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

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

Plaintiffs,

v.

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

Defendants.

Case No.: 24 OC 00153 1B
Dept. No.: 1

REPLY IN SUPPORT OF MOTION TO DISMISS

Plaintiffs have no answer to the fundamental problem with their Complaint: while Nevada law includes robust protections against noncitizen voting, it does not require the Secretary of State to adopt Plaintiffs' preferred methods for verifying registered voters' citizenship. The Legislature has prescribed some requirements for voter list maintenance and explicitly left the rest of the details to the Secretary's and county officials' discretion. Nowhere has the Legislature required the citizenship matching processes that Plaintiffs ask the Court to impose. And Plaintiffs' scattershot constitutional theories all fail because Nevada's existing procedures do not treat any voter or set of voters differently from others, render Nevada elections fundamentally unfair, or abridge any eligible voter's right to vote. To the contrary, it is Plaintiffs' relief that would risk those consequences, by removing registered voters based on an unreliable data matching process that relies on databases with citizenship information that is often outdated or inaccurate. The Court should dismiss the Complaint.

ARGUMENT

I. Plaintiffs fail to state an equal protection claim.

The "threshold question" in an equal protection claim is "whether a statute treats similarly situated people disparately." *Vickers v. Dzurenda*, 134 Nev. 747, 749, 433 P.3d 306, 308 (2018). Plaintiffs' equal protection claim fails because they make no such allegation, nor could they. Nevada's existing list maintenance process is uniform, applies equally to all Nevada voters, and affects all Nevada voters equally.

Plaintiffs' theory rests entirely on gerrymandering and apportionment cases, but those cases are inapposite. Opp. 6–7 (citing *Baker v. Carr*, 369 U.S. 186, 207-08 (1962) (apportionment); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (apportionment); *Rucho v. Common Cause*, 588 U.S. 684, 695 (2019) (gerrymandering)). Apportionment and gerrymandering cases raise equal protection issues because they *do* involve disparate treatment—unlike the claims that Plaintiffs bring here. Apportionment cases challenge districts of *unequal* population, which "disfavor[] the voters" in the overpopulated districts, "placing them in a position of constitutionally unjustifiable inequality vis-a-vis voters in" underpopulated districts. *Baker*, 369 U.S. at 297–08; *see also*

Reynolds, 377 U.S. at 562 (explaining that the "discrimination against those individual voters living in disfavored areas" from malapportioned districts "is easily demonstrable mathematically"). And racial gerrymandering cases, like the one Plaintiffs cite, involve discrimination between racial groups: "[l]aws that explicitly discriminate on the basis of race, as well as those that are race neutral on their face but are unexplainable on grounds other than race." *Rucho*, 588 U.S. at 700. In each type of case, one group of voters is disadvantaged as compared with another group of voters.

Plaintiffs' vote dilution argument is nothing like that. They argue that "every eligible voter" is injured, but by that very allegation, the law does not "treat[] similarly situated people disparately" and therefore poses no equal protection issue. *Vickers*, 134 Nev. at 749, 433 P.3d at 308. This argument only confirms that Plaintiffs do not allege that their votes are "weighed differently" than anyone else's votes. Instead, Plaintiffs assert a "generalized grievance" common to all voters and that *anyone* "who voted could make if they were so allowed." *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 711–12 (D. Ariz. 2020). And while Plaintiffs also argue that Republican voters in particular are injured, and that their desired relief would remove more Democratic than Republican voters from the rolls, they make no allegation that Republican voters are *treated differently* from other voters, nor that they are subjected to intentional discrimination. Plaintiffs' supporters are subject to the same list maintenance procedures as everyone else, and their votes weigh the same "as compared to the votes of others." *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 383 (W.D. Pa. 2020). There is no disparate treatment, and thus no equal protection issue. And Plaintiffs' request that the Court depart from federal law does not change the analysis, as Nevada law equally makes disparate treatment the touchstone of an equal protection claim. *See Vickers*, 134 Nev. at 749, 433 P.3d at 308.[1]

II. Plaintiffs fail to state a substantive due process claim.

Plaintiffs also fail to state a substantive due process claim, because they make no plausible

[1] Plaintiffs complain that this would preclude them from challenging a state law permitting noncitizens to vote. Not necessarily. They simply would have no *equal protection claim*.

allegation that "the election process" has reached a "point of patent and fundamental unfairness." *Curry v. Baker*, 802 F.2d 1302, 1315 (11th Cir. 1986). They base their argument on the contention that the "safeguards placed on Nevada's voting system through statute are being actively disregarded by the Secretary." Opp. 8. But that is a legal conclusion that the Court must assess for itself, and as explained below, *see infra* § IV, Nevada statutes do not require the processes that Plaintiffs seek to compel. That, no doubt, is why Plaintiffs focus on their constitutional claims.

Beyond their inaccurate complaint about statutory violations, Plaintiffs' substantive due process claim, though wrapped in conclusory assertions about a "systemic issue with election integrity," Opp. 9, boils down to a demand that the Secretary maintain the voter rolls differently. Contrary to Plaintiffs' argument, *id.* at 8, whether this constitutes "fundamental unfairness" is a legal conclusion that the Court must decide for itself. *Brown v. Eddie World, Inc.*, 131 Nev. 150, 152, 348 P.3d 1002, 1003 (2015); *see also State v. Lisenbee*, 116 Nev. 1124, 1127, 13 P.3d 947, 949 (2000) (holding that the "legal consequences of . . . facts are questions of law"). Plaintiffs cannot point to a single instance where a court has recognized a substantive due process claim based on mere disagreement with how a state official maintains the state's voter rolls. Such administrative details are not the stuff of a substantive due process claim, and the Court has no basis to "enter into the details of the administration of the election" where Plaintiffs have failed to allege any fundamental unfairness warranting such intrusion. *Lecky v. Va. State Bd. of Elections*, 285 F. Supp. 3d 908, 915 (E.D. Va. 2018); *see also Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998). Indeed, even "[g]arden variety election irregularities" do "not prove fundamental unfairness" as would be required to support such a claim. *Ne. Ohio Coal. For the Homeless v. Husted*, 837 F.3d 612, 637 (6th Cir. 2016).

III. Plaintiffs fail to state a right-to-vote claim.

Plaintiffs' right-to-vote claim is a repackaging of their equal protection claim that is even less persuasive and less grounded in law. Both are premised on the theory that, by not verifying the citizenship of voters, the Secretary is allowing illegal votes to be cast, supposedly diluting the votes of Plaintiff Dagusen and Republican voters. *Compare* Compl. ¶¶ 103–11, *with id.* ¶¶ 118–

22. Plaintiffs cite only *Reynolds* to support this claim, *see* Opp. 10, but *Reynolds* is an equal protection case and provides no support for a standalone right-to-vote claim. *See supra* § I; *see also* 377 U.S. at 568. In other words, "the 'right to vote' discussed in *Reynolds v. Sims* must be understood as a narrow substantive right, *conferred by the equal protection clause*, 'of a person to vote on an equal basis with other voters.'" *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980) (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 77 (1980)) (emphasis added). Plaintiffs allege no violation of such a right because, again, they allege no inequality in treatment. And while Plaintiffs invoke Article II, Section 1 of the Nevada Constitution, Compl. ¶¶ 118–22, they cite no case supporting a claim for vote dilution under that provision, much less one based on neutral, generally applicable election-administration rules that do not make it harder for anyone to vote and that affect all voters equally. Because Plaintiffs have not alleged that Defendants are unlawfully abridging Plaintiffs' or anyone else's right to vote, this claim must be dismissed. *See* Mot. 6.

IV. Plaintiffs fail to state a claim under NRS 293.675.

Plaintiffs' claim under NRS 293.675 fails because nothing in that statute requires the Secretary or anyone else to perform the database comparisons that Plaintiffs demand. *See* Mot. 6–8. Plaintiffs rely entirely on the general statement that the statewide voter registration list must be "regularly maintained to ensure the integrity of the registration process and the election process." NRS 293.675(3)(i). But that general statement cannot possibly be read to require the highly specific comparisons to particular databases and data sources that Plaintiffs ask the Court to impose. Compl. at pp. 21–22 (Prayer for Relief). To the contrary, where the Legislature wanted to require particular comparisons, it said so, by expressly requiring agreements with the Department of Motor Vehicles, the Social Security Administration, and the Registrar of Vital Statistics, NRS 293.675(5), (6), (8). Notably, the Legislature included no such requirement with respect to the Department of Homeland Security or the court system. And beyond those mandatory procedures, Nevada law makes clear that list maintenance is a matter of discretion: "[c]ounty clerks *may* use any reliable and reasonable means available to correct the portions of the statewide voter registration list" for which they are responsible. NRS 293.530(1)(a).

The Secretary therefore has no statutory obligation to conduct Plaintiffs' preferred forms of additional list maintenance. Plaintiffs' contrary reading would violate a cardinal rule of statutory construction by adding a legal requirement to a statute that is not there. The Nevada Supreme Court has "repeatedly refused to imply provisions not expressly included in the legislative scheme." *State Indus. Ins. Sys. v. Wrenn*, 104 Nev. 536, 539, 762 P.2d 884, 886 (1988) (per curiam). And contrary to Plaintiffs' arguments, this issue raises no "question of fact" that cannot be decided on a motion to dismiss. Opp. 11. The extent of the Secretary's duties turns on the construction of NRS 293.675 and other statutes, and "[t]he proper construction of a statute is a legal question rather than a factual question." *Sheriff, Washoe Cnty. v. Encoe*, 110 Nev. 1317, 1319, 885 P.2d 596, 598 (1994); *see also, e.g.*, *Wingco v. Gov't Emps. Ins. Co.*, 130 Nev. 177, 179, 321 P.3d 855, 856 (2014) (stating that "an issue of statutory interpretation" is "a pure question of law" in affirming grant of motion to dismiss). NRS 293.675 simply does not create any legal obligation for the Secretary to consult either SAVE or any of the other sources of information that Plaintiffs would like to see the Secretary employ. *See* Mot. 7–8.[2] Plaintiffs cannot evade dismissal of their legally deficient statutory claim by recharacterizing a straightforward question of law as a factual dispute.

V. At a minimum, the Court should dismiss claims for relief affecting the 2024 election.

Plaintiffs' Complaint unambiguously seeks "[a] preliminary injunction requiring the Secretary of State to implement and conduct" their preferred forms of list maintenance "before the November 2024 general election." Compl. at p. 22. As the Motion explains, such relief would violate the NVRA and run afoul of both laches and established equitable bars to last-minute changes in election procedures. Mot. 8–10. In response, Plaintiffs disavow any request for such relief. Opp. 12. At a minimum, the Court should therefore dismiss Plaintiffs' claims for relief affecting the 2024 election.

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[2] Moreover, imposing such a requirement—by judicial fiat no less—would likely run afoul of the Civil Rights Act and the NVRA. *See* Mot. 7 n.7 (citing *Mi Familia Vota v. Fontes*, 719 F. Supp. 3d 929, 995–96, 999 (D. Ariz. 2024)).

CONCLUSION

For the reasons stated above, the Court should dismiss the Complaint.

AFFIRMATION

Pursuant to NRS 239B.030 and 603A.040, the undersigned does hereby affirm that this document does not contain the personal information of any person.

DATED this 4th day of November, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2024, a true and correct copy of this **REPLY IN SUPPORT OF MOTION TO DISMISS** was served via electronic mail per agreement as follows:

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