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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

ZENAIDA DAGUSEN, an individual, *et al.*,

Plaintiffs,

vs.

FRANCISCO AGUILAR, in his official capacity as Nevada Secretary of State, *et al.*,

Defendants,

NAACP TRI-STATE CONFERENCE OF IDAHO-NEVADA-UTAH

Intervenor Defendants

Case No.: 24 OC 00153 1B

Dept. No. I

SECRETARY OF STATE'S REPLY IN SUPPORT OF MOTION TO DISMISS

The Secretary[1] hereby files this Reply in Support of his Motion to Dismiss. This Reply is made and based upon the following Memorandum of Points and Authorities and the papers and pleadings on file.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs fundamentally fail to grapple with the Secretary's arguments in his Motion. Plaintiffs do not dispute, and thereby concede, that the Organizational Plaintiffs

[1] Defined terms have the same meanings set forth in the Secretary's Motion to Dismiss.

lack standing. And their argument about the Individual Plaintiff's standing is negated by a host of federal circuit court decisions from across the nation. Nevertheless, despite having no injury-in-fact, Plaintiffs persist in advancing their meritless claims in an attempt to seize control of list maintenance in Nevada. Their constitutional claims must be dismissed because Plaintiffs cannot allege unequal treatment, fundamental unfairness, or a denial of the right to vote. And their declaratory judgment claim fails because Nevada law does not require what Plaintiffs demand. The Complaint therefore should be dismissed.

II. ARGUMENT

A. Plaintiffs Do Not Have Standing

Plaintiffs begin with the faulty premise that they have alleged facts that would show that their supposed injuries are more than "conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (citation and quotation marks omitted); *see* Opp. at 5. They have not. Plaintiffs' allegations and sources: (1) do not demonstrate, either directly or indirectly, how a noncitizen willing to risk a criminal conviction and permanent immigration inadmissibility would vote, Mot. at 7;[2] (2) draw conclusions from untenably small sample sizes, *id.* at 5–6; (3) do not account for recent shifts in voting preferences, *id.* at 5; and (4) are too attenuated to demonstrate causation, *id.* at 7.[3] While Plaintiffs

[2] In their Opposition, Plaintiffs again only point to presidential candidate preferences of noncitizens *in general*. *See* Opp. at 6. This says *nothing* about noncitizens who would actually vote, and it is the height of conjecture, hypothesis, and speculation to say that the two groups are identical.

[3] Plaintiffs state that the Secretary's Motion "evokes numerous factual disputes and extraneous evidence beyond the four corners of the Complaint," Opp. at 3, but they do not dispute the accuracy of the sources the Secretary cites in his Motion. Nor do they explain what "factual dispute[]" there is concerning the contents of, for instance, a letter from Secretary Cegavske, Mot. at 2; the contents of a Nevada voter registration application, *id.* at 3; the results of various elections, *id.* at 5, 6; documents relating to the very data sources Plaintiffs rely on, *id.*; a complaint filed in this Court, *id.* at 8–9; or government naturalization statistics, *id.* at 11. The Court can and should therefore take judicial notice of the facts cited by the Secretary. *See* NRS 47.130, 47.150(1); *ACLU NV v. Cnty. of Nye*, Case No. 85507, 2022 WL 14285458, at *1 n.2 (Oct. 21, 2022) (unpublished disposition) (taking judicial notice of information on governmental websites); *see also Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999, 1001-02 (9th Cir. 2018) (clarifying when it is proper for a district court to judicially notice facts "not subject to reasonable dispute" under Fed. R. Evid. 201(b) without converting a motion to dismiss into a motion for summary judgment; finding that district court did not abuse discretion in judicially noticing the filing date of a patent application—a governmental document whose accuracy or authenticity "[n]either party disputes").

complain that if they do not have standing, no one would have standing, Opp. at 3, "[t]he assumption that if [Plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013) (citations and quotation marks omitted).

1. Vote Dilution and Associational Standing. Plaintiffs incorrectly argue that a vote dilution injury somehow depends on the number of allegedly illegal votes in question. Opp. at 6. It does not. The many federal circuit courts that have addressed vote dilution unanimously confirm that the type of vote dilution alleged here simply does not establish a cognizable injury. *See* Mot. at 4 (collecting cases); *see also Election Integrity Project Cal., Inc. v. Weber*, 113 F.4th 1072, 1082, 1089 n.13 (9th Cir. 2024) ("A vote dilution claim requires a showing of *disproportionate* voting power for some voters over others . . . ."; collecting cases where courts have rejected vote dilution injuries similar to that of Plaintiffs) (emphasis in original). And as described above, Plaintiffs have not alleged any facts demonstrating that noncitizens who vote prefer Democratic presidential candidates. The individual plaintiff therefore does not have standing, and accordingly, the Organizational Plaintiffs do not have associational standing either. *See* Mot. at 8.

2. Competitive Harm. Plaintiffs' competitive harm argument appears to be that the Court cannot scrutinize the Complaint's allegations, and it is enough for Plaintiffs to claim they have adequately alleged standing. *See* Opp. at 6. But that would render nugatory the requirement that a plaintiff allege an injury that is not conjectural or speculative. It is Plaintiffs' burden to demonstrate standing. *See Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016). And tellingly, Plaintiffs choose not to address the Secretary's arguments that Plaintiffs have not and cannot demonstrate (1) a potential loss of an election or (2) that there is any state-imposed disadvantage. *See* Mot. at 4–7. "[S]uch lack of challenge cannot be regarded as unwitting and . . . constitutes a clear concession by [Plaintiffs] that there is merit in [the Secretary's] position." *Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955); *see also Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563,

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216 P.3d 788, 793 (2009) (per curiam) (treating a party's failure to dispute or otherwise respond to an argument as a concession that the argument is meritorious).

3. Diversion of Resources. Plaintiffs also concede that they do not have direct organizational standing by failing entirely to address the Secretary's argument that they have not alleged a "concrete injury that directly affected and interfered with [their] core business activities." *See* Mot. at 7–8 (citation omitted). Plaintiffs focus instead on the minimum for identifying which resources they diverted, Opp. at 6–7, and ignore that the U.S. Supreme Court in *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024), and the Nevada Supreme Court in *Board of Pharmacy v. Cannabis Equity & Inclusion Community*, Case Nos. 85756, 86128, 2024 WL 3664464 (Nev. Aug. 5, 2024) (unpublished disposition), have both recognized that a plaintiff claiming direct organizational standing must have suffered direct harm to a core business activity, *see* Mot. at 7–8. Plaintiffs' arguments about their mysterious expenditures are incomplete, and in any event, do not satisfy their affirmative burden of demonstrating that they have standing because they are diverting resources not merely to oppose disfavored policies. *See id.*

B. Plaintiffs Have Not Stated Any Claim

1. Plaintiffs' Equal Protection Claim Fails as a Matter of Law

Plaintiffs' arguments in support of their Equal Protection Clause claim fail. Plaintiffs merely state in conclusory fashion that they have alleged "disparate treatment of 'similarly situated persons,' [and] a 'device designed to impose different burdens on different classes of person." Opp. at 7. They have not, and they cannot. As to disparate treatment, all voters in Nevada are subject to the same laws and the same list maintenance processes. As the Secretary explained, "[u]nlike in the apportionment context, nothing the Secretary has done treats similarly situated persons differently." Mot. at 8. Plaintiffs rely in their Opposition exclusively on apportionment and gerrymandering cases, which clearly involve disparate treatment of similarly situated persons, without so much as attempting to explain how those cases could apply here where there is no question of gerrymandering or malapportionment. *See* Opp. at 7–8.

Plaintiffs also claim that they have alleged that the Secretary's actions benefit Democrats. *See id.* at 8. As explained above, they have not. But regardless, that would not be *disparate treatment*, but rather disparate impact. To make out an Equal Protection Clause claim based on disparate impact, Plaintiffs would need to allege that the Secretary's actions were *designed* to impose such different burdens. *See* Mot. at 8 (citing *Rico v. Rodriguez*, 121 Nev. 695, 703, 120 P.3d 812, 817 (2005)). Plaintiffs concede that they cannot do so by failing to address this argument. *See Colton*, 71 Nev. at 72, 279 P.3d at 1036; *Ozawa*, 125 Nev. at 563, 216 P.3d at 793.

2. Plaintiffs' Due Process Claim Fails as a Matter of Law

Plaintiffs' attempt to salvage their Due Process Claim requires the Court to ignore that they have alleged that an approximate 3,731 noncitizens vote in Nevada's election. *See* Opp. at 9; Mot. at 9 (citing Compl. ¶ 99). The Secretary's Motion accepts this allegation as true, and thereafter argues the *legal conclusion* that Plaintiffs' factual allegations do not establish fundamental unfairness as is required for their Due Process Claim. *See* Mot. at 9–10. There is no "factual question not appropriate for a 12(b)(5) analysis," as Plaintiffs contend. *See* Opp. at 9, 10; *see also State v. Lisenbee*, 116 Nev. 1124, 1127, 13 P.3d 947, 949 (2000) (the "legal consequences of . . . facts are questions of law"). Plaintiffs' arguments fail for the additional and independent reason that they are wholly conclusory; for instance, Plaintiffs state that the Secretary has "discriminate[d] against a discrete group of voters," Opp. at 10, but as discussed above, Plaintiffs have not alleged discrimination.

3. Plaintiffs' Right to Vote Claim Fails as a Matter of Law

As the Secretary explained, Plaintiffs' right to vote claim fails because they rely only on the inapposite *Reynolds* apportionment case, and their theory of a right to vote claim would lead to an unworkable standard where "even one single improper vote would result in a violation." *See* Mot. at 10. The only new argument Plaintiffs advance in their Opposition is that the Secretary "asks the Court to adopt a legal interpretation under which voters have no recourse when the state permits ineligible voters to vote and dilute the votes

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of eligible and properly registered voters." Opp. at 11. But the Secretary has asked for no such thing; neither the Secretary nor Nevada law permits an ineligible voter to vote.

4. Plaintiffs' Declaratory Judgment Claim Fails as a Matter of Law

Plaintiffs' declaratory judgment claim reads nonexistent, specific requirements into NRS 293.675(3)(i)'s general requirement that the statewide voter registration list be "regularly maintained to ensure the integrity of the registration process and the election process."[4] The Legislature clearly is aware of how to require use of specific data for list maintenance, *see* NRS 293.675(5)-(8), but since NRS 293.675's adoption in 2003, the Legislature has not mentioned or required use of data to verify citizenship. At bottom, Plaintiffs seek to "'[r]equir[e] additional' processes" for list maintenance, but that improperly "'second-guesses the judgment of' state legislatures." *RNC v. Benson*, Case No. 1:24-cv-262, 2024 WL 4539309, at *13 (W.D. Mich. Oct. 22, 2024), *appeal docketed* Case No. 24-1985 (6th Cir. Nov. 8, 2024) (quoting *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 774 (2018)). NRS 293.675 does not require what Plaintiffs demand.

III. CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint.

DATED this 23rd day of December, 2024.

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[4] Plaintiffs' claim depends on the statutory construction of NRS 293.675, which presents a question of law, *City of Henderson v. Amado*, 133 Nev. 257, 259, 396 P.3d 798, 800 (2017), not a question of fact, as Plaintiffs appear to argue, *see* Opp. at 12.

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 23rd day of December, 2024, I served a true and correct copy of the foregoing **SECRETARY OF STATE'S REPLY IN SUPPORT OF MOTION TO DISMISS** by electronic mail addressed to:

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