

Marquis Aurbach
Brian R. Hardy, Esq.
Nevada Bar No. 10068
Harry L. Arnold, Esq.
Nevada Bar No. 15866
Nicholas M. Adams, Esq.
Nevada Bar No. 15859
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
bhardy@maclaw.com
harnold@maclaw.com
nadams@maclaw.com
Attorneys for Plaintiff

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

ZENAIDA DAGUSEN, an individual;
REPUBLICAN NATIONAL COMMITTEE;
NEVADA REPUBLICAN PARTY; and
DONALD J. TRUMP FOR PRESIDENT 2024,
INC.

Case No.: 24-OC-001531B
Dept. No.: 1

Plaintiff,

vs.

FRANCISCO AGUILAR, in his official capacity
as NEVADA SECRETARY OF STATE,
DEMOCRATIC NATIONAL COMMITTEE,
NEVADA STATE DEMOCRATIC PARTY

Defendant.

OPPOSITION TO MOTION TO DISMISS

Plaintiffs ZENAIDA DAGUSEN, an individual and the REPUBLICAN NATIONAL COMMITTEE, the NEVADA REPUBLICAN PARTY, and DONALD J. TRUMP FOR PRESIDENT 2024, INC. hereby submit the following Opposition to the Motion to Dismiss ("Opposition").

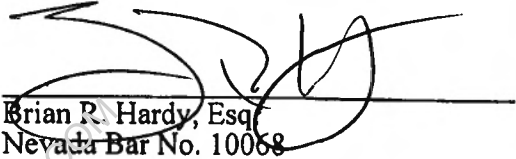
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1 This Opposition is based upon the following Memorandum of Points and Authorities, the pleadings
2 and papers on file herein and any oral argument allowed at a hearing on this matter.

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4 Dated this 25th day of October, 2024.

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6 MARQUIS AURBACH

7
8
9 By 

10 Brian R. Hardy, Esq.
11 Nevada Bar No. 10068
12 Harry L. Arnold, Esq.
13 Nevada Bar No. 15866
14 Nicholas M. Adams, Esq.
15 Nevada Bar No. 15859
16 10001 Park Run Drive
17 Las Vegas, Nevada 89145
18 Attorney(s) for Plaintiff
19
20
21
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Zenaida Dagusen (the "Individual Plaintiff"), the Republican National Committee and the Nevada Republican Party (the "Republican Party Plaintiffs"), and Donald J. Trump for President 2024 Inc. (collectively, "Plaintiffs") have plausibly alleged claims in the Complaint under the Nevada Constitution and for declaratory judgment pursuant to NRS 30.040.

In the Motion to Dismiss (the "Motion"), Defendants the Democratic National Committee and Nevada State Democratic Party ("Democratic Defendants") request that the Court not accept Plaintiffs' factual allegations as true and decline to draw reasonable inferences in Plaintiffs' favor. Ultimately, Democratic Defendants ask the Court to adopt a legal interpretation whereby no Nevada voter or political entity has standing to bring a claim under the Nevada Constitution based on the failures of the Defendant Francisco Aguilar, Nevada Secretary of State (the "Secretary"), to abide by his statutory duties as related to Nevada's voter rolls. Plaintiffs' Complaint alleges a severe issue in Nevada's election process whereby Nevada voters are being disenfranchised through the votes of ineligible, noncitizen voters as a result of the Secretary's noncompliance with his statutory duties.

Democratic Defendants' Motion evokes numerous factual disputes which are improper at this stage, as well as arguments which are plainly inapposite at a 12(b)(5) posture, such as whether Plaintiffs are able to obtain pre-election relief. Plaintiffs have pleaded valid claims under the Nevada Constitution upon which relief can be granted. Democratic Defendants have failed to show that Plaintiffs can prove no set of facts which would entitle them to relief as to the subject claims. Therefore, Plaintiffs request that the Court deny the Motion in its entirety.

II. BRIEF STATEMENT OF FACTS¹

The Complaint details the recent history of the Nevada Secretary of State failing to ensure that noncitizens are not registered to vote. *See* Complaint, ¶¶56-90. Of note, Nevada's voter rolls

¹ Plaintiffs incorporate and restate by reference herein Paragraphs 24-102 of the Complaint.

1 contain thousands of noncitizens who voted in the 2020 election, and thousands more actively
2 registered. *Id.* The problem of noncitizen voting has continued since the 2020 general election. *Id.*
3 Nevada's numbers of noncitizens registered to vote are higher than the national average, showing
4 that nearly 12 percent of noncitizen respondents included in the survey datasets for 2018 and 2022
5 had a voter-file match indicating that they were registered to vote. *Id.* Under the U.S. Census
6 Bureau's noncitizen population estimates, a conservative 4 percent registration rate among
7 noncitizens amounts to approximately 11,730 noncitizens registered to vote in Nevada in 2018;
8 11,587 noncitizens registered in 2020; and 11,220 noncitizens registered in 2022. *Id.* Evidence
9 shows that the Secretary's violations are highly correlated with dilution of eligible votes. *Id.* at
10 ¶92.

11 Vote dilution by noncitizen voting favors Democratic candidates and harms Republican
12 candidates. *Id.* at ¶97. Similarly, vote dilution by noncitizen voting disproportionately dilutes the
13 vote of the Individual Plaintiff as well as all Republican voters. *Id.* The Cooperative Election Study
14 cumulative data file shows that approximately 74 percent of individuals who identified themselves
15 as noncitizens indicated that they preferred the Democratic presidential candidate, while
16 approximately 20 percent indicated that they preferred the Republican presidential candidate. *Id.*
17 at ¶98. This suggests that for every 10 noncitizen votes cast, the Democratic party margin would
18 improve by about 5.374 votes. *Id.*

19 Comparing these statistics to the U.S. Census Bureau's estimate of the noncitizen voting-
20 age population shows that noncitizen voting can determine the outcome of close elections (fewer
21 than 2,000 votes). *Id.* at ¶99. The Census Bureau reports that Nevada has a noncitizen voting-age
22 population of 266,065, representing about 12.7% of the total voting-age population. *Id.* The
23 Cooperative Election Study thus suggests that Nevada can expect a voter turnout of about 3,731
24 noncitizens. *Id.* Given the partisan tendencies of noncitizens, that means the Democratic
25 presidential candidate can expect a marginal gain of about 2,005 votes over the Republican
26 presidential candidate. *Id.* The predicted vote dilution would drop significantly if Nevada began
27 verifying citizenship. *Id.* at ¶100. For example, these numbers show that if Nevada began verifying
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1 citizenship through the SAVE program and jury information, the estimated number of noncitizens
2 voting would drop from 3,731 to just 297. *Id.* That would in turn cut the marginal benefit to the
3 Democratic presidential candidate from 2,005 votes to 160 votes. *Id.*

4 **III. LEGAL STANDARD**

5 When considering an NRCP 12(b)(5) motion, factual allegations in the complaint are
6 accepted as true, while inferences in the complaint are drawn in favor of the plaintiff. *Facklam v.*
7 *HSBC Bank USA*, 133 Nev. 497, 498, 401 P.3d 1068, 1070 (2017). A plaintiff fails to state a claim
8 for relief only “if it appears beyond a doubt that [he] could prove no set of facts” that “if true ...
9 entitle [him] to relief.” *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d
10 670, 672 (2008). Under the notice-pleading standard, courts “liberally construe [the] pleadings”
11 for “sufficient facts” that put the “defending party” on “adequate notice of the nature of the claim
12 and relief sought.” *W. States Constr., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223
13 (1992).

14 **IV. LEGAL ARGUMENT**

15 Democratic Defendants’ Motion repeatedly requests that the Court ignore Nevada’s notice
16 pleading standards, decline to accept the Complaint’s factual allegations as true, and opt not to
17 draw reasonable inferences in Plaintiffs’ favor. Democratic Defendants suggest that the Court
18 dismiss the Complaint because it does not allege “actual evidence of a substantial problem with
19 noncitizens voting in Nevada.” *Motion*, p.1. However, that is not the standard for a motion to
20 dismiss. *See Buzz Stew, LLC*, 124 Nev. at 228. Plaintiffs have plausibly alleged their claims under
21 the Nevada Constitution and for declaratory relief. As such, the Motion should be denied.

22 **A. PLAINTIFFS HAVE STATED CLAIMS UPON WHICH RELIEF MAY BE** 23 **GRANTED.**

24 **1. Plaintiffs have plausibly alleged that permitting noncitizens to vote in** **Nevada elections violates their right to equal protection under the law.**

25 Plaintiffs’ Complaint plausibly alleges that their right to equal protection under the law has
26 been violated through the Secretary’s violations of his statutory duties to ensure that only citizens
27 are registered to vote, thereby diluting the votes of the Individual Plaintiff and the Republican
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1 Party Plaintiffs' members. *See generally* Complaint, at ¶¶ 59-100. Democratic Defendants contend
2 that the claim fails as a matter of law and that Plaintiffs have not alleged that the maintenance of
3 voter rolls in Nevada results in their votes counting less. On the contrary, that is precisely what
4 Plaintiff have alleged. *See, e.g. id.* at ¶¶ 91-102. Plaintiffs have stated a claim upon which relief
5 can be granted that the Secretary's violations of Nevada's statutes and permitting noncitizens to
6 vote in Nevada elections violates their right to equal protection under the law.

7 Democratic Defendants contend that the equal protection clause only protects against (1)
8 vote dilution through redistricting and apportionment, and (2) "arbitrary and disparate treatment"
9 by the state that "values one person's vote over that of another. *Motion*, p.3:16-25 (citations
10 omitted). Democratic Defendants argue that Plaintiffs have not adequately pled either theory. To
11 the contrary, accepting the factual allegations of the Complaint as true and drawing reasonable
12 inferences in Plaintiffs' favor, Plaintiffs have unambiguously alleged that the Secretary's
13 violations amount to valuing the votes of others over Plaintiffs'.

14 Article IV, Section 21 of the Nevada Constitution enshrines an equal protection principle
15 in the Nevada Constitution that "is the same as the federal standard." *State Farm Fire & Gas Co.*
16 *v. All Elec., Inc.*, 99 Nev. 222, 224 (1983). The Fourteenth Amendment to the United States
17 Constitution prohibits states from "denyin[g] to any person within [their] jurisdiction the equal
18 protection of the laws." U.S. Const. amend. XIV, § 1. Equal protection requires that States protect
19 the right of citizens "to have [their] vote counted at full value without dilution or discount."
20 *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (quoting *South v. Peters*, 339 U.S. 276, 279 (1950)
21 (Douglas, J., dissenting). "[T]he right of suffrage can be denied by a debasement or dilution of the
22 weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the
23 franchise." *Id.*

24 Noncitizen voting dilutes the votes of a least two distinct groups. First, every eligible voter
25 who casts a ballot in a given election is injured when their vote is diluted from a false tally. The
26 "impairment resulted from dilution by a false tally" is an injury unique to the voters included in
27 the tally for that specific election. *Baker v. Carr*, 369 U.S. 186, 208 (1962). Democratic
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1 Defendants' assertion that dilution must be geographic or race-based to constitute an equal
2 protection violation is incorrect. Second, Republican voters are uniquely injured when the
3 Secretary fails to abide by Nevada law and purge voter rolls of non-citizens. As alleged in the
4 Complaint, the Secretary's violations expressly benefit Democrats. *See Complaint* at ¶¶ 91-102.
5 This is certainly a cognizable injury, as recognized by the United States Supreme Court. *See Rucho*
6 *v. Common Cause*, 139 S. Ct. 2484 (2019) (finding dilution for partisan advantage to be a valid
7 injury, but finding that partisan redistricting cases presented nonjusticiable politician questions in
8 federal courts).

9 The Democratic Defendants' position necessarily implies that Nevada could pass a law
10 permitting noncitizens to vote in flagrant violation of the Constitution, but that no voter would
11 have standing to challenge the law. That view is irreconcilable with *Reynolds*. 377 U.S. at 555
12 ("The right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted
13 by ballot-box stuffing.") The mathematical "disadvantage" in the effectiveness of a plaintiff's vote
14 which stands as the basis for standing in redistricting cases is the same injury that is the basis for
15 standing here. *See Baker*, 369 U.S. at 205.

16 Finally, even if Democratic Defendants' position were correct as a matter of federal law,
17 this Court has the power to deviate from federal equal protection cases. "It is fundamental that
18 state courts be left free and unfettered by [federal courts] in interpreting their state constitutions."
19 *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940). This would be the case to do so.
20 Accordingly, the Court should determine that Plaintiffs have stated an equal protection claim under
21 the Nevada Constitution based upon vote dilution caused by non-citizens voting.

22 **2. Plaintiffs have plausibly alleged that permitting noncitizens to vote in**
23 **Nevada elections violates their due process rights.**

24 Plaintiffs' Complaint plausibly alleges that their due process rights have been violated by
25 the Secretary's failure to abide by his statutory duties to maintain accurate voter rolls, and that the
26 Secretary's failure has caused Nevada's election processes to reach a point of fundamental
27 unfairness, including election outcomes being altered through illegitimate votes. *See Complaint* at
28 ¶¶ 112-117. The Court should allow this claim to proceed.

1 Relying upon federal cases, Democratic Defendants assert that the Complaint fails to state
2 a substantive due process claim under the Nevada Constitution because substantive rights under
3 the federal Due Process Clause are implicated only in exceptional cases where a state's voting
4 system is fundamentally unfair. Counter to Democratic Defendants' arguments, the Complaint
5 absolutely alleges fundamental unfairness in Nevada's voting system and that the safeguards
6 placed on Nevada's voting system through statute are being actively disregarded by the Secretary.
7 Whether Nevada's election processes have reached a point of fundamental unfairness is a factual
8 question. As alleged in the Complaint, states across the nation are removing noncitizens from voter
9 rolls left and right, yet the Secretary refuses to adhere to his statutory duties to do so in Nevada.
10 Plaintiffs have alleged a patent and fundamental unfairness which erodes the democratic process:
11 noncitizens registered to vote in Nevada elections. Taking the allegations in the complaint as true
12 and drawing reasonable inferences in Plaintiffs' favor, it is certainly not beyond a doubt that
13 Plaintiffs could prove no set of facts which would entitle them to relief on this claim.

14 As stated in the Motion, a voter's substantive rights under the due process clause are
15 implicated where a state's voting system is "fundamentally unfair." *Warf v. Bd. of Elections of*
16 *Green Cnty.*, 619 F.3d 553, 559 (6th Cir. 2010). "[C]ases justifying [judicial] intervention have
17 involved attacks 'upon the fairness of the official terms and procedures under which the election
18 was conducted.'" *Id.* (quoting *Griffin*, 570 F.2d at 1078). Under the "fundamentally unfair"
19 standard, a plaintiff must allege "broad-gauged, patent and fundamental unfairness that erode[s]
20 the democratic process." *See Nolles v. State Comm. for Reorganization of Sch. Districts*, 524 F.3d
21 892, 898 (8th Cir. 2008) ("A canvass of substantive due process cases related to voting rights
22 reveals that voters can challenge a state election procedure in federal court only in limited
23 circumstances, such as when the complained of conduct discriminates against a discrete group of
24 voters, when election officials refuse to hold an election though required by state law, resulting in
25 a complete disenfranchisement, or when the willful and illegal conduct of election officials results
26 in fraudulently obtained or fundamentally unfair voting results.") (cleaned up).

Democratic Defendants cite a number of cases wherein Courts have found that inaccuracies and inadvertent mistakes do not amount to fundamental unfairness. *Motion*, p.5. Plaintiffs' Complaint alleges far more—a statewide issue that thoroughly affects the voter registration and election process, which significantly alters the final ballot counts, and which the Secretary has failed to address for years. Plaintiffs allege conduct by the Secretary which discriminates against a discrete group of voters, as well as the Secretary's willful failure to follow the law as relates to Nevada's voter rolls. Many other states have recognized and corrected this serious problem. This case concerns a fundamental, systemic issue with election integrity throughout the state. Plaintiffs allege a systematic denial of equality in voting in Nevada elections, as well as a fundamental unfairness in Nevada's elections caused by disproportionate debasement and dilution of the votes of Individual Plaintiff and the Republican Party Plaintiffs' members by ineligible voters. *See* Complaint at ¶¶ 91-102. At the very least, whether Nevada's election processes have reached a point of fundamental unfairness is a factual question not appropriate for NRCP 12(b)(5) dismissal.

Overall, Plaintiffs have alleged a serious statewide issue causing the election process itself to reach the point of patent and fundamental unfairness. This Court cannot reasonably conclude that it is beyond a doubt that Plaintiffs cannot prove any set of facts to support the claim. Accepting the Complaint's allegations as true and drawing reasonable inferences in Plaintiffs' favor, the Complaint states a due process claim under the Nevada Constitution upon which relief can be granted.

3. **Plaintiffs have plausibly alleged that permitting noncitizens to vote in Nevada elections violates their constitutional right to vote.**

Plaintiffs have plausibly alleged that their right to vote under the Nevada Constitution has been and is being impaired by the Secretary's disregard for his duties in allowing noncitizens to vote. Article II, Section I of the Nevada Constitution guarantees that all eligible voters "shall be entitled to vote." *See* Complaint at ¶¶ 118-122. Democratic Defendants argue that Plaintiffs' right to vote claim fails despite the Complaint's allegations that Plaintiffs' votes are diluted by the votes of noncitizen voters because the state is not depriving or burdening the right to vote. *Id.* at ¶¶ 91-102.

1 Democratic Defendants' argument is fundamentally at odds with the Supreme Court's
2 holding in *Reynolds* finding that included within the right to vote is the right of qualified voters to
3 have their vote counted at full value and without dilution or discount. Democratic Defendants
4 argue that vote dilution is actionable only through the federal Equal Protection Clause, while
5 arguing that the same clause permits only *redistricting* dilution claims. In effect, Democratic
6 Defendants ask the Court to adopt a legal interpretation under which voters have no recourse when
7 the state permits ineligible voters to vote and dilute the votes of eligible and properly registered
8 voters. The Court should reject Democratic Defendants' assertion that noncitizens voting in
9 Nevada elections has *nothing* to do with the right to vote.

10 Democratic Defendants also argue that Plaintiffs are somehow seeking to disenfranchise
11 Nevada voters and "chill potential voters from registering" to vote. Democratic Defendants cannot
12 explain why removing noncitizens from the over rolls would chill eligible voters from registering
13 to vote. Democratic Defendants' only support for that claim is an opinion issued after a bench trial
14 evaluating an expert opinion that requiring proof of citizenship could "impose psychological costs"
15 on registrants. *Mi Familia Vota v. Fontes*, No. 2:22-cv-509, 2024 WL 862406, at *22 (D. Ariz.
16 Feb. 29, 2024). That Court rejected the evidence because the "Plaintiffs did not ... quantify the
17 scope of this impact" and "did not adduce any evidence that voters would be unable to include
18 birthplace information." In any event, it is wholly inappropriate for Democratic Defendants to rely
19 upon such speculative evidentiary issues on a 12(b)(5) motion, and this Court should disregard
20 them.

21 The United States Supreme Court held in *Reynolds* that the right to vote means more than
22 being permitted to cast a ballot. Included within the right to vote is the right of all Nevada citizens
23 to have their vote counted at full value and without dilution or discount. Plaintiffs have plausibly
24 alleged that the Secretary's acts are depriving them of the right to vote. Therefore, the Court should
25 deny Democratic Defendants' request to dismiss this claim.

1 4. Plaintiffs have plausibly alleged that the Secretary is failing to
2 maintain the voter rolls as required by Nevada law.

3 Plaintiffs' fourth claim for relief is for declaratory judgment pursuant to NRS 30.040(1).
4 Plaintiffs allege in the Complaint that the Secretary has failed to fulfill his duties under NRS
5 293.675(3)(i), NRS 293.124(2), and NRS 293.675(2)(i), among others, by failing to conduct any
6 systematic or routine removal of noncitizens from the voter rolls. See Complaint at ¶¶ 123-128.

7 In the Motion, Democratic Defendants contend that the claim fails because the Secretary's
8 duties under NRS 293.675 do not require the Secretary to ensure that noncitizens are removed
9 from the voter rolls. The Democratic Defendants incorrectly argue that the list-maintenance
10 protocols in NRS 293.675 are exhaustive, which is not what the statute provides. NRS
11 293.675(3)(i) provides that the Secretary's statewide voter registration list must be "regularly
12 maintained to ensure the integrity of the registration process and the election process." This is an
13 independent duty. Democratic Defendants argue that the duty is limited by NRS 293.675(5), (6),
14 (8), and (9), which would invert the statutory structure and render the "regularly maintained"
15 clause a nullity. This Court is obliged to refrain from interpreting the statute in a manner which
16 would result in an absurd outcome. *Gallagher v. City of Las Vegas*, 114 Nev. 595, 599, 959 P.2d
17 519, 521 (1998) ("[W]hen possible, the interpretation of a statute or constitutional provision will
18 be harmonized with other statutes or provisions to avoid unreasonable or absurd results.")

19 Democratic Defendants' arguments also critically ignore that the Complaint alleges that
20 the Secretary is failing to comply with his statutorily prescribed duties. Even if Democratic
21 Defendants' framing of the relevant law were correct (which it is not), it would not provide a basis
22 for dismissing Plaintiffs' declaratory judgment claim. Plaintiffs have alleged that the Secretary has
23 failed to meet his obligations under NRS 293.675(3)(i) and NRS 293.124(2). While Democratic
24 Defendants believe otherwise, that is a question of fact. Plaintiffs have stated a claim for relief,
25 and it cannot be said at this juncture that Plaintiffs could not prove any set of facts entitling them
26 to a declaratory judgment.

27 In the Motion, Democratic Defendants continue with their pattern of advancing arguments
28 and raising evidentiary issues far beyond the scope of the pleadings or a 12(b)(5) motion to dismiss.

Democratic Defendants advance arguments relating to the SAVE system and other databases, as well as what precise information is necessary to conclude that someone is not a citizen. Those factual evidentiary issues are proper when considering a remedy, not for evaluating whether Plaintiffs have stated a claim upon which relief can be granted, or for determining whether the Secretary has failed to comply with his list-maintenance duties under NRS 293. The Court should disregard these arguments as beyond the scope of the NRCP 12(b)(5) Motion and beyond the four corners of Plaintiffs' Complaint.

In sum, Plaintiffs have stated a viable NRS 30.040(1) declaratory judgment claim for relief. Democratic Defendants have failed to show that Plaintiffs' claim necessarily fails as a matter of law or that Plaintiffs could prove no set of facts which would entitle them to declaratory relief. Accordingly, the Court should allow the claim to proceed.

B. DEMOCRATIC DEFENDANTS' ARGUMENTS ABOUT THE TIMING OF RELIEF BEFORE THE 2024 ELECTION ARE PREMATURE.

Much of the rhetoric and legal argument advanced by Democratic Defendants in the Motion relates to Democratic Defendants' assertion that relief for the claims cannot be granted to Plaintiffs before the 2024 election. Democratic Defendants argue that the NVRA's 90-day quiet period as well as equitable considerations foreclose any relief prior to the 2024 election. In advancing these contentions, Democratic Defendants never argue that the NVRA or equitable considerations are reasons to dismiss the Complaint. Therefore, these issues are beyond the scope of the Motion and not presently before the Court.

Democratic Defendants do not argue that the NVRA or equitable considerations justify dismissal of the Complaint for good reason. Those arguments become relevant when a court is poised to grant relief, not when it is evaluating whether the complaint states a claim. Even if Democratic Defendants' arguments are legitimate, they are premature here. Plaintiffs have not filed a preliminary injunction motion, nor have they demanded relief before the 2024 election. The Court thus need not reach these arguments at this stage.

V. CONCLUSION

Plaintiffs request that the Court deny the Motion and enter the attached proposed order.

MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

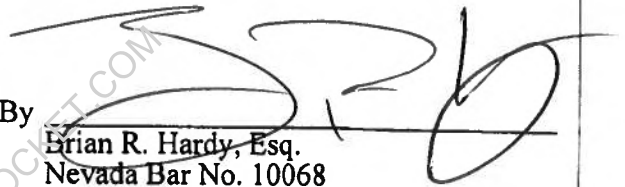
AFFIRMATION

(Under NRS 239B.030)

The undersigned does hereby affirm that the preceding document filed in the above referenced matter does not contain the social security number of any person.

Dated this 25th day of October, 2024.

MARQUIS AURBACH

By 

Brian R. Hardy, Esq.
Nevada Bar No. 10068
Harry L. Arnold, Esq.
Nevada Bar No. 15866
Nicholas M. Adams, Esq.
Nevada Bar No. 15859
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorney(s) for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **OPPOSITION TO MOTION TO DISMISS** was served on the 25th day of October, 2024 via email as follows:

BRAVO SCHRAGER LLP
Bradley S. Schrager, Esq.
Daniel Bravo, Esq.
6675 S. Tenaya Way, Ste. 200
Las Vegas, NV 89113
bradley@bravoschrager.com
daniel@bravoschrager.com

Laena St Jules
Senior Deputy Attorney General
100 N. Carson St.
Carson City, NV 89701
lstjules@ag.nv.gov

Attorneys for Defendant Francisco V. Aguilar

ELIAS LAW GROUP LLP
David R. Fox, Esq.
250 Massachusetts Ave. NW, Ste. 400
Washington, D.C. 20001
dfox@elias.law

Julie Harkleroad
Judicial Assistant to Hon. James R. Russell
First Judicial District Court, Dept. I
885 E. Musser St, Suite 3031
Carson City, NV 89701
jharkleroad@carson.org

*Attorneys for Defendants Democratic
National Committee and Nevada State
Democratic Party*

Chatfield

An employee of Marquis Aurbach