UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Lynchburg Division

LEAGUE OF WOMEN VOTERS OF VIRGINIA; KATHERINE D. CROWLEY; ERIKKA GOFF; and SEIJRA TOOGOOD, **Plaintiffs,** **v.** **VIRGINIA STATE BOARD OF ELECTIONS; ROBERT H. BRINK, JOHN O'BANNON, and JAMILAH D. LECRUISE, in their official capacities as Chairman, Vice-Chair, and Secretary of the Virginia State Board of Elections, respectively; and CHRISTOPHER E. PIPER, in his official capacity as Commissioner of the Virginia Department of Elections,** **Defendants.**	**Case No. 6:20-cv-00024-NKM**

REPLY BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The Republican Party of Virginia ("RPV") and amici throw a kitchen sink of objections at Plaintiffs with the hope that something will land, suggesting that the COVID-19 pandemic is supposedly not as bad as predicted; asserting that requiring voters to jump through extra hoops to find a witness during the pandemic is not particularly burdensome; and papering the Court with broad claims of voter fraud and irrelevant examples, without ever showing how the witness requirement addresses these concerns. Evaluating the actual evidence of harm, however, and weighing it against the minimal (if any) value of the witness requirement, there is no contest. In the context of the pandemic, continued enforcement of the witness requirement will

unconstitutionally burden the right to vote of Plaintiffs and many thousands of other Virginians and cannot be justified by vague election integrity interests. The Court should grant Plaintiffs' preliminary injunction motion if it denies entry of the proposed consent decree.

I. The RPV and amici misframe the relevant legal standards and fail to rebut Plaintiffs' demonstration of significant harm, including through suggested workarounds such as a "voter-witness dance."

A. Courts evaluate the burden on voters in light of present circumstances, including in the context of pandemics and disasters.

The RPV and amici note that Plaintiffs do not challenge the witness requirement in a "COVID-less world," but rather in the context of the current pandemic. They are correct. Where they are wrong is in how this affects the Court's analysis. In reviewing right to vote claims, courts must assess the burdens imposed by a challenged voting restriction within the context of circumstances as they currently exist—regardless of whether those circumstances are unusual or abnormal. And several courts have already struck down various election administration procedures as unduly burdensome in the context of the current pandemic, particularly where complying with such procedures would conflict with a state's "stay-at-home" orders. *See, e.g.*, *Libertarian Party of Ill. v. Pritzker*, No. 20-cv-2112, 2020 WL 1951687, at *4 (N.D. Ill. Apr. 23, 2020) (finding that the "combined effect of . . . Illinois' stay-at-home order and the usual in person signature requirements [posed] a nearly insurmountable hurdle"); *Esshaki v. Whitmer*, No. 20-cv-10831, 2020 WL 1910154, at *1 (E.D. Mich. Apr. 20, 2020) (noting state's "insist[ence] on enforcing [ballot-access] requirements as if its Stay-at-Home Order . . . had no impact on the rights of candidates and the people who may wish to vote for them").

Indeed, although the RPV contests the relevance of the ongoing pandemic when assessing the constitutionality of Virginia's elections administration procedures, it recently argued precisely the *opposite* in state court. In fact, the RPV recently sought and obtained a

consent order extending a temporary injunction in state court against a Virginia statute providing for certain candidate selection deadlines for all non-primary districts through July 28, 2020, on the grounds that the statutory deadlines were unconstitutionally burdensome in the context of the pandemic. *See* Compl., *Seventh Cong. Dist. Republican Comm. v. Va. Dep't of Elections* ("*Seventh Cong. Dist.*"), No. CL20001640-00 (City of Richmond Circuit Ct. Apr. 7, 2020) (attached as Ex. A); *Id.* ¶ 73 (requesting injunction under *Anderson-Burdick* framework and arguing that the "fact that State Defendants are encouraging voters to vote absentee and not travel to the polls insinuates that it is contrary to the health of Virginians to come into close contact with others."); Plaintiff-Intervenor Republican Party of Va.'s Unopposed Mot. & Consent Order to Extend Temp. Injunction, *Seventh Cong. Dist.* (Apr. 20, 2020) (requesting and agreeing in consent order that injunction against Va. Code § 24.2-510 in Seventh District until July 28 be applied to all district committees using a non-primary method of selecting candidates) (attached as Ex. B). Having recently endorsed the claim that election procedures can impose particularly significant burdens in the context of the COVID-19 pandemic that take on constitutional significance, the RPV should be estopped from taking the opposite position in this case.[1] *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (the doctrine of judicial estoppel "protect[s] the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.").

[1] In another recent state court case challenging Virginia's signature requirements for a prospective candidate to gain a place on the ballot as unduly burdensome in light of the pandemic, the RPV (which was a defendant along with the Commonwealth) took no position on relief, which was ultimately granted. *See Faulkner v. Va. Dep't of Elections*, No. CL 20-1546, Slip Op. at 2 (Va. Cir. Ct. Mar. 25, 2020) (previously filed in this case at ECF No. 17-3 at pp. 51–55) (granting emergency preliminary injunction against Virginia election statute to Republican candidate in which RPV took no position). If the RPV had no position on whether it is unduly burdensome for prospective Republican candidates to gather voter signatures during the pandemic, it is odd that RPV now takes the position here that gathering a witness signature poses no significant burden on *voters*.

In any event, when confronted with other natural disasters or emergencies, courts have not hesitated to enjoin election laws that, in the context of the emergency, would unconstitutionally burden individuals' right to vote. For example, a district court found that Florida's voter registration deadline unconstitutionally burdened the right to vote in light of Hurricane Matthew, which "foreclosed the only methods of registering to vote" during the final week of Florida's voter registration window, such that maintaining Florida's statutory registration deadline would "completely disenfranchise[] thousands of voters," amounting "to a severe burden on the right to vote." *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016); *see also Ga. Coalition for the Peoples' Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344, 1345–46 (S.D. Ga. 2016) (granting preliminary injunction to extend statutory voter registration deadline for a Georgia county after a hurricane). Similarly, the federal court in the Eastern District of Virginia granted a preliminary injunction in 2016 extending Virginia's statutory voter registration deadline after the state voter registration website crashed on the final day of registration. Order, *New Va. Majority Educ. Fund v. Va. Dep't of Elections*, No. 1:16-cv-01319-CMH-MSN, Dkt. No. 10 (E.D. Va. Oct. 20, 2016) (granting preliminary injunction extending Virginia's statutory voter registration deadline after state voter registration website crashed on the final day of registration). And an appellate court in Pennsylvania upheld a decision postponing an election entirely in light of significant flooding because, "[w]ithout the court's action, some voters, by reason of the elements, would have incurred the discrimination of disenfranchisement." *In re Gen. Election-1985*, 531 A.2d 836, 839 (Pa. Commw. Ct. 1987).

The *Anderson*/*Burdick* framework is a "flexible standard," *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), requiring courts to take a context-specific approach to its burden analysis. The scrutiny applied "will wax and wane with the severity of the burden imposed on the right to vote

in any given case; heavier burdens will require closer scrutiny, lighter burdens will be approved more easily." *Fish v. Schwab*, No. 18-3133, --- F.3d ----, 2020 WL 2050644, at *12 (10th Cir. Apr. 29, 2020). In the hurricane and technological failure cases described above, federal courts took for granted that the registration deadlines ordinarily did not raise significant constitutional concerns, but conducted their analysis in light of the unusual circumstances that rendered those deadlines particularly burdensome. In the circumstances present in these cases, the states' registration deadlines significantly burdened the right to vote such that the state's regulatory interest—which might justify the deadlines under normal times—were no longer constitutionally sufficient. As one court explained, "[o]f course, the State of Florida has the ability to set its own deadlines and has an interest in maintaining those deadlines. But it would be nonsensical to prioritize those deadlines over the right to vote, especially given the circumstances here." *Fla. Democratic Party*, 215 F. Supp. 3d at 1258.

Here, the toll of sickness and loss of life from the COVID-19 pandemic now dwarfs those of the natural disasters that, in Florida and Georgia, rendered those state's voter registration deadlines unduly burdensome. Indeed, the national death toll from COVID-19 now exceeds American lives lost in the Vietnam War.[2] Unfortunately, the "painful new reality is that we are constantly at risk of contracting a deadly virus and are experiencing previously unimagined safety measures to stop its spread." *Thakker v. Doll*, 1:20-CV-480, 2020 WL 1671563, at *7 (M.D. Pa. Mar. 31, 2020); *see also Faulkner*, Slip Op. at 2 ("the circumstances as they exist in the Commonwealth of Virginia . . . are not normal right now"); Chief Judge Michael Urbanski,

[2] *See, e.g.*, David Welna, *Coronavirus Has Now Killed More Americans Than Vietnam War*, NPR, Apr. 28, 2020, https://www.npr.org/sections/coronavirus-live-updates/2020/04/28/846701304/pandemic-death-toll-in-u-s-now-exceeds-vietnam-wars-u-s-fatalities.

Ltr. to Members of WDVA Bar, Apr. 16, 2020 ("In a few short weeks, the global pandemic has changed the way we live . . . .").

For this same reason, the RPV's argument that absentee voting is not a constitutional right, and that "Plaintiffs remain free to vote at the polls," ECF No. 44 at 30, misses the mark. Many if not most Virginians rightfully do not feel safe voting in person for the June primary.[3] This concern carries particular weight for older Virginians and Virginians who have preexisting conditions that put them at a higher risk for serious COVID-19 complications like Plaintiff Toogood and League members McGrady and Claar. *See* ECF No. 17-5 ¶¶ 5–6; ECF No. 17-6 ¶¶ 7–8. As Dr. Reingold explains, "geriatric patients are at the greatest risk of severe cases, long-term impairment, and death," as are "those with immunologic conditions and with other preexisting conditions, such as hypertension, certain heart conditions, lung diseases (e.g., asthma, COPD), diabetes mellitus, obesity, and chronic kidney disease." ECF No. 17-1 ¶ 7; *see also United States v. Edwards*, No. 6:17-CR-00003, 2020 WL 1650406, at *6 (W.D. Va. Apr. 2, 2020) (explaining that COVID-19 "presents a significant risk to those . . . with compromised immune systems"); *In re Poulios*, No. 2:09-CR-109, 2020 WL 1922775, at *1 (E.D. Va. Apr. 21, 2020) (noting that the "COVID-19 pandemic" can "result in catastrophic health consequences for [individuals] vulnerable to infection").

Despite amicus Individual Voters' assertion that other elections have been safe and the RPV's suggestion that voters merely need to wear appropriate protective gear and everything will be fine, they disregard the actual evidence. Indeed, although the Individual Voters amici

[3] Nor is it assured that in-person voting will be as accessible—let alone safe—in upcoming elections as in past years, as localities are having difficulty recruiting poll workers to work the polls on Election Day. *See e.g.*, Iles Decl., ECF No. 17-2 ¶ 3.

assert that, "weeks after the Wisconsin election" on April 7, which featured substantial in-person voting, "COVID-19 cases had not spiked," ECF No. 37 at 4, in fact, the opposite is true: Wisconsin state officials have reported that *at least 50 people* who voted in-person last month's primary have already tested positive for COVID-19.[4] And Dr. Reingold has specifically cited incidents like this as further evidence for his opinion that requiring individuals to come within six feet of others to whom they are not otherwise being exposed would increase their risk of infection." ECF No. 17-1 ¶ 17. Given the current environment, the right at stake is not the "right to vote absentee" but the right to vote at all without endangering one's health.

Because of the risk to our communities posed by the pandemic, the witness requirement imposes particularly severe burdens on Virginia voters—particularly those who are at a higher risk for health complications and death.

B. The RPV and amici fail to rebut Plaintiffs' demonstration of irreparable harm to Plaintiffs and Virginia voters, including through their suggested alternative practices.

The most remarkable aspect of Intervenor's and amici's responses is their disregard of the burdens placed on voters should the witness requirement stay in place. They discount the expert evidence of real health risks as well as Plaintiffs' unrebutted testimony that they face real risks by observing the witness requirement or in-person voting and will be disenfranchised if it is not removed. And in all of their proposals, they expect voters to bear extra burdens to exercise the franchise without regard to the costs and consequences or their limitations. Only one proposal—requiring the voter to write the last four digits of their social security number on the

[4] Associated Press, *The Latest: 52 positive cases tied to Wisconsin election*, Apr. 28, 2020, https://apnews.com/b1503b5591c682530d1005e58ec8c267.

ballot envelope—merits any serious consideration in the longer term. But even that proposal, if employed in the June primary, would likely create confusion and disenfranchise eligible voters.

Amici and the RPV collectively suggest a number of more "narrowly tailored" alternatives than elimination of the witness requirement for the June election for individuals who live alone. They casually suggest electronic notaries, videoconference witnessing, and a "voter-witness dance" with neighbors. ECF No. 37 at 6, 16–17; ECF No. 44 at 10, 29, 34. None of these are likely to solve the witness problem for many thousands of Virginians, and even for those who could employ these techniques, they impose additional burdens that increase the cost of voting for those individuals with no tangible benefit for election integrity interests. For one, many Virginians lack access to smartphones and/or broadband internet, making all of the proposed technological solutions nonstarters. A recent report by Virginia's Chief Broadband Adviser and a study from the Virginia Chamber of Commerce found that approximately 600,000 Virginians do not have broadband access,[5] and this disparity is not evenly distributed across the Commonwealth. Moreover, Virginians should not need to pay a notary to exercise their fundamental right to vote. *Cf.* U.S. Const. amend. XXIV ("The right of citizens of the United States to vote in any primary or other election . . . shall not be denied or abridged by . . . any State by reason of failure to pay any poll tax or other tax.").

Both RPV and the Individual Voters also propose a system which the latter refer to as a "voter-witness dance," wherein a voter finds a neighbor, knocks on their door, and engages in some sort of elaborate choreography to complete the witnessing of the ballot where neither

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[5] Va. Chamber of Commerce, *Increasing Support for Virginia's Broadband Needs: An Update from the Commonwealth's Chief Broadband Advisor, Evan Feinman*, Nov. 22, 2019, https://www.vachamber.com/2019/11/22/increasing-support-for-virginias-broadband-needs-an-update-from-the-commonwealths-chief-broadband-advisor-evan-feinman/.

person comes within six feet of the other. ECF No. 37 at 16. As an initial matter, this once again fails to consider that many Virginians do not live near another neighbor or know someone willing to come close enough to them to serve as a witness, may be experiencing symptoms or illness and thus quarantined, or may otherwise have accessibility issues. They also simply ignore the only scientific testimony in this case from Dr. Reingold that any such in-person exposure carries grave risks, and the evidence put forward by Plaintiffs and League members regarding the particular dangers for high-risk individuals like Plaintiff Toogood and older League members.

Even if the voter can find a witness who will agree to assist the voter in somehow meeting the requirement without coming within six feet of the voter, RPV and the Individual Voters miss two important points. First, "transmission of the virus can occur via environmental surfaces, [so] there is also risk of spread of the virus at any location where multiple individuals touch surfaces," Reingold Decl. ¶ 11, ECF No. 17-1, which would include here the ballot materials. Second, these parties do not explain how any "anti-fraud" interest is served by forcing voters to jump through these hoops only to end up with a witness who may not know the voter and cannot see the ballot materials themselves and link that person to them.

Finally, the RPV suggests another alternative where instead of finding a witness, voters who are unable to do so write the last four digits of their social security number on the witness signature line. ECF No. 44 at 34. While this or a similar proposal may be a viable alternative in a scenario where election officials have time to print absentee ballot envelopes to reflect this new requirement, this is not the case for the June primary. Requiring voters to provide a different type of information than that called for on the envelope will likely result in confusion for many voters, and lead to disenfranchisement for those who misunderstand the requirement. In contrast, allowing individuals who cannot safely find a witness to simply omit putting anything on the

witness signature line, while still attesting to the requirements with their signature under penalty of perjury, preserves election integrity and minimizes the risk of wrongful disenfranchisement during a public health crisis.

II. The RPV and amici ignore Virginia's other substantial election integrity protections, and fail to connect their sparse examples of voter fraud to the witness requirement or show how it outweighs the significant harm Plaintiffs and many thousands of Virginians will face absent preliminary relief.

Whatever the level of scrutiny applied when evaluating a voting restriction, in weighing that against the government interests affected by enjoining an election law, courts must consider "the *precise* interests put forward by the State," and take into account "the extent to which those interests make it necessary to burden the plaintiff's rights." *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 108–09 (2d Cir. 2008) (internal citations and quotation marks omitted); *see also Ne. Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 632 (6th Cir. 2016) ("none of the precise interests put forward by Ohio," including a generalized interest in "[c]ombatting voter fraud perpetrated by mail," was sufficient to overcome burden of ballot rejection due to technical errors). While the RPV and amici all repeatedly assert the general interest in preventing voter fraud, none of them ever explain how the witness requirement actually advances this interest or even how eliminating the requirement during the pandemic would harm voter integrity.

The most the RPV offers is an incorrect assertion that it "is undisputed that the witness requirement serves to deter fraudulent absentee balloting activity," and references to a "level of assurance" and "solemnity" to the event of casting a ballot. ECF No. 44 at 31. Plaintiffs have previously explained why the requirement has little-to-no anti-fraud value. ECF No. 17 at 27–30. The state elections board in South Carolina, which has a similar requirement, agrees, *see* ECF No. 17 at 28 and ECF No. 17-3 at 58–61, as it appears at least one chief election official of a major Virginia city does as well, *see* ECF No. 17-2 ¶ 9. It cannot be the case that preserving an

essentially ceremonial aspect of filling out a ballot in the middle of a pandemic outweighs the disenfranchisement of thousands of Virginia voters.

But that suggestion drives home the point that the RPV and amici have not been able to identify how the witness requirement actually advances the state's election integrity interests, and surely not that it outweighs the risks of disenfranchisement in maintaining it. Intervenors and amici trot out vague concerns and isolated examples of "voter fraud" from across the United States as a reason to deny Plaintiffs' motion and enforce the witness requirement during the pandemic. Much of this "evidence," however, consists of cobbled together accusations and incidents that have nothing to do with absentee voting. Especially bold is the list supposedly listing Virginians who are deceased but who remain on voting rolls by amicus Public Interest Legal Foundation ("PILF"), an organization which recently was forced to settle a voter intimidation and defamation lawsuit against it in Virginia after publishing similar lists of purportedly unlawfully registered voters based on PILF's faulty research and methodology. *See League of United Latin Am. Citizens – Richmond Region Council 4614 v. Pub. Interest Legal Found.*, No. 18-cv-00423 (E.D. Va.) (alleging PILF falsely accused eligible citizens of voting illegally and resulting in a settlement requiring PILF to apologize for incorrectly characterizing these individuals as "noncitizen felons").[6]

More importantly, none of these groups have connected any of these isolated incidents to the presence or absence of a witness requirement, and have not rebutted Plaintiffs' showing of only two single incidences of absentee voting misconduct in Virginia over the past couple of

[6] S. Coalition for Social Justice, *Voters Strike Back and Win Settlement and Apology in Challenge to Voter Intimidation in Virginia*, July 11, 2019, https://www.southerncoalition.org/voters-strike-back-and-win-settlement-in-virginia/.

decades. ECF No. 17 at 29. As recently explained by MIT Professor Charles Stewart and co-author Amber McReynolds, "[v]ote fraud in the United States is exceedingly rare, with mailed ballots and otherwise."[7] They noted, over the last 20 years, an average "one case per state every six or seven years" which "translates to about 0.00006 percent" of total mail votes cast in that period.[8] And even if there were some minimal incidences of voter misconduct relating to absentee voting, the RPV and amici have not shown that such rare instances would or could be prevented by Virginia's witness requirement, or that preventing those rare instances outweighs the harm of disenfranchising thousands of Virginia voters through enforcement of the witness requirement this year.

And just this week, the Tenth Circuit unanimously held that, although a state's "interest in counting only the votes of eligible voters is legitimate in the abstract," that interest is not a talisman justifying any restrictions on voting, and cannot suffice where the court did "not see any evidence that such an interest made it necessary to burden voters' rights here." *Fish*, 2020 WL 2050644, at *18 (affirming injunction against Kansas's documentary proof of citizenship requirement for voter registration). Like the record in this case, the record in *Fish* included only "incredibly slight evidence that [the state's] interest in counting only the votes of eligible voters is under threat," leading the Court to rule that the challenged restrictions were unconstitutionally burdensome. *Id.*; *see also Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, Slip Op. at 2, 12 (D. Nev. Apr. 30, 2020) (attached as Ex. C) (denying preliminary injunction to stop plan to implement mostly mail ballot elections for the upcoming June 9, 2020 Nevada primary, because

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[7] Amber McReynolds & Charles Stewart, *Let's put the vote-by-mail 'fraud' myth to rest*, The Hill, Apr. 28, 2020, https://thehill.com/opinion/campaign/494189-lets-put-the-vote-by-mail-fraud-myth-to-rest.

[8] *Id.*

state's interest in protecting the health and safety of voters far outweigh Plaintiffs' claimed burden on their right to vote that was premised on a speculative and baseless claim of potential voter fraud).

Finally, Intervenors and amici cite the recent decision by the Seventh Circuit to stay a district court decision in Wisconsin enjoining that state's witness requirement. *See Democratic Nat'l Comm. v. Bostleman*, No. 20-1538 (7th Cir. Apr. 3, 2020) (filed as ECF No. 50-2 in this case). But that decision, which Plaintiffs believe was wrongly decided as to Wisconsin's witness requirement, is nevertheless distinguishable on several grounds. First, the Seventh Circuit based its decision in part on the fact that the election was less than a week away, an issue not presented here. Slip Op. at 3. Second, the Court did not reverse the district court but rather stayed its ruling, and did so out of a concern that the district court did not properly conduct the *Anderson-Burdick* balancing test and evaluate the requirement's effect on voter fraud. *Id.* at 3–4.[9] Here, Plaintiffs recognize the need for the Court to conduct this balancing test before granting a preliminary injunction. They have shown that Virginia's witness requirement serves little to no purpose in advancing government interests in election integrity, and even if it did, the benefit it provides would be far outweighed by the substantial risk of disenfranchisement of thousands of Virginia voters.

Because the RPV and amici have failed to rebut the burdens caused by the witness requirement in the context of the pandemic and have not even shown how the requirement promotes election integrity, Plaintiffs are entitled to a preliminary injunction.

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[9] Further, the Seventh Circuit specifically noted that Wisconsin's Election Commission appeared to be issuing guidance to ease the witness requirement including by eliminating "the witness's physical signature." *Bostleman*, No. 20-1538, Slip Op. at 4.

III. Plaintiffs' claims are timely, not premature, and they have standing to bring them.

The Individual Voters also argue that Plaintiffs have brought their claims too close to the June primary to afford any relief. Meanwhile, the RPV asserts that any relief beyond the June primary is premature, notwithstanding that it has separately sought relief from a Virginia election statute through at least late July. The RPV also disregards the substance of the evidence Plaintiffs submitted that proves a substantial risk of irreparable harm to them absent relief. To read these briefs, everything is coming up roses and despite preexisting medical conditions and the advice of public health officials, Plaintiffs have plenty of options to safely vote in June and comply with the witness requirement. The facts in Virginia and the opinions of experts do not bear out these arguments. Plaintiffs have provided ample evidence that they face a substantial risk of imminent, irreparable harm, and are entitled to relief for the June primary and other future elections affected by COVID-19 (which will likely include at least the upcoming July special elections in Arlington and Smyth Counties).

First, amici Individual Voters and Honest Elections Project argue that Plaintiffs' relief should be barred under *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). But amici fail to explain how relief sought more than a month and a half before the relevant election, and before absentee ballots even begin going out to voters, fits in with the cited cases. *Purcell* itself concerned a ruling striking down a state law within several weeks of the election, *id.* at 3, and the recent *Bostleman* order was issued five days before Wisconsin's April 7 election. Further, *Purcell* was concerned with ensuring courts weigh the risk of "voter confusion and consequent incentive to remain away from the polls," in ordering last minute changes to voting procedures. 549 U.S. at 7. But the concerns animating *Purcell* are exceptionally weak where, as here, election officials have shown they are entirely capable of and willing to timely inform voters of the change—in this

case, by agreeing to a proposed consent decree relieving some voters of the witness requirement for the June primary.

In contrast, the RPV does not argue that *Purcell* forbids relief for the June primary but rather that any injunction extending beyond the June primary is overbroad and the claims for those elections are not ripe. ECF No. 44 at 17–26. These arguments ignore several relevant facts and much of the evidence presented by Plaintiffs. For one, they completely disregard that two counties—Arlington and Smyth—are holding special elections in July,[10] a time period they have already conceded in their state litigation will be affected by COVID-19. *See* Ex. B. Moreover, they ignore and fail to rebut the expert testimony of public health expert and epidemiologist Dr. Reingold, who testified that "transmission of the virus will continue through the population until the development and widespread use of a vaccine and/or herd immunity," ECF No. 17-1 ¶ 12, neither of which are likely to occur until 2021, *id.* ¶¶ 13–15. Similarly, experts at the University of Virginia recognized by Virginia's Public Health Commissioner have identified mid-August as the most likely peak of transmission in Virginia, suggesting continued community transmission through the summer and into the fall. *See* ECF No. 35-1 ¶ 3. Therefore, it is the RPV who is engaging in speculation about future virus transmission, not Plaintiffs.

Similarly, though the RPV makes no real challenge to Plaintiffs' standing with respect to the June primary, it does do so with respect to future elections including the November election. Although RPV contends that Plaintiffs Toogood and Goff do not specifically allege they will vote in November, the Court can draw a reasonable inference that they will based on Erikka

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[10] *See* Arlington Cty., Voting and Elections, https://vote.arlingtonva.us/elections/ (last visited Apr. 30, 2020); Smyth Cty. Voter Registrar, http://www.smythcounty.org/voter_registrar/voter_reg.htm (last visited Apr. 30, 2020).

Goff's statement that she has "voted in virtually every state and federal election in which I have been able to vote," ECF No. 17-4 ¶ 4, and Seijra' Toogood's statement that she "cannot think of the last federal or state election in which I have not voted, as voting and political participation are a core part of my values," ECF No. 17-5 ¶ 3. And the League's declaration concerning Pat McGrady's intent to vote in future elections, hearsay or not, is still admissible in considering a preliminary injunction. ECF No. 17-6 ¶ 7-a; *TechINT Sols. Group, LLC v. Sasnett*, No. 5:18-CV-00037, 2018 WL 4655752, at *5 (W.D. Va. Sept. 27, 2018) ("The Fourth Circuit has determined that a district court ruling on a preliminary injunction 'may look to, and indeed in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted.'" (quoting *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 725–26 (4th Cir. 2016), *vacated and remanded on other grounds*, 137 S. Ct. 1239 (2017))).

RPV's and amici's arguments concerning Plaintiffs' timing and future injuries lack merit.

CONCLUSION

The RPV and amici seek to use broad assertions of voter fraud and minimizing the threat of COVID-19 to deny Plaintiffs' relief. But the actual evidence before the Court shows otherwise. The Court should grant Plaintiffs' preliminary injunction motion if it denies the proposed Partial Consent Judgment and Decree.

Dated: May 1, 2020

Respectfully submitted,

/s/ Davin M. Rosborough

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CERTIFICATE OF SERVICE

I certify that on May 1, 2020, I served a copy of the foregoing Reply Brief in Support of Plaintiffs' Motion for a Preliminary Injunction via filing with the Court's CM/ECF system, which sent copies of this document to Counsel of Record.

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EXHIBIT A

V I R G I N I A:
IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

SEVENTH CONGRESSIONAL DISTRICT REPUBLICAN COMMITTEE,
A Subdivision of the Republican Party of Virginia, Inc. A Virginia Corporation,

And

BENJAMIN J. SLONE III, CHAIRMAN,

***Plaintiffs*,**

v. **Civil Action No.: _____**

VIRGINIA DEPARTMENT OF ELECTIONS

And

VIRGINIA STATE BOARD OF ELECTIONS

ROBERT H. BRINK, Chairman of the State Board of Elections, in his official capacity,
JOHN O'BANNON, Vice-Chairman of the State Board of Elections, in his official capacity,
JAMILAH D. LECRUISE, Secretary of the State Board of Elections, in her official capacity,
CHRISTOPHER E. "CHRIS" PIPER, Commissioner of the State Board of Elections, in his official capacity, and
JESSICA BOWMAN, Deputy Commissioner of the State Board of Elections, in her official capacity,

Defendants.

VERIFIED COMPLAINT

COME NOW, The Seventh Congressional District Republican Committee, an official Committee of the Republican Party of Virginia, Inc. A Virginia Nonstock Corporation (RPV), and its Chairman, Benjamin J. Slone III (Slone) (hereafter,

collectively, "The Committee" unless otherwise designated), by counsel, and pursuant to the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. §1983, §8.01-184 et seq. and §8.01-620, et seq., of the Code of Virginia (the "Code"), state the following verified complaint for declaratory judgment and permanent, preliminary, and emergency injunctive relief against the Virginia Department of Elections (The Department), the Virginia State Board of Elections (The State Board), its Chairman, Vice-Chairman, Secretary, Commissioner, and Deputy Commissioner, (hereafter, collectively, "Defendants") to restrain defendants, in the 2020 election cycle only, from enforcing the requirements of §24.2-510 of the Code of Virginia, as amended, requiring the Committee to select its candidate for U.S. Congress by June 9, 2020, which is the second Tuesday in June of 2020, and in support state the following;

PARTIES

1. The Seventh Congressional District Republican Committee, as previously stated, is an Official Committee of the RPV, it is comprised of twenty-four committee members, eighteen of whom are voting members, and represents all, or a portion of the following Counties in the Commonwealth of Virginia: Amelia, Chesterfield, Culpeper, Goochland, Henrico, Louisa, Nottoway, Orange, Powhatan and Spotsylvania.

2. Slone is a resident of Goochland County, Virginia, and is the duly elected Chairman of the Committee. He is suing in his official capacity as Chairman.

3. The State Board, through the Department oversees "voter registration, verification of candidates that are nominated by nonprimary methods, ballot access for candidates, campaign finance disclosure and voting equipment certification in coordination with

Virginia's 133 local election offices." See also Va. Code § 24.2-103(A) (vesting the State Board of Elections, through the Department of Elections, with supervisory authority to obtain uniformity in election laws).

4. The State Board is also the entity to be notified by Slone, as Chairman, once a nominee for Congress is selected, the State Board is then tasked with notifying the general registrars of the nominee, so the proper name is placed on the ballot for the general election, which is scheduled for November 3, 2020. *See* §24.2-511 of the Code of Virginia 1950, as amended.

5. Defendant Robert H. Brink is the Chairman of the State Board of Elections. He is sued in his official capacity.

6. Defendant John O'Bannon is the Vice-Chairman of the State Board of Elections. He is sued in his official capacity.

7. Defendant Jamilah D. LeCruise is the Secretary of the State Board of Elections. She is sued in her official capacity.

8. Defendant Christopher E. "Chris" Piper is the Commissioner of the State Board of Elections. He is sued in his official capacity.

9. Defendant Jessica Bowman is the Deputy Commissioner of the State Board of Elections. She is sued in her official capacity.

JURISDICTION AND VENUE

10. This Court has jurisdiction to hear this suit through both §§8.01-184, et seq. and 8.01-620 of the Code of Virginia 1950, as amended.

11. Venue is proper because the defendants are primarily based and operate within the City of Richmond, Virginia, pursuant to §8.01-261 of the Code of Virginia 1950, as amended.

FACTS

12. On August 19, 2019, the Committee met pursuant to a duly and properly called meeting by its Chairman and during that meeting the Committee unanimously voted to select its method of nomination for Congress by a convention, which is an approved method of nomination of the Party Plan (The Plan) of the RPV.

13. On February 3, 2020, The Committee met pursuant to a duly and properly called meeting by its Chairman and at that meeting the Committee approved a "Call for Convention" (The Call) to select, among other offices, its nominee for the Seventh Congressional District general election on November 3, 2020, via Convention pursuant to the RPV Plan.

14. On February 6, 2020, the Call for a convention was published on the RPV web site and has been continuously posted to this date.

15. The RPV Plan mandates that once the Call for a method of nomination is published, the method of nomination cannot be changed.

16. The published Call states that the Committee will hold its convention on April 25, 2020 at the Arthur Ashe, Jr. Athletic Center, 3001 N. Arthur Ashe Blvd., starting at 11:00 a.m.

17. As the Committee was beginning to work on logistics, contact vendors, and arrange for liability insurance to host the convention, a global pandemic in the form of a

coronavirus, now known as Covid-19, gripped our society and brought life as we know it to a screeching halt.

18. In fact, On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic.[1]

19. In response to the conflagration of cases and to combat COVID-19, on March 12, 2020 Governor Northam declared a State of Emergency. In his "Declaration Of A State Of Emergency Due To Novel Coronavirus (Covid-19)," Governor Northam declared that COVID-19 is public health threat because it is a communicable disease.

20. The following day, President Trump declared a national emergency.

21. On Monday, March 16, 2020, Governor Northam issued a directive stating that restaurants, fitness centers, and theatres either had to reduce capacity to 10 people or close. Governor Northam also banned all events with 100 or more persons.

22. That same day the Supreme Court of Virginia declared a judicial emergency. This order declared that a judicial emergency exists from March 16 to Monday April 6, 2020. The order further ordered that all non-emergency and non-essential court proceedings be suspended and that all deadlines are tolled for 21 days.

23. The Supreme Court of Virginia has since extended its judicial emergency Order an additional twenty-one (21) days and is now affect until April 27, 2020.

24. On March 17, President Trump declared that for a period of 15 days, there should be no gatherings of 10 or more people.

[1] In fact, six candidates have filed to seek the congressional nomination and almost five thousand citizens residing within the Seventh Congressional District have filed to participate as Delegates at the scheduled convention.

25. The White House in collaboration with the Center for Disease Control published guidelines for how people should conduct themselves through these next 15 days. Included within these guidelines is the recommendation that in areas where community spread of COVID-19 is present, "bars, restaurants, food courts, gyms, and other indoor and outdoor venues where groups of people congregate should be closed."

26. By the beginning of March 2020, it became apparent to Slone that alternative arrangements for the convention needed to be considered in case a traditional convention could not be held on the selected date at the selected location.

27. As the impact of the pandemic became more imminent, Slone started consulting with the known congressional candidates, their campaign staffers, and members of the Committee to seek input and suggestions for an alternative way to select a nominee for Congress that would satisfy the constraints of the RPV Plan and also comply with §24.2-510 of the Code of Virginia, as amended, which requires a political committee that selects its nominee by a method other than a primary election, to do so by the second Tuesday of June, which this year falls on June 9.

28. On March 23, 2020, Governor Northam issued Executive Order 53 (EO 53) in response to the global health crisis secondary to the spread of the Covid-19 coronavirus.

29. In part, EO 53 banned all gatherings of more than ten (10) persons, public or private, until 11:59 p.m., Thursday April 29, 2020; closure of all restaurants, dining establishments, food courts, breweries, microbreweries, distilleries, wineries, tasting rooms, and farmers markets to did not offer delivery or take-out services; closure of all

public access to recreational and entertainment businesses; and, finally, ordered the closure of all K-12 public schools in the Commonwealth of Virginia.

30. Upon entry of EO 53, Slone duly called a telephonic conference of the Committee to discuss the impact of the Governor's Order and also met with the known congressional candidates (all in compliance with EO 53) to further discuss how the Committee can host a convention that complies with the mandates of EO 53 and the RPV Plan that outlines the mandates of a convention, and several options were being and explored by Slone and the Committee.

31. However, on March 30, 2020, Governor Northam issued Executive Order 55 (EO 55), which took immediate effect until June 10, 2020, which is one day after the Committee is required to select its nominee for Congress by convention.

32. EO 55 mandates, "All individuals in Virginia shall remain at their place of residence, except as provided below by this Order and Executive Order 53."

33. Additionally, it states, "All public and private in-person gatherings of more than ten individuals are prohibited. This includes parties, celebrations, religious, or other social events, whether they occur indoor or outdoor."

34. Moreover, a violation of the public and private in-person gatherings of more than ten individuals contained in EO 55, is punishable as a Class 1 Misdemeanor pursuant to §44-146.17 of the Code of Virginia 1950, as amended.

35. In response to the issuance of EO 55, Slone and select Committee members have reached out to vendors who provide services for convention and none of them are willing to provide services before June 10.

36. Additionally, since the convention is a private event, The Committee and Slone agree that a convention, especially considering the severity of the symptoms associated with the Covid-19 coronavirus, cannot be held without insurance.

37. Slone and Committee member have contacted insurers who typically underwrite insurance policies for such an event, and not one insurer will even quote a premium for a policy of insurance for an event to occur before June 10, 2020.

38. Simply stated, at this time, there is no practicable or feasible way for the Committee to conduct a convention to select its nominee for Congress that complies with the RPV Plan and does not violate EO 55.

39. Absent the global pandemic caused by the Covid-19 coronavirus, resulting in the issuance of Governor Northam's Executive Orders 53 and 55, the Committee would have conducted its convention on April 25, 2020, pursuant to the Call and would have complied with the statutory mandates of §24.2-510 of the Code of Virginia, as amended, by notifying the Board of the identity of its nominee well before the June 9, 2020 deadline.

40. Absent an injunction, The Committee's nominee for Congress will not appear on the ballot for the general election to be conducted on November 3, 2020.

41. This will violate the Committee's and Slone's constitutional right to speech and free association.

42. The defendants at all relevant times are acting under color of state law.

U.S. CONSTITUTIONAL LAW – 1ST AMENDMENT

43. The First Amendment declares in no uncertain terms that Congress shall make no law abridging the freedom of speech. U.S. Const. amend. I. *See also Citizens United v. FEC*, 558 U.S. 310, 336 (2010). This restriction against governmental power is applied to the states through the Fourteenth Amendment. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

44. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

45. The Supreme Court has made clear, "whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters … state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny" *Id*. at 460-61.

46. The right to "voluntary political association … is an important aspect of the First Amendment freedom" that the Supreme Court "has consistently found entitled to constitutional protection." *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 (1977).

47. A person's ability to exercise their rights guaranteed under the First Amendment is "[u]ndeniably enhanced by group association." *Buckley v. Valeo,* 424 U.S.1, 15 (1976) (quoting *NAACP v. Alabama*, 357 U.S. at 460).

48. Both the First and the Fourteenth Amendments, therefore, guarantee the "freedom to associate with others for the common advancement of political beliefs and ideas..." *Id.*;

see also *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) ("[T]he right of individuals to associate for the advancement of political beliefs . . . rank[s] among our most precious freedoms.").

49. Further, because the freedom of association enhances the effectiveness of the freedom of speech, the government cannot limit or dictate who an association chooses to associate with for the common advancement of the association's beliefs. *Tashjian v. Republican Party*, 479 U.S. 208, 224 (1986).

50. Although states are entrusted with administering their elections and imposing reasonable restrictions "in exercising their powers of supervision over elections… the States may not infringe upon basic constitutional protections." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973).

51. "[Ballot] Access restrictions also implicate the right to vote because, absent recourse to referendums, voters can assert their preferences only through candidates or parties or both." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979).

52. In constitutional analysis, the primary concern of courts is "with the tendency of ballot access restrictions to limit the field of candidates from which voters might choose." *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983).

53. "By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979).

VIRGINIA LAW

54. Virginia political parties are empowered to make their own rules and regulations, and for the purposes of this case, provide for the nomination of its candidates. *§24.2-508* of the Code of Virginia, as amended.

55. Virginia political parties are also provided the ability to select its method of nomination, which in this case the Committee did, selecting a convention as the method of nomination. *§24.2-509* of the Code of Virginia, as amended.

56. If a political party elects to use a nomination method other than by primary, the nomination process for a general election must be completed by 7:00 p.m. on the second Tuesday in June. Additionally, and equally as important, the nonprimary method of nomination shall only occur within the 47 days immediately preceding the primary date established for nominating candidates. *§24.2-510* of the Code of Virginia, as amended.

57. As it applies to the case at bar, the Committee is required to nominate its nominees between April 23, 2020 and June 9, 2020. *§24.2-510* of the Code of Virginia, as amended.

58. Once a nominee is selected, the Chairman of the respective Committee must notify the State Board not later than five days after the last day nominations are to be made. *§24.2-511* of the Code of Virginia, as amended.

59. While it is not explicitly stated in the Code, if a political party fails to comply with these mandates, no candidate for the respective party will appear on the general election ballot.

ARGUMENT

60. It goes without saying that we are all in unprecedented times due to a pandemic that threatens the health and safety of millions of people across the globe.

61. In the midst of this crisis, the citizens of this Commonwealth are attempting to move forward in order to select nominees for their respective political parties for the upcoming general election this November.

62. Unfortunately, the Committee's efforts to select it nominee for Congress, and other positions, has ground to a halt through no fault of its own.

63. The Committee selected a convention pursuant to the RPV Plan as its method of nomination in August of 2019, with no expectation that we would be where we are today.

64. The Call for a convention was properly adopted, approved, published, and preparation for the convention began in earnest when life as we know it, in a word, stopped.

65. As a result of Governor Northam's issuance of EO 53 and EO 55, the Committee is now unable to conduct the method of nomination within the 47-day window allowed under Virginia law.

66. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964).

67. Ballot restrictions that severely burden the right to vote and associate violate the First Amendment to the U.S. Constitution. See *Storer v. Brown*, 415 U.S. 724, 728-29 (1974).

68. Accordingly, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms. If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973) (internal quotation marks and citations omitted).

69. Therefore, in recognizing that States must enact election codes for orderly, fair, and honest elections, courts reviewing challenges to ballot access cases impose a flexible standard. *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992). If the election regulation imposes a severe burden, then the regulation must survive strict scrutiny. *Id*. At 434. By contrast, if the election regulation imposes a light burden, rational basis or intermediate scrutiny applies. *Id*.

70. Under the current conditions created by COVID-19, including the mandates of EO 53 and EO 55, the statutory mandates of §§24.2-510 and 511, impose a severe burden on the Committee and Slone.

71. This burden is compounded because of the Governor's mandate contained within EO 55 that "All public and private in-person gatherings of more than ten individuals are prohibited. This includes parties, celebrations, religious, or other social events, whether they occur indoor or outdoor."

72. The Department, the State Board, and Virginia do not have a compelling justification to require Plaintiffs to attempt to conduct a convention that cannot practicably be done under law until after June 10, 2020.

73. Furthermore, defendants cannot claim a compelling justification when Virginia, recognizing the danger imposed by the communicable disease COVID-19, is encouraging voters to cast absentee ballots rather than go to the polls and vote. The fact that State Defendants are encouraging voters to vote absentee and not travel to the polls insinuates that it is contrary to the health of Virginians to come into close contact with others. Virginia cannot say that for the health of voters, do not vote in person but still demand that Plaintiffs attempt to seek a nominee that would violate the Governor's EO 55.

74. In analogous situations, courts have extended voter registration deadlines due to natural disasters, like hurricanes. *See Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250 (N.D. Fla. 2016). In that court's analysis of the burden, the court noted that in the final week before voter registration closed, an estimated 100,000 people were expected to register. Id. at 1257. But because of Hurricane Matthew, these potential voters were forced to flee the State. Id. Thus, these potential voters could not vote because they were unregistered. Id. Florida's voter registration statute imposed a severe burden that it could not justify. Id.

75. Similarly, in this case, without an extension of the June 9, 2020, deadline, the Delegates who have signed up to elect their nominee, will be deprived of their right to vote for the candidate of their choice, and the defendants cannot articulate a compelling

or sufficient reason to require the Committee to comply with the applicable Virginia statutes.

76. Absent an injunction extending the deadline for the Committee to select its nominee by a method other than a primary, the Committee's candidate will not appear on the November ballot, which is a severe burden to the Committee's and Slone's First Amendment rights. *See Fla. Democratic Party*, 215 F. Supp. 3d at 1257.

77. Lastly, the Committee and Slone have demonstrated, absent the occurrence of the Covid-19 pandemic and Governor Northam's issuance of EO 53 and EO 55, they would have selected a congressional nominee to appear on this November's general election ballot. *See Bowe v. Board of Election Comm'rs*, 614 F.2d 1147, 1152 (7th Cir. 1980) ("The ultimate question was said to be whether in the context of California politics, a reasonably diligent candidate could be expected to be able to meet the requirements and gain a place on the ballot.") (citing *Storer*, 415 U.S. at 742).

PRAYER FOR RELIEF

A. That this Court take jurisdiction of this action and declare that §24.2-510 of the Code of Virginia, as amended, is unconstitutional in this particular election cycle as it is applied to the Seventh Congressional District Republican Committee and Benjamin J. Slone III;

B. Temporarily enjoin the defendants from enforcing §24.2-510 of the Code of Virginia, as amended, through a date to be determined by this Court;

C. That this Court select a date in the future wherein the plaintiffs can safely conduct the convention they elected to have so that they can select a congressional nominee to appear on the general election ballot on November 3, 2020; and,

D. That this Court maintain jurisdiction of this case after the entry of its Temporary Injunction, so that in the event that health conditions within the Commonwealth last longer than anticipated, or even worsen, the Court will have the ability to extend the deadline again, if necessary; and,

E. For such other and further relief as this Court may deem appropriate.

Respectfully Submitted,

The Seventh Congressional District Republican Committee

&

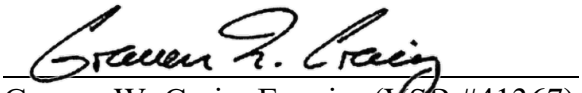
Benjamin J. Slone III, Chairman

VERIFICATION PURSUANT TO CODE SECTION 8.01-4.3

I, Benjamin J. Slone III, as Chairman of the Seventh Congressional District Republican Committee have reviewed the factual averments in the Verified Complaint and I can swear under penalty of perjury that those factual averments are true and correct to the best of my knowledge.

Benjamin J. Slone III

Benjamin J. Slone III, Chairman



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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April 2020, an original of the foregoing Verified Complaint was filed in the Clerk's Office of the City of Richmond Circuit Court and a true copy was sent by electronic mail and overnight delivery to:

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On behalf of:

VIRGINIA DEPARTMENT OF ELECTIONS

-and-

VIRGINIA STATE BOARD OF ELECTIONS

ROBERT H. BRINK, Chairman of The State Board of Elections, in his official capacity,
JOHN O'BANNON, Vice-Chairman of the State Board of Elections, in his official capacity,
JAMILAH D. LECRUISE, Secretary of the State Board of Elections, In her official capacity,
CHRISTOPHER E. "CHRIS" PIPER, Commissioner of the State Board of Elections, in his official capacity
JESSICA BOWMAN, Deputy Commissioner of the State Board of Elections, in her official capacity.

Graven W. Craig

EXHIBIT B

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

SEVENTH CONGRESSIONAL DISTRICT REPUBLICAN COMMITTEE, et al.,

Plaintiffs,

v.

VIRGINIA DEPARTMENT OF ELECTIONS, et al.,

Defendants.

Civil Action No. CL20001640-00

PLAINTIFF-INTERVENOR'S UNOPPOSED MOTION TO EXTEND TEMPORARY INJUNCTION

The Republican Party of Virginia, Inc. ("Plaintiff-Intervenor" or "RPV"), by counsel, respectfully files this motion to extend the temporary injunction issued by the Court to apply to all of its Congressional District Committees that have selected a non-primary method of nomination pursuant to §24.2-509 of the Code of Virginia.

On April 14, 2020, the Court enjoined Defendants from enforcing the provisions of §24.2-510 against Plaintiffs until 7:00 p.m., Tuesday, July 28, 2020. Ct.'s Order Granting Temporary Inj. p. 7. The Court's findings of fact in that order as they relate to the Plan of Organization of the Republican Party of Virginia, Inc. ("Party Plan"), the actions of the Governor, and the mandates of the Code of Virginia apply equally to the situation of the five other committees that have made plans to nominate by convention. Only the specific details of those other committees' meeting dates and preparations for a convention differ and not in any material way (e.g., each Committee made its nominating method decision at a properly called

meeting, adopted a call for convention at another such meeting, and posted its call to the RPV website; three other committees had scheduled conventions for May 30, while two also planned conventions for April 23).

The Court's findings of law and application of law to the facts should apply equally to each of the other committees, having turned primarily on the application of the same statute and executive actions to a committee operating under the same resulting constraints. Specifically, each of the committees must meet the June 9 deadline set by §24.2-510 in order for the Party's nominees to appear on the November 3, 2020 ballot and, in the current emergency situation, none of the committees can do so.

Counsel for Plaintiffs and Defendants have confirmed that their clients do not oppose this motion and an endorsed Consent Order is attached as Exhibit A.

For the foregoing reasons, RPV respectfully requests that the Court grant its motion to extend its temporary injunction to all of its Congressional District Committees that have selected a non-primary method of nomination.

Respectfully submitted,

REPUBLICAN PARTY OF VIRGINIA, INC.

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Counsel for Petitioner

Dated: April 20, 2020

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was electronically mailed on the 20th day of April, 2020, to the following:

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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

SEVENTH CONGRESSIONAL DISTRICT REPUBLICAN COMMITTEE, et al., Plaintiffs, v. VIRGINIA DEPARTMENT OF ELECTIONS, et al., Defendants.	Civil Action No. CL20001640-00

CONSENT ORDER GRANTING EXTENSION OF TEMPORARY INJUCTION

THIS MATTER comes before the Court on the Republican Party of Virginia's Motion to Extend the Temporary Injunction.

The Court granted a te:nporary injunction on April 14, 2020, enjoining the enforcement of §24.2-510 of the Code of Virginia against the Plaintiff, the Seventh Congressional District Republican Committee until 7:00 p.m., Tuesday, July 28, 2020, unless otherwise modified or revised by further Order.

The Court now makes the following findings of fact:

1. The Fourth, Fifth, Eighth, Tenth, and Eleventh Congressional District Republican Committees each selected a convention to nominate a candidate for U.S. House of Representatives in the November 3, 2020, General Election, in accord with the Party Plan and §24.2-509 of the Code of Virginia.

2. Like Plaintiff, each of these Committees will be unable to hold a convention by June 9, 2020, for the reasons stated in the Court's initial Order Granting a Temporary Injunction.

The Court's findings of law in its initial Order Granting a Temporary Injunction when applied to these additional facts lead to the same conclusions, warranting the extension of the temporary injunction.

IT IS HEREBY ORDERED:

1. Upon entry of this Order the Plaintiff-Intervenor is granted a temporary injunction pursuant to §8.01-620 *et seq.*, enjoining the Virginia Department of Elections and the Virginia State Board of Elections from enforcing the provisions of §24.2-510 of the Code of Virginia, against the Fourth, Fifth, Eighth, Tenth, and Eleventh Congressional District Republican Committees.

2. This temporary injunction shall be in effect until 7:00 p.m., Tuesday, July 28, 2020, unless otherwise modified or rescinded by further Order of this Court.

The Clerk of Court is directed to send a certified copy of this Order to counsel of record upon its entry by the Court.

ENTER 4:22:2020

Bradley B. Cavedo, Judge

ENDORSEMENTS ON FOLLOWING PAGE

ENDORSED BY:

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EXHIBIT C

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

STANLEY WILLIAM PAHER, *et al.*, Plaintiffs, v. BARBARA CEGAVSKE, in her official capacity as Nevada Secretary of State, *et al.*, Defendants.	Case No. 3:20-cv-00243-MMD-WGC ORDER

I. SUMMARY

Contending with the novel coronavirus disease ("COVID-19") pandemic, Nevada's Secretary of State Barbara Cegavske (the "Secretary"), in partnership with Nevada's 17 county election officials, developed a plan to implement an all-mail election for the upcoming June 9, 2020 Nevada primary in order to diminish the spread of COVID-19 (the "Plan"[1]). Relevantly, there are currently five states in the western United States that conduct elections entirely by mail: Oregon, Washington, Colorado, Utah, and Hawaii. Nevada also currently allows for mail-in voting in certain mailing precincts—separate from absent ballot precincts—with no reported incidents of election fraud. It is also undisputable that under NRS Chapter 293, the Nevada Legislature has vested the Secretary with authority to enact voting regulations and that the Secretary has pronounced the Plan to safeguard the health and safety of Nevada voters (and the larger public) during unprecedented times.

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[1]The Court adopts Plaintiffs' reference to the Plan but recognizes that Plaintiffs challenge only the expansion of voting by mail. Intervenor-Defendants have filed a separate action challenging other aspects of the Plan (ECF No. 27 at 3–4) which are not at issue in this case.

Plaintiffs William Paher, Gary Hamilton, and Terresa Monroe-Hamilton here sue the Secretary and Deanna Spikula—Registrar of Voters for Washoe County ("Washoe Registrar")—chiefly claiming that the Plan is not "chosen" by Nevada's Legislature, and that an all-mail election strips voter-fraud-prevention safeguards and unconstitutionally violates Plaintiffs' right to vote due to purported vote dilution. (ECF No. 1.) Upon these contentions and others, Plaintiffs seek a preliminary injunction to stop the Plan ("PI Motion").

The Court finds that Plaintiffs have not established an injury particularized to them to confer standing. However, even if they can establish standing, Plaintiffs' claims fail on the merits and the other relevant factors for preliminary injunctive relief counsel against the Court enjoining Defendants from implementing the all-mail election provisions of the Plan. The Court finds that Defendants' interests in protecting the health and safety of Nevada's voters and to safeguard the voting franchise in light of the COVID-19 pandemic far outweigh any burden on Plaintiffs' right to vote, particularly when that burden is premised on a speculative claim of voter fraud resulting in dilution of votes. The Court will therefore deny the PI Motion.[2]

II. BACKGROUND

The following facts are taken from the Verified Complaint and exhibits attached thereto as well as the evidence submitted concerning the PI Motion.

A. The Parties

This action stems from the decision to hold the all-mail primary (i.e., to implement the Plan's mailing provisions), which was announced to the public on March 24, 2020.

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[2]In addition to the PI Motion, the Court has considered Defendants' and Intervenor-Defendants' oppositions (ECF Nos. 25 (Washoe Registrar), 27-1 (Defendant-Intervenors), 28 (Secretary), and Plaintiffs' reply (ECF No. 43). The Court has also deliberated the arguments the parties presented at a hearing on the PI Motion on April 29, 2020 ("Hearing"). Because Plaintiffs' reply was unresponsive to Intervenor-Defendants' brief, the Court provided Plaintiffs an additional opportunity for Plaintiffs to respond to those arguments at the Hearing.

(ECF No. 1-1.) The Plan applies only to Nevada's June 9, 2020 primary election. (*Id.*) The parties are described as follows.

Plaintiffs are all registered Nevada voters. (ECF No. 1.) Stanley resides in Reno, Nevada and typically participates in in-person early voting. (*Id.*) Terresa Monroe-Hamilton and Garry Hamilton (together, "Hamiltons") are married, recently moved to Nevada, and also reside in Reno. (*Id.*) The Hamiltons ordinarily vote early or in person on election day. They registered to vote online the day before filing this lawsuit. (*Id.*)

The Secretary is the Chief Officer of Elections for the State of Nevada, *see* NRS § 293.124. (*Id.*) The Washoe Registrar is responsible for implementing the state's election laws in Washoe County. (*Id.*) The Secretary and Washoe Registrar are collectively referenced as Defendants, where not individually referenced.

B. Impetus and Concerns that Led to the Plan

The decision to implement the Plan was made to "maintain a high level of access to the ballot, while protecting the safety of voters and poll workers[—who belong to groups who are at high risks for severe illness from COVID-19—]." (ECF No. 1-1.) In decreeing the Plan, the Secretary wanted to "reassure voters in Nevada that their health and safety while participating in voting is paramount to state and local election officials." (*Id.*) Pertinently, the Secretary is quoted, stating:

> Because of the many uncertainties surrounding the COVID-19 pandemic, as well as the immediate need to begin preparations for the 2020 primary election, it became necessary for me to take action regarding how the election will be conducted.

She further states that she, along with Nevada's 17 county election officials, "jointly" determined that "the best option for the primary election is to conduct an all-mail election." (*Id.*) The Secretary's announcement of the Plan emphasized that election officials are focused on also maintaining the integrity of the election: "the high standard Nevada has set for ensuring the security, fairness, and accuracy of elections will still be met." (*Id.*)

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C. The New Details of the Plan and Maintained Election Safeguards

Under the Plan, all *active* registered voters will be mailed an absentee ballot (mail-in ballot) for the primary election. If a voter is registered to vote at his or her current address, they need not take any further action to receive an absentee ballot. (*E.g.*, ECF No. 1-3.) If an individual is not registered or needs to update registration information (*e.g.*, name, address, and party), they are required to do so. (*Id.*) To accommodate same-day registration requirements enacted by the 2019 Nevada Legislature, the Plan also establishes at least one physical polling place in each of Nevada's counties and in Carson City. (ECF No. 1-1.)

The Plan otherwise maintains Nevada's election system and safeguards. (*See* ECF No. 21 (Decl. of Wayne Thorley, Deputy of Elections for the Secretary).) For example, NRS § 293.2725(1) requires first-time voters in Nevada to present identification and proof of residency before being allowed to vote, whether in person or by mail. (*Id.*) The requirements to present identification and proof of residency for first-time voters are waived pursuant to NRS § 293.2725(2)(b) if election officials are able to match the voter's driver's license number, ID card number or social security number with personal identifier on file with the Nevada Department of Motor Vehicle ("DMV") or Social Security Administration ("SSA"). (*Id.*)

When voter registration applicants register (1) by mail, (2) through the DMV by appearing in person or using the DMV's on-line system, or (3) via the Secretary of State's on-line system, the overwhelming majority of those applicants are positively matched to the personal identifiers on file with the DMV or the SSA. (*Id.*) The match is made through automated systems, which the Secretary finds to be highly reliable. (*Id.*) Voters who are positively matched to personal identifiers on file with the DMV or SSA are not required to present identification and proof of residency before voting, even if they are voting for the first time in Nevada. (*Id.*) They can simply vote in person or by mail without submitting to

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additional verification processes. (*Id.*) Voters who are not positively matched[3] to personal identifiers on record with the DMV or SSA must present identification and proof of residency before voting (referred to as "ID required voters"). (*Id.*) These ID required voters constitute less than 1% of all registered voters. (*Id.*) They have different ballot return envelopes than other voters with an envelope flap indicating that the voter must return a copy of the voter's identification and proof of residency, without which their votes will not count.

Penalties against fraudulent votes are provided for under, *inter alia*, NRS §§ 293.313, 293.730(2), (3), and 293.840.

D. Nevada's Election System Already Permits Mail-in Ballots in Mailing Precincts

Nevada's governing statutes provide for mailing precincts—specifically NRS §§ 293.343 through 293.355. Through these provisions, the Nevada Legislature has given the Secretary and county clerks authority to mail ballots to registered voters rather than requiring voters to request those ballots through the absent ballot process.

NRS § 293.343 provides that "[w]henever the county clerk has designated a precinct as a mailing precinct, registered voters residing in that precinct may vote at any election regulated by this chapter in the manner provided in NRS [§§] 293.345 to 293.355, inclusive." NRS § 293.343(2). Further, NRS § 293.213 gives the county clerk unilateral authority to designate a precinct as a mailing precinct if one of two conditions is met: (1) if fewer than 20 registered voters reside in that precinct, or (2) if fewer than 200 ballots were cast in the last general election. NRS § 293.213(1), (3). A county clerk may establish a mailing precinct that does not meet the requirements of NRS § 293.213(1)–(3) "if the county clerk obtains prior approval from the Secretary of State." NRS § 293.213(4).

Mailing precincts, as opposed to absent ballot precincts, have been used in Nevada—albeit on a small scale—for many years. (ECF No. 21 at 3.) In recent Nevada

[3]The Deputy of Elections for the Nevada Secretary of State attests that the lack of a match is "almost always because of a typographical or printing error in [the] application to register to vote." (ECF No. 21 at 2.)

elections, a statistically significant numbers of ballots were cast by the voters in mailing precincts, providing a reasonable sample of ballots cast without incidents of election fraud. (*Id.*) The number of ballots that voters recently cast in mailing precincts are: 2018 General election (3,879); 2018 Primary election (2,273); 2016 General election (6,069); 2016 Primary election (362); 2014 General election (4,288). (*Id.*)

E. Lawsuit

Plaintiffs filed this lawsuit on April 21, 2020. The Verified Complaint asserts five claims for relief, detailed *infra*, and requests declaratory and injunctive relief to prevent the Secretary and county administrators from implementing the Plan. (ECF No. 1 at 8–13.) Plaintiffs particularly challenge the Plan's expansion of mail-in voting or in their characterization, "[t]he Plan would require the State to forego almost all in-person voting and instead conduct the Primary by mailed absent ballots." (ECF No. 1 at 9.) Plaintiffs contend that the largely all-mail primary circumvents various statutory safeguards designed to protect against voter fraud, and that their votes will as a result be diluted by illegal votes. (*E.g.*, *id.*, at 2, 9, 12.)

Along with the Verified Complaint, Plaintiffs filed the PI Motion, a motion to expedite briefing and hearing on the PI Motion, and a motion to consolidate the requested hearing on the PI Motion with hearing on the merits of Plaintiffs' Verified Complaint ("Consolidation Motion"). (ECF Nos. 1, 2, 3,4.) The Court granted the motion to expedite in part (ECF No. 14) and later granted the Consolidation Motion under Fed. R. Civ. P. 65(a)(2) (ECF No. 36)[4]. The Court further granted intervention by the following parties: Nevada State Democratic Party ("NSDP"), DNC Services Corporation/Democratic National Committee ("DNC"), DCCC, Priorities USA, and John Solomon (collectively, "Intervenor-Defendants"). (ECF No. 39.)

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[4]However, at the Hearing the Court determined that a resolution on the merits of the case should be deferred given the Secretary's position as to her right to assert Eleventh Amendment immunity. Such a deferral would not affect the parties' ability to seek interlocutory appeal.

III. PI MOTION STANDARD

Federal Rule of Civil Procedure 65 governs preliminary injunctions. "'An injunction is a matter of equitable discretion' and is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22, 32 (2008)). This relief is "never awarded as of right." *Alliance for the Wild Rockies v. Cottrell ("Alliance")*, 623 F.3d 1127, 1131 (9th Cir. 2011). To qualify for a preliminary injunction, a plaintiff must satisfy four requirements: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm; (3) that the balance of equities favors the plaintiff; and (4) that the injunction is in the public interest. *See Winter*, 555 U.S. at 20. A plaintiff may also satisfy the first and third prongs by showing serious questions going to the merits of the case and that a balancing of hardships tips sharply in plaintiff's favor. *Alliance*, 632 F.3d at 1135 (holding that the Ninth Circuit's "sliding scale" approach continues to be valid following the *Winter* decision).

On the merits-success prong, "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006); *see also id.* at 428 (citing *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

IV. DISCUSSION

Plaintiffs' claims are that the Plan: (1) violates the right to vote by removing safeguards against fraudulent votes that dilute votes, which they claim is a severe burden; (2) violates the right to vote for legislative representatives to establish the manner of elections by substituting a scheme that replaces the Nevada Legislature's plan; (3) violates the right to vote under the *Purcell*[5] principle; (4) violates Plaintiffs' right to have, and to vote in, federal elections where the manner of election is chosen by the state's legislature; and (5) violates the right to a republican form of government under the United States

[5] *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam).

Constitution. (ECF No. 2 at 7–20.) Defendants and Intervenor-Defendants raise threshold issues about Plaintiffs' claims that the Court will address before turning to the merits.[6]

A. Standing

Both Defendants and Intervenor-Defendants argue that Plaintiffs lack standing to assert their claims. (ECF No. 25 at 11–16; ECF No. 28 at 8–10; ECF No. 27-1 at 9–11.) The Court agrees.

"Article III of the Constitution limits federal-court jurisdiction to 'Cases' and 'Controversies.'" *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). "To satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 180-81 (2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The party invoking federal jurisdiction bears the burden of establishing these elements. *FW/PBS,* 493 U.S. at 231. Moreover, the party invoking standing also must show that it has standing for each type of relief sought. *Summers v. Earth Island Inst.,* 555 U.S. 488, 493 (2009).

Among other things, the Secretary argues that Plaintiffs lack standing because their alleged injury is speculative and at best Plaintiffs hint at a possible injury only in the first claim for voter dilution. (ECF No. 28 at 8–10.) Washoe Registrar similarly argues that Plaintiffs' injury is speculative, unsupported and not particularized. (ECF No. 25 at 11–16.) Intervenor-Defendants make the same arguments, but more fully argue why Plaintiffs have not alleged an injury-in-fact. (ECF No. 27-1 at 9–11.) Intervenor-Defendants contend, *inter alia*, that Plaintiffs do not allege an injury-in-fact because Plaintiffs' "purported injury is no

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[6]Intervenor-Defendants argue that this Court is barred by the Eleventh Amendment from deciding this action—which they contend amounts to an action to enjoin state officials for alleged violations of state law. (ECF No. 27-1 at 8–9.) Neither the Secretary nor the Washoe Registrar, who are the directly concerned parties, substantively argue the issue in briefing or at the Hearing. The Court will therefore not consider the issue here.

different than that of any other voter in Nevada (or any other citizen who will be governed by the candidates elected through Nevada's elections, for that matter)." *(Id.* at 10.) In briefing and at the Hearing, Plaintiffs counter that they have standing, in gist arguing that mail-in ballots are unlawful under state law, resulting in vote dilution, and that vote dilution from voter fraud results in disenfranchisement, and "disenfranchisement is a severe burden that is personal to the person disenfranchised." (*E.g.*, ECF No. 43 at 4, 7.)

Plaintiffs' argument is difficult to track and fails to even minimally meet the first standing prong. The theory of Plaintiffs' case, and which is the only alleged injury driving all of their claims, is that the Plan will lead to an increase in illegal votes thereby harming them as rightful voters by diluting their vote. (*See generally* ECF No. 1.) But Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud may be conceivably raised by any Nevada voter. Such claimed injury therefore does not satisfy the requirement that Plaintiffs must state a concrete and particularized injury. *See, e.g.*, *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (citation omitted) (providing, *inter alia*, that an injury must be "concrete and particularized"); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–74 (1992) (explaining that U.S. Supreme Court's case law has "consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy"). This is not a pioneering finding. Other courts have similarly found the absence of an injury-in-fact based on claimed vote dilution. *See, e.g.*, *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution[is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact."); *cf. United States v. Florida*, No. 4:12cv285-RH/CAS, 2012 WL 13034013, at *1 (N.D. Fla. Nov. 6, 2012) (rejecting a motion to intervene under Rule 24 based on the same theory of vote dilution because the "asserted interests are the same . . . as for every other registered voter in the state" and therefore constitute "[g]eneralized interests").

The Secretary additionally argues that she did not violate state law—because she was authorized to implement the Plan under NRS § 293.213(4) and therefore Plaintiffs fail to show a "causal connection" between the alleged injury of vote dilution and the purported unlawful conduct they allege the Secretary has engaged in, *see Lujan*, 504 U.S. at 560. (ECF No. 28 at 4, 7, 9.) The Court ultimately agrees with this contention in light of its findings below.[7]

Even if the Court had concluded that Plaintiffs have standing here, Plaintiffs' claims also fail on the merits.[8]

B. The Merits of Plaintiffs' Claims

In the PI Motion, Plaintiffs focus chiefly on likelihood of success on the merits, arguing that they are likely to succeed on each of their claims. (*See* ECF No. 2 at 7–20.) In considering the merits of Plaintiffs' claims, the Court finds that Plaintiffs' second, fourth, and fifth claims are in many ways materially intertwined, as discussed *infra*. The Court ultimately concludes that Plaintiffs fail to establish the merits of each claim. While the Court therefore need not further consider the *Winter* factors, the Court also finds that the balance of equities favors Defendants and Intervenor-Defendants and that injunction would not be in the public's interest.[9]

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[7]Even if the Court had concluded *infra* that there was a violation of Nevada law in the implementation of the all-mail provisions of the Plan, such as the Plan being untimely or otherwise "inconsistent" with the intent of Nevada's Legislature—which Plaintiffs argue, *see infra*, the Court finds that Plaintiffs have not established a nexus between such alleged violations and the alleged injury of vote dilution.

[8]The Court does not consider Intervenor-Defendants' argument that Plaintiffs do not state a cognizable federal cause of action because Plaintiffs have no private right of action to enforce Nevada's election laws. (ECF No. 27-1 at 11–12.)

[9]If the Court had concluded that Plaintiffs establish that they are likely to succeed on the merits, the Court would also necessarily find irreparable harm. *See Sanchez, et al. v. Cegavske, et al.,* 214 F. Supp. 3d 961, 976 (D. Nev. 2016) *(*citing *Cardona v. Oakland Unified Sch. Dist., California*, 785 F. Supp. 837, 840 (N.D. Cal. 1992) ("Abridgement or dilution of a right so fundamental as the right to vote constitutes irreparable injury.") *& Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'")).

1. Plaintiffs' First Claim

Plaintiffs' predominant claim, on which they expend most of their bandwidth, is that the Plan violates the fundamental right to vote by removing safeguards against fraudulent votes—that they claim are attendant to in-person and request-only-absentee-ballot voting—that dilute votes. (ECF No. 2 at 7–15; ECF No. 43 at 3.) The Court addresses some threshold issues before turning to the merits (i.e., whether Plaintiffs have established a constitutional violation).

As an initial matter, the Court must determine the applicable test/analytical framework for considering this argument. Plaintiffs specifically present the *Anderson-Burdick* balancing test/line of cases and the *Reynolds-Bush* line of cases as the possible frameworks for this case (ECF No. 2 at 8–9). *Compare Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983) & *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) *with Reynolds v. Sims*, 377 U.S. 533 (1964) & *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam). Plaintiffs argue that the latter should govern the case because they claim that voter disenfranchisement in the form of vote dilution is at issue here and that the *Anderson-Burdick* balancing test is not suitable for such claims. (*See id.* at 9.) They additionally posit that the *Anderson-Burdick* line of cases should not apply because the Plan being challenged is not a state-enacted election law, to which they appear to concede the *Anderson-Burdick* balancing test would typically apply. (*See id*.) Defendants and Intervenor-Defendants argue that the Court should, like other courts, apply the *Anderson-Burdick* balancing test where it is alleged that an election law or policy violates the right to vote. (ECF No. 28 at 7; ECF No. 27-1 at 14–15; ECF No. 25 at 18.)

The Court will apply the *Anderson-Burdick* balancing test. The Court finds Plaintiffs' reasons for the *Reynolds-Bush* framework and for rejecting the *Anderson-Burdick* balancing test, which Plaintiffs admit is ordinarily applicable to these types of cases, unpersuasive. For one, as will be explained *infra*, the Court disagrees with Plaintiffs that the Plan does not constitute state-enacted election law. Further, Plaintiffs provide no case where a *Reynolds-Bush* framework was applied within a context similar to the instant one.

(*See id.* at 9–15.) To be sure, while Plaintiffs present this case as one about voter disenfranchisement due to purported vote dilution as a result of voter fraud; their claim of voter fraud is without any factual basis.[10] Regarding the latter, Plaintiffs notably moved to consolidate the hearing on the PI Motion with a motion on the merits of the Verified Complaint, contending that the merits of this case turns on "purely legal issues." (*E.g.*, ECF No. 4 at 1.) Moreover, at least one case more recent than *Reynolds*, *Anderson*, *Burdick*, and *Bush—Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008)—applies the *Anderson-Burdick* balancing test.[11]

Plaintiffs next argue that if the Court applies the *Anderson-Burdick* balancing test, the Court should apply strict scrutiny in evaluating the burdens caused by the Plan. (ECF No. 2 at 8.)[12] But the Supreme Court has not been so exacting. In *Crawford*, the Court reiterated that it has not "identif[ied] any litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters. However slight that burden may appear, as *Harper* [*v. Virginia Bd. Of Elections,* 383 U.S. 663 (1966)] demonstrates, it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Id.* at 190 (quoting *Norman v. Reed*, 502 U.S. 279, 288–289 (1992)); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) ("No bright line separates permissible election-related regulation from unconstitutional infringements."). But, "[w]hen a state election law

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[10]Plaintiffs, for the first time in their reply, attempt to argue voter fraud through the presentation of evidence in the form of newspaper articles. (*See* ECF No. 43 at 4–5.)

[11]The PI Motion makes no mention of *Crawford* and appears to suggest that *Anderson* and *Burdick* should not apply here also because they predate *Bush*. (*See* ECF No. 2 at 9 n.8.)

[12]Notably, Plaintiffs concede that *Bush* did not discuss, much less explicate, any particular level of scrutiny. (*See* ECF No. 2 at 10 ("Building on *Reynolds*, *Bush didn't discuss the scrutiny level*, but held that the Florida Supreme Court could not by its orders and interpretations of state law dilute voters' fundamental right to vote, 551 U.S. at 107–11, which was either a per-se ban of vote dilution or at least an exercise of the strict scrutiny now required in equal-protection challenges involving fundamental rights with an analysis and outcome so readily apparent that it required no detailing.") (emphasis added).

provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788; *see Crawford*, 553 U.S. at 189–90 (internal quotation and citations omitted) ("[E]venhanded restrictions that protect the integrity and reliability of the electoral process itself are not invidious.").

As the Supreme Court did in *Crawford*, this Court begins its analysis of the constitutionality of the Plan's all-mail provision by focusing on the state's interests. *See id.* at 191. Here, the Secretary, acting on behalf of the State of Nevada, has identified at least two interests that justify the burdens that the Plan imposes on voters and potential voters like Plaintiffs. The Secretary expressly implemented the Plan to protect the health and safety of Nevada's voters and to safeguard the voting franchise. (*E.g.*, ECF No. 1-1.) These are indisputably compelling and longstanding interests. For example, the states' police powers over matters of public health and safety and to act over the general welfare of their inhabitants is entrenched in the rights reserved to the state under the Tenth Amendment to the United States Constitution. *See also Reynolds*, 377 U.S at 554 ("Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections.").

On the other hand, and as the Secretary puts it (ECF No. 28 at 8), Plaintiffs cannot demonstrate a burden upon their voting rights, only an imposition upon their preference for in-person voting—as opposed to mail-in voting, where ballots are mailed to voters. The same can be said regarding Plaintiffs' emphasis on request-only-absentee-ballots, where ballots are sent to voters only if they request one. (ECF No. 2 at 12–13, 17, 21.) *Cf. McDonald v. Bd. of Election Commissioners,* 394 U.S. 802, 807 (1969) (providing that the right to absentee voting (i.e., a preference where other voting options exists) is not a fundamental right because it does not in fact put the right to vote at stake). Further, Plaintiffs' overarching theory that having widespread mail-in votes makes the Nevada

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election more susceptible to voter fraud seems unlikely where the Plan essentially maintains the material safeguards to preserve election integrity. (*See* ECF Nos. 1-1, 21.)

Moreover, although Plaintiffs cloak their preference in a claim of voter disenfranchisement (*e.g.*, ECF No. 2 at 8, 9, 17; ECF No. 43 at 7), Defendants may equally claim that voters will be disenfranchised. For example, if the Plan is not implemented voters worried about risks to their health or unsure about how to obtain an absentee ballot may very well be discouraged from exercising the right to vote all together. Additionally, as Defendants also point out, under the Plan, Plaintiffs may—if they choose to exercise their preference for in-person voting—vote in person on election day at a county wide polling center regardless of their precinct per NRS §§ 293.3072–.3075. (*Id.* at 6–7; ECF No. 25 at 13.) The Court therefore concludes that Nevada's interests, reflected by the Secretary in implementing the Plan, far outweigh the burdens placed on Plaintiffs' right to vote. Thus, Plaintiffs' first claim fails on the merits.

2. Plaintiffs' Second and Fourth Claims

For efficiency, the Court discusses Plaintiffs' second and fourth claims in a single section because the two overlap. As noted above, Plaintiffs' second argument is that the Plan violates the right to vote for legislative representatives to establish the manner of elections by substituting a scheme that replaces the Nevada Legislature's plan. (ECF No. 2 at 15–16.) This argument is expressly premised on Plaintiffs' fourth contention. (*See id.* at 16; *see also* ECF No. 43 at 7–8 (explaining that the violation in the second claim results due to the Plan allegedly disregarding the legislature's chosen manner of elections—which is captured by the fourth claim).) The latter is that the Plan violates Plaintiffs' right to have, and to vote in, federal elections where the manner of election is chosen by the state's legislature under Article I, section 4, clause 1 of the United States Constitution.[13] (*Id.* at 3–

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[13]Article I, section 4, clause 1 provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature

5, 17–18.) To be clear, both arguments rest on the claim that the Plan contravenes Nevada's Legislature/representatives' chosen manner of election.

Plaintiffs appear to classify the June 9, 2020 Nevada Primary as a "federal" election because "[c]andidates for the office of U.S. Representative are on the Primary ballot." (*Id.* at 17.) Assuming that this primary constitutes a "federal election," the Court disagrees with Plaintiffs' material premise—that the Plan is not the Legislature's chosen manner of election.

The Nevada Legislature has authorized the Secretary to enact voting regulations under NRS § 293.124. The section provides:

> 1. The Secretary of State shall serve as the Chief Officer of Elections for this State. As Chief Officer, the Secretary of State is responsible for the execution and enforcement of the provisions of title 24 of NRS and all other provisions of state and federal law relating to elections in this State.
>
> 2. The Secretary of State shall adopt such regulations as are necessary to carry out the provisions of [the election laws under Title 24—NRS Chapters 293–306].

NRS § 293.124(1)–(2). While at the Hearing Plaintiffs' counsel argued that the Plan is not a regulation—but instead a news release—such is an argument of mechanical semantics. The Plan is in fact a directive authorized by the Secretary regulating the upcoming Nevada primary. The Court therefore finds that, as a baseline, the Plan is effectively prescribed by the state's legislature because the Nevada Legislature has in the first instance authorized the Secretary to adopt regulations to carry out the state's election laws.

Plaintiffs nonetheless argue that the Plan is inconsistent with the state's election laws, contrary to NRS § 293.247. (ECF No. 2 at 3–5.) NRS § 293.247 pronounces:

> 1. The Secretary of State shall adopt regulations, *not inconsistent* with the election laws of this State, for the conduct of primary, general, special and district elections in all cities and counties. *Permanent regulations* of the Secretary of State that regulate the conduct of a primary, general, special or district election and are effective on or before the last business day of

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> thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of ch[oo]sing Senators.

U.S. Const. art. I, § 4, cl. 1.

> February immediately preceding a primary, general, special or district election govern the conduct of that election.
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> . . .
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> 3. The regulations must prescribe: [*inter alia*]
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> (j) Such other matters as determined necessary by the Secretary.
>
> 4. The Secretary of State *may provide interpretations and take other actions necessary* for the effective administration of the statutes and regulations governing the conduct of primary, general, special and district elections in this State.

(Emphasis added.)

Plaintiffs particularly pinpoint four ways in which they believe the Plan is "inconsistent" with election laws. Defendants and Intervenor-Defendants largely ignore the minutiae of these purported inconsistencies. They instead directly argue that the all-mail provisions of the Plan were lawfully prescribed pursuant to, *inter alia*, NRS § 293.213(4)—detailed *supra* (ECF No. 25 at 6; ECF No. 28 at 2, 4; ECF No. 27-1 at 13) NRS § 293.247(4) (*see* ECF No. 25 at 5 (Washoe Registrar's brief); and NRS §§ 293.343–.355 (ECF No. 27-1 at 13)). Plaintiffs similarly fail to grapple with the statutes Defendants and Intervenor-Defendants contend authorize the all-mail in provisions of the Plan; Plaintiffs merely claim that NRS § 293.213(4) was not intended to apply to the whole state. (ECF No. 2 at 4 n.5.) Plaintiffs also do not particularly address subsections within NRS § 293.247, such as subsection (4),[14] which the Court concludes also supports the implementation of the Plan's mail-in provisions. In any event, upon considering each of Plaintiffs' arguments of inconsistencies, the Court finds they are tenuous at best. The Court addresses each purported inconsistency in turn below.

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[14]That is, Plaintiffs provide no argument beyond the claim at the Hearing that the Plan is not a regulation and therefore the subsection does not apply. But, if NRS § 293.247(4) does not apply based on Plaintiffs' "the Plan is not a regulation" contention, then NRS § 293.247(1), which Plaintiffs rely on for their claimed inconsistencies would be equally inapplicable. Plaintiffs' reliance on NRS § 293.247(1) in briefing is an implicit concession that the Plan is a regulation.

First, Plaintiffs argue that the Plan is untimely, seemingly based on the last sentence in subsection 1 of NRS § 293.247, because it was only announced on March 24, 2020. (ECF No. 2 at 3–4.) According to Plaintiffs, per subsection 1, the Plan had to be implemented on or before the last business day of February 2020. (*Id.*) Plaintiffs' argument is flawed, at minimum, because the subject sentence clearly pertains to [p]ermanent regulations of the Secretary." NRS § 293.247(1). It is undisputed that the Plan is not intended to be permanent—it only applies to the upcoming June 9, 2020 primary. (*See, e.g.*, ECF No. 1-2.)

Second, Plaintiffs argue that the Plan is inconsistent with certain requirements under NRS §§ 293.205 and .206. (ECF No. 2 at 4.) It became clear at the Hearing that Plaintiffs were more precisely contending that the Plan's "designation" of mailing precincts under NRS § 293.343[15] was not timely per NRS § 293.205. Plaintiffs' counsel appeared unaware that the PI Motion also argues NRS § 293.206(1). In diligence, the Court discusses both sections as briefed.

The first provision, NRS § 293.205, pertains to election precincts. Plaintiffs particularly rely on NRS § 293.205(1), noting that it requires county clerks to establish election precincts "on or before the third Wednesday in March of every even-numbered year." (*Id.*) NRS § 293.206 requires that "[o]n or before the last day in March of every even-numbered year, the county clerk shall provide the Secretary of State and the Director of the Legislative Counsel Bureau with a copy or electronic file of a map showing the boundaries of all election precincts in the county," NRS § 293.206(1). (*See id.*) In making these arguments, Plaintiffs appear to recognize the obvious—that these provisions on their face concern physical election precincts, not mail-in votes. (*Id.* (recognizing that county clerks may establish "mailing precincts" with certain exceptions under NRS 293.343).) Plaintiffs nonetheless contend that based on NRS §§ 293.205(1) and .206(1)

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[15]While both the PI Motion and Plaintiffs' reply once reference NRS § 293.343, neither even mentions the words "designate" or "designation." (*See generally* ECF Nos. 2, 43.)

election precincts and maps showing the precincts' boundaries had to be established by March 18, 2020. (*Id.*)

However, the Plan would not violate the date requirements of NRS § 293.206(1) because March 24 is before the "last day in March." Even accepting Plaintiffs' position, in briefing, that the Plan is inconsistent with NRS §§ 293.205(1) and .206(1), based on the purported March 18 deadlines of these provisions and assuming such provisions apply here, Plaintiffs' argument is transparently grounded on the technicality of a difference of six days. It is hard to imagine that a procedural difference of six days in implementation would render the Plan inconsistent with Nevada's election laws.

In any event, the Court finds that Plaintiffs' argument does not support a conclusion that the Plan is inconsistent. It is obvious that the Plan does not alter the establishment of precincts nor their existence as a matter of fact. The Secretary echoes this in her opposition. (*See* ECF No. 28 at 6 ("[T]here were no changes to precinct boundaries . . . [t]he only change was to the method of voting within existing precinct boundaries.").) On its face, the Plan simply supersedes the need to appear at a physical precinct as the Secretary found "necessary" due to the COVID-19 pandemic. (*See* ECF No. 1-1 (the Secretary explaining that the Plan was enacted because in light of the uncertainties surrounding the COVID-19 pandemic, "it became necessary for me to take action regarding how the election will be conducted").)

Moreover, the Court finds that the Secretary has authority based on the plain reading of NRS §§ 293.213(4) and 293.247 to prescribe regulations, like the Plan here, to allow for voting by mail. Particularly, § 293.213(4) gives the Secretary authority to approve mailing precincts. As noted *supra*, Plaintiffs merely claim that NRS § 293.213(4) was not intended to apply to the whole state. (ECF No. 2 at 4 n.5.) But § 293.213(4) does not suggest such a reading because it effectively operates as an exception to the preceding sections—*e.g.*, subsections (1) and (3), which permits mailing precincts if fewer than 20 registered voters reside in a precinct, or fewer than 200 ballots were cast in the precinct in the last general election, respectively. At minimum, the Secretary had the authority to

interpret § 293.213(4) to permit her to act in concert with county election officials to allow for voting by mail in all precincts pursuant to § 293.247(4). *See* NRS § 293.247(4) ("providing that the Secretary "may provide interpretations and take other actions necessary for the effective administration of the statutes and regulations governing the conduct" of the state's elections). Section 293.247(3) also requires the Secretary to prescribe, among other things, "[s]uch other matters [i.e., forms, procedures, etc.,] as determined *necessary* by the Secretary of State." NRS § 293.247(3)(g).

The Court's conclusion regarding the Secretary's authority further applies to Plaintiffs' third claimed inconsistency. (ECF No. 2 at 4.) Plaintiffs' third assertion of inconsistency also relies on NRS §§ 293.205 and .206 and similarly contends that these sections "indicate[] the [Nevada] Legislatures' intent for such precincts for in-person voting, not that the whole election be subsumed under an exception allowing mailing districts in certain circumstances." (*Id.*) Again, this argument in no way undermines the Secretary's implementation of all-mail voting in light of the authority the Nevada Legislature has vested with the Secretary to, for example, act *as she determines necessary*. *See* NRS § 293.247(3)(g), (4). Nor does Plaintiffs' follow-on claim that the noted NRS sections reflect the Nevada Legislature's intent "to have *regular* in-person voting and actual absentee-ballot as the controlling model" renders the Plan inconsistent. (*Id.* at 4–5.) This latter argument is beside the point. Implementation of the Plan is a one-off situation triggered by a pandemic. It therefore would not contravene the legislature's intent "as [to] the controlling model." What is evident is that the Secretary's challenged action here also comports with the legislature's intent. Plaintiffs' third argument of inconsistency therefore fails.

Finally, Plaintiffs contend in briefing, without citing to any particular provision, that where mailing precincts are created, "county clerk[s] shall, at least 14 days before establishing or designating a precinct as a mailing precinct . . . cause notice of such action to be: (a) Posted [as prescribed] . . . ; and (b) Mailed to each Assemblyman, [etc. as prescribed]" and argue that the Plan "supplant[s]" this requirement. (*Id.* at 5.) The Court

nonetheless confirmed that the applicable provision is NRS § 293.213(5). Plaintiffs' argument, as written, does not in fact contend that this provision is "inconsistent" with the legislature's prescribed manner, but rather that the Plan displaces the requirement. Nonetheless, the Washoe Registrar has declared under penalty of perjury that she provided notice as required under NRS § 293.213(5). (ECF No. 50.)[16] The argument is therefore a moot point—though standing alone it would not likely amount to a constitutional violation.

In sum, the Court finds that Plaintiffs' various arguments that the Plan's all-mail election provisions are inconsistent with Nevada's election laws and thereby violate the U.S. Constitution all fail. The Court turns to Plaintiffs' fifth claim.

3. Plaintiffs' Fifth Claim

Plaintiffs' fifth claim essentially extends from Plaintiffs' second and fourth arguments. In this claim, Plaintiffs argue that the Plan violates the right to a republican form of government under the United States Constitution, U.S. Const., Article IV, § 4 (Guarantee Clause). (ECF No. 2 at 18–20.) More specifically, Plaintiffs argue that the Plan violates "the very foundational rights of the [Plaintiffs] to a republican form of government and to vote in [a] manner established under a republican form of government." (*Id.* at 18–19.) Plaintiffs nevertheless concede that this issue may be deemed a nonjusticiable political question that this Court should not reach. (*See* ECF No. 2 at 19; ECF No. 43 at 8.) That alone is reason for this Court not to consider this claim. In any event, as a logical extension of the Court's conclusions *supra*, the Court disagrees that the Plan is repugnant to a republican form of government. Therefore, this claim fails even accepting *arguendo* that it is a cognizable claim.

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[16]The Court inquired about NRS § 293.213(5) at the Hearing and the Washoe Registrar represented that the section was complied with. The Court then permitted the Washoe Registrar to submit a declaration attesting to her representation.

4. Plaintiffs' Third Claim

Plaintiffs' third claim is that the Plan violates the right to vote under the *Purcell* principle. (ECF No. 2 at 16–17.) It is not clear that this is even a cognizable claim, though Plaintiffs' contention contains other defects that render the purported claim meritless, which the Court discusses.

In *Purcell*, the Supreme Court vacated an order of the Court of Appeals for the Ninth Circuit enjoining operation of Arizona voter identification procedures. 549 U.S. at 2. The Supreme Court's ultimate ruling to vacate the Ninth Circuit's order resulted in the subject Arizona election proceeding "without an injunction." *Id.* at 6.

The ruling district court had denied the plaintiffs' request for an injunction to enjoin Arizona's voter identification requirements. *Id.* at 3. In ruling, the district court did not issue findings of facts or conclusions of law. *Id.*[17] The plaintiffs appealed and the Ninth Circuit set forth a briefing schedule that would have closed two weeks after the election. *Id.* The circuit court ultimately issued a four-panel order, about a month before the election, enjoining the enforcement of the Arizona requirement pending disposition after full briefing. *Id.* The court "offered no explanation or justification" for its decision in the order or upon a subsequent reconsideration. *Id.*

The Supreme Court's decision to vacate the Ninth Circuit's order emphasized the "imminence of the election and the inadequate time to resolve the factual disputes" as well as the possibility that a court's order, or conflicting orders concerning election provisions, may result in voter confusion. *Id.* at 4–6.[18] The Court underscored that such possibility

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[17]The Court noted that "[t]hese findings were important because resolution of legal questions in the Court of Appeals required evaluation of underlying factual issues." *Purcell*, 549 U.S. at 3.

[18]In vacating the circuit court's decision, the Court concluded that the Ninth Circuit failed to necessarily give deference to the district court, although recognizing that the district court had not yet made factual findings. *Purcell*, 549 U.S. at 5. The Court also found that the circuit court's decision failed to show that the "ruling and findings of the District Court [were] incorrect." *Id.*

should caution courts in deciding whether to grant or deny an injunction as an election draws closer. *Id.*

This Court finds, as argued by Defendants (ECF No. 25 at 21–23, ECF No. 28 at 11), Plaintiffs' reliance on *Purcell* is wholly inapposite to Plaintiffs' position and ultimate goal here—for the Court to issue an injunction.[19] To be sure, *Purcell* does not appear to support the Court deciding the PI Motion. Nonetheless, the Court considers and rejects Plaintiffs' specific contention that, as to courts, *Purcell* "applies to state and local election administrators" because "election-alerting actions pose the same risk" as to both. (*Id.* at 16; *see also id.* at 17.) Plaintiffs provide no support for treating courts and states the same under *Purcell*. Clearly, courts and states serve very different functions in our system of governance, including in relation to prescribing the rules that govern an election. It is obvious in this regard that the states ordinarily do what the courts cannot—prescribe voting regulations. The Secretary, acting on behalf of the State of Nevada, has done so here, and the Court finds the contention that *Purcell* prohibits the state doing so meritless. Accordingly, Plaintiffs' third claim fails.

In sum, the Court finds that Plaintiffs have not established the merits of any of their five claims raised in the Verified Complaint.

C. Balancing of the Equities

The Court further finds that a balancing of the equities favors Defendants and Intervenor-Defendants.

"To determine which way the balance of the hardships tips, a court must identify the possible harm caused by the preliminary injunction against the possibility of the harm caused by not issuing it." *Univ. of Haw. Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1108

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[19]Plaintiffs also reference the recent Supreme Court decision in *Republican Nat'l Comm. v. Democratic Nat'l Comm*. ("*RNC*"), No. 19A1016, 2020 WL 1672702 (U.S. Apr. 6, 2020). (ECF No. 2 at 16–17.) In RNC, the Supreme Court relevantly stated: "This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Id.* at *1 (citing *Purcell*; *Frank v. Walker*, 574 U.S. 929 (2014); and *Veasey v. Perry*, 574 U. S. __, 135 S. Ct. 9 (2014)). Thus, *RNC* is equally unsupportive of Plaintiffs' ultimate request for an injunction.

(9th Cir. 1999). The Court must then weigh "the hardships of each party against one another." *Id*.

As indicated above, even accepting Plaintiffs' purported harm to them of being disenfranchised due to vote dilution, such disenfranchisement could be, even more concretely, claimed in the absence of the Plan (and additionally by confusion that may result by the Court enjoining the Plan, and appeal—which would surely follow). The Court therefore concludes that, at minimum, the Plan's all-mail election implementation to protect the public during a public health crisis tips the scale of equity in favor of Defendants and Intervenor-Defendants (i.e., against the issuance of an injunction).

D. The Public Interest

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24. It is clear that as triggered by the uncertainties of COVID-19, the public's interests align with the Plan's all-mail election provisions. As provided above, an injunction precluding Defendants' use of mail ballots in the June 9, 2020 Primary would put Nevadans at risk and may result in the very type of confusion that *Purcell* cautions against.

In short, the Court finds that Plaintiffs have not proven that they are entitled to have this Court enjoin the Plan's challenged provisions.

V. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the issues before the Court.

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It is therefore ordered that Plaintiffs' motion for preliminary injunction (ECF No. 2) is denied for the reasons provided herein.

DATED THIS 30th day of April 2020.

MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE