Nye County could engage in its "parallel tabulation" process without even complying with the temporary regulation's requirements for other hand counts.

[1] The Secretary argues in a footnote that the legality of Nye County's plan should be addressed in a separate lawsuit pending before the Fifth Judicial District Court, Resp. Br. 18 n.68 (citing *ACLU of Nev. v. Nye Cnty.*, No. CV22-0503 (Nev. Dist. Ct. Oct. 4, 2022)), but that court has since denied relief on unrelated procedural grounds. *See ACLU of Nev. v. Nye Cnty.*, No. CV22-0503 (Nev. Dist. Ct. Oct. 12, 2022). Regardless, that case was also distinct from this one, because it raised problems with the particular means by which Nye County intends to hand count ballots—principally, that they will unlawfully reveal election results before the close of the polls—rather than challenging the legality of hand counting itself as Plaintiff does here.

This appeal therefore is not moot, because the temporary regulation, with its narrow definition of "hand count," continues to have the effect of authorizing Nye County's "parallel tabulation" process.[2] This case has always challenged that feature of the temporary regulation as unlawful, in addition to challenging the temporary regulation's authorization of particular hand-counting procedures as a primary tabulation method. *See, e.g.*, JA008 ¶ 29 ("Because of the temporary regulation's restrictive definition of 'hand count,' counties may also choose to primarily use electronic tabulation, while conducting a hand count that is not subject to the temporary regulation's procedures at all"); JA009 ¶ 33 (similar); JA014 (seeking an injunction "prohibiting the Secretary of State from authorizing or permitting counties to engage in hand counting, whether under the temporary regulation or otherwise . . . .").[3]

The Secretary's brief largely ignores the regulation's continuing effect in Nye

[2] Contrary to the Secretary's argument and the District Court's order, it is not true that cities and counties could already use hand counting before the temporary regulation was issued under Nevada law, for the reasons explained in Section II.B, below.

[3] There is nothing unusual about challenging a regulation as unlawfully narrow for failing to regulate or prohibit something that was required by law to be regulated or prohibited. *See, e.g.*, *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1181–82 (9th Cir. 2008) (holding regulation unlawful because it failed to impose legally required prohibitions and standards); *Waterkeeper All., Inc. v. U.S. EPA*, 399 F.3d 486, 498–503 (2d Cir. 2005) (holding regulation unlawful for failing to impose certain requirements on applicants for Clean Water Act permits).

County. In a terse footnote, the Secretary asserts without citation that Nye's plan to engage in a parallel count is harmless because, "[a]bsent compliance with the temporary regulation at issue," which cannot possibly occur now that the October 9 deadline has passed, "only the mechanical voting system tabulation determines the election outcome." Resp. Br. 4 n.12. Unfortunately, the Nye County Clerk does not seem to share the Secretary's view: he has said that he will use the hand count to "check[] the results" of the mechanical tabulator, Golonka, *supra*, https://thenevadaindependent.com/article/state-adopts-regulation-for-hand-counting-ballots-but-it-wont-affect-nye-county, and he has agreed with a county commissioner that the purpose of the hand count is to "either eliminate the tabulator or let us know that the tabulator is any good or not," Nye Cnty., Board of County Commissioners Regular Meeting at 2:08:24 (Sept. 20, 2022), https://nyecounty.granicus.com/MediaPlayer.php?view_id=4&clip_id=1722. In the event that the hand and mechanical counts do not perfectly match—a likely outcome, given the unreliability of hand counting—the temporary regulation's allowance of a parallel tabulation process therefore risks competing counts and electoral chaos.[4]

[4] At a minimum, if the Court thinks the Secretary is right that when counties engage in parallel hand counts, the mechanical count governs under Nevada law in the event of any discrepancy, the Court should say so now before counting begins.

B. Plaintiff is likely to succeed on the merits because the temporary regulation violates the Secretary's statutory duties and voters' rights.

1. Hand counting is unlawful because it does not meet Election Assistance Commission standards.

Nevada law requires the Secretary to ensure that all "voting systems" used in Nevada "[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 temporary regulation violates that requirement because the Secretary does not, and cannot, contend that hand counting meets those standards. Instead, the Secretary argues that hand counting, alone among all voting systems, is exempt from this requirement. Resp. Br. 12–13. The Secretary is wrong as a matter of statutory text, structure, and purpose.

First, text and structure. The Secretary cannot deny that when the Legislature enacted NRS 293.2696(5) in 2003, Nevada law already had a defined term, "*mechanical* voting system," to cover electronic and mechanical voting equipment specifically. *See* NRS 293B.033. Indeed, an entire chapter of the Nevada Revised Statutes, Chapter 293B, was and is devoted to regulating such equipment. *See* NRS 293B.010 to .400. If the Legislature had wished to restrict NRS 293.2696(5)'s requirement to only mechanical voting systems, rather than to all means of voting, it would surely have used that defined term and placed the statute in Chapter 293B. Instead, the Legislature used the unmistakably broader, undefined term "voting

systems" and intentionally placed the provision in Chapter 293, which regulates elections generally. *See* 2003 Nev. Laws Ch. 382 (S.B. 453) §§ 1, 5 (adding NRS 293.2696(5) to Chapter 293). A "well-established canon of statutory interpretation" requires the Court to give effect to the Legislature's choice of a different word. *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003). And where, as here, the "chapter designation was part of the legislative enactment when the [statute] was first created," the statute should be interpreted in manner that is "consistent with the chapter in which the Legislature chose to codify" it. *Lofthouse v. State*, 136 Nev. 378, 383, 385, 467 P.3d 609, 613, 615 (2020).[5]

The Secretary also relies on NRS 293B.050, which specifically authorizes the use of mechanical voting systems in all Nevada elections. Resp. Br. 11. But if anything, that provision supports Plaintiff's position, because there is no similar express statutory authorization to use hand counting. Under the "negative-implication canon," "[t]he expression of one thing implies the exclusion of others." Scalia & Garner, *Reading Law* 107 (2012). Thus, to the extent NRS 293B.050's

[5] Given the clear text and structure of Nevada law, the Secretary's reliance on a federal-law definition of "voting system" is misplaced, particularly where the Secretary herself admits that hand-counted paper ballots are a "paper ballot voting system," and thus a "voting system," for federal law purposes. Resp. Br. 5, 13. Regardless, hand counting qualifies as a "voting system" even under the federal definition because, as the temporary regulation's detailed procedures make clear, hand counting involves "mechanical . . . equipment" like specialized forms and writing implements. 52 U.S.C. § 21081(b); *see also* JA017–24.

specific authorization of mechanical voting systems has anything to say about the legality of hand counting, it impliedly prohibits it, along with any other methods of vote tabulation that the statute does not mention. *See id.* at 100–01 (discussing examples). The provision's use of the word "may" does not change this, but merely reflects the fact that voters *may*, but are under no obligation to, cast votes in any election. *See* NRS 293B.050 ("At 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." (emphasis added)). The use of "may" in that context does not impliedly authorize other forms of voting systems, and it certainly does not overcome NRS 293.2696(5)'s express requirements applicable to all "voting systems," which hand counting indisputably does not meet.

Second, purpose. The Secretary offers no explanation why the Nevada Legislature would have imposed stringent requirements on mechanical tabulation in NRS 293.2696(5) while leaving far less reliable hand counting methods entirely unregulated. The Secretary admits that Congress enacted the Help America Vote Act (HAVA)—the federal statute that prompted Nevada to enact NRS 293.2696—to "establish minimum election administration standards." Resp. Br. 13 (quoting Pub. L. No. 107-252, 116 Stat. 1706). It would badly undermine such "minimum standards" to exempt hand counting tabulation methods, which are particularly unreliable, from them. Moreover, regardless of Congress's purpose in HAVA, this

Court must construe the Nevada statute to avoid unreasonable results and effectuate the intended statutory benefit. *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct. ex rel. Cnty. of Washoe*, 124 Nev. 193, 201–02, 179 P.3d 556, 560–61 (2008). Exempting hand counting from Nevada law's minimum standards would do the opposite. And while the Secretary points out that the Nevada Legislature did not discuss eliminating hand counting in 2003 when it enacted NRS 293.2696(5), *see* Resp. Br. 12, there was no reason for the Legislature to do so. Mechanical voting systems had by then been authorized and used in Nevada for decades, and there is no evidence that any jurisdiction in the state was still hand counting ballots at that time.

Finally, the Secretary's argument that HAVA "explicitly excluded 'paper ballot voting systems' from its terms," Resp. Br. 5–7, 12–13, in fact confirms Plaintiff's position that hand-counted paper ballots are "voting systems" for purposes of the statute. In making this argument, Plaintiff concedes that "paper ballot voting systems . . . includes hand counting." *Id.* at 5. But HAVA exempts "paper ballot voting systems" from only a *single* statutory requirement applicable to "voting systems"—the requirement that "[e]ach voting system . . . 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 ballot voting system to

meet the requirements of such subsection or to be modified to meet such requirements."). "Paper ballot voting systems" are *not* exempted from HAVA's other requirements for "voting systems," including the error rate requirements. *See id.* § 21081(a)(5). The very existence of a narrow express exclusion from one of HAVA's requirements confirms that "paper ballot voting systems" are, contrary to the Secretary's argument, "voting systems" that are otherwise subject to HAVA's requirements. *See id.* § 21081(a)(1)(B) (identifying different types of voting systems, including "paper ballot voting system[s]").

2. The temporary regulation is unlawful because it fails to provide a uniform standard for counting votes accurately.

The temporary regulation's authorization of hand counting also violates Nevada voters' statutory and constitutional rights "to a uniform, statewide standard for counting and recounting all votes accurately," Nev. Const. art. II, § 1A(10); *see also* NRS 293.2546(5). The Secretary attempts to minimize these rights and obligations as requiring uniformity only in determining "what qualifies as a vote" and not in how votes are counted. Resp. Br. 14–16. That would be an extraordinarily odd reading of the statutory and constitutional text, which is specifically concerned not just with "counting" but with "counting . . . *accurately*." Nev. Const. art. II, § 1A(10) (emphasis added); *see also* NRS 293.2546(5). Accuracy is a characteristic of a counting system, not of a set of rules for what "qualifies as a vote."

The Secretary does not cite any precedent supporting its unnatural

construction of "counting and recounting all votes accurately" as referring only to what qualifies as a vote and not to the actual counting process. The Secretary mentions *Bush v. Gore*, 531 U.S. 98, 106 (2000), Resp. Br. 15, but she provides no reason to believe that the Nevada Legislature was specifically concerned with addressing the narrow issue from that case out of Florida when it enacted NRS 293.2546(5) three years later, much less that Nevada voters had that narrow issue in mind when they ratified the constitutional provision almost two decades after that.

Moreover, if the Legislature had wished for NRS 293.2546(5) and Nevada Constitution Article II, § 1A(1) to establish a right only to "uniform, statewide standards for *what qualifies as a vote*," it would surely have said so. The Secretary's reference to HAVA's requirement that states "adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote," Resp. Br. 15 (quoting 52 U.S.C. § 21081(a)(6)), confirms the point. If that is what the Legislature wanted NRS 293.2546(5) and Nevada Constitution Article II, § 1A(1) to do, the Legislature could easily have used HAVA's "what constitutes a vote" language. By instead establishing a right to uniform standards for "counting . . . all votes accurately," the Legislature unmistakably created a broader right to uniform and accurate ballot counting.

The Secretary makes no argument that the temporary regulation—both in authorizing a specific hand counting procedure and in exempting parallel tabulation

from any requirements at all—is consistent with this broader right. Plainly it is not. The temporary regulation authorizes each county to decide for itself whether and to what extent to use a hand-counting system in whole or in part, and in combination with an electronic tabulator or not. And it does so without any basis for concluding that the hand counting procedures are accurate. All evidence suggests that they are not. *See, e.g.*, 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). The temporary regulation is thus unlawful for this reason.

3. The temporary regulation violates the Equal Protection Clause.

The temporary regulation also violates the Equal Protection Clause because it authorizes counties to count some ballots differently, using a less reliable method, from others. "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. Contrary to the Secretary's argument, this case is nothing like *Kraus v. Cegavske*, No. 20 OC 00142 1B, 2020 WL 8340238, at *4 (Nev. Dist. Ct. Oct. 29, 2020), where the plaintiffs challenged the use of ballot sorting and signature-matching software, which treated all mail ballots alike and did not involve tabulation at all. Here, in contrast, the temporary regulation does treat similarly situated voters differently, by providing for some ballots to be counted

(unreliably) by hand while others are counted using reliable mechanical voting systems.

The Secretary argues that the temporary regulation instead promotes uniformity by providing guidelines for hand counting for counties that chose to use that system. Resp. Br. 17. There are two problems with that argument. First, it again ignores the temporary regulation's carve out—via its narrow definition of "hand count"—of Nye County's "parallel tabulation" plan, which the temporary regulation allows to proceed in a non-uniform, unreliable manner, without even following the temporary regulation's requirements. Second, the argument assumes that hand counting is permissible in the first instance, when it is not. *Supra* Part II.B.1. The Secretary may be right that hand counting that is governed by the regulation is preferable to hand counting that is not. But no hand counting *at all* would be far more uniform, and thanks to the temporary regulation's narrow "hand count" definition, Nye County's parallel tabulation process will not be governed by the regulation's requirements in any event.

C. The other requirements for injunctive relief are met.

Plaintiff also meets the other requirements for injunctive relief. The Secretary argues that Plaintiff does not face irreparable harm because no county has submitted a plan to conduct a hand count in accordance with the temporary regulations. Resp. Br. 18. But this argument again ignores Nye County's "parallel tabulation" plan,

which the temporary regulation directly enables via its narrow definition of "hand count." *Supra* Part II.A. And while the Secretary also argues that an injunction against the temporary regulation would not preclude a parallel hand count, Plaintiff sought a broader injunction below, prohibiting the Secretary "from authorizing or permitting counties to engage in hand counting, whether under the temporary regulation or otherwise," except in narrow circumstances. JA033. Such a broader injunction would prevent a parallel hand count, and it is fully justified because, as explained above, Nevada law affirmatively requires the Secretary to ensure that all voting systems in the state meet U.S. Election Assistance Commission standards, and guarantees voters a uniform, statewide standard for accurately counting all votes. Thus, the Secretary is not merely prohibited from authorizing hand counting in the temporary regulation—she is required by law to prohibit it, and Plaintiff is irreparably harmed by her failure to do so. *See 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.").

The Secretary's argument about the balance of equities and the public interest fails for the same reason. It is based entirely on the false premise that cities and counties could already use hand counting before the temporary regulation was issued. Because that is wrong as a matter of Nevada law, the Secretary and the District Court are wrong to portray the temporary regulation as promoting

uniformity rather than undermining it. In fact, by authorizing each county to decide for itself whether to hand count ballots, either as a primary or secondary method, the temporary regulation harms the public interest by creating a non-uniform standard for counting votes in Nevada.

III. CONCLUSION

The Court should reverse.

Dated this 13th 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 15 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 13th day of October, 2022.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and that on this 13th day of October, 2022, I electronically filed and served by electronic mail a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** properly addressed to the following:

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