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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

CITIZEN OUTREACH FOUNDATION, CHARLES MUTH,

Petitioners,

vs.

CARRE-ANN BURGESS, in her official capacity as Washoe County Interim Registrar of Voters,

Respondent,

and

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

Intervenor-Respondents.

Case No. CV24-02182

Dept. No. 3

SECRETARY AND REGISTRAR'S RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

Cari-Ann Burgess, in her official capacity as Washoe County Interim Registrar of Voters ("Registrar"), by and through counsel, and Intervenor-Respondent Francisco V. Aguilar, in his official capacity as Nevada Secretary of State ("Secretary"), by and through counsel, respond in opposition to Petitioners Citizen Outreach Foundation ("COF") and Charles Muth's Petition for Writ of Mandamus Pursuant to NRS 293.535 and NRS 293.530 for Respondent[] to Notify the Registrants of the Challenge and Follow the Requirements of NRS 293.530 ("Petition") and to Petitioners' Motion for Preliminary Injunction and to Advance the Trial on the Merits ("Motion"). This Response is made and based upon the following Memorandum of Points and Authorities and attachments, and the papers and pleadings on file in this matter.

I. INTRODUCTION

Petitioners cannot obtain the relief they seek in this matter. First, the Nevada law under which they submitted their voter challenges, NRS 293.535, sets out extremely specific requirements for challenges. Petitioners' challenges simply fail to meet those requirements. Moreover, federal law bars processing challenges like Petitioners' later than 90 days before the November election—a deadline that has already passed. 52 U.S.C. § 20507(c)(2)(A). Further, Petitioners waited too long to bring their petition, and it should be denied based on laches. Petitioners' claims each also suffer from fatal defects; the writ petition is not supported by any affidavit, and the declaratory judgment claim fails for lack of standing. Petitioners' challenges based on data that is well known to be an imperfect proxy for voter eligibility cannot support their request for relief that would cause confusion and potential mass disenfranchisement.

Nevada already has procedures for responsibly processing the data Petitioners rely on—executed by elections professionals who understand how to use it. Nevada law does not allow for vigilante list maintenance.

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II. BACKGROUND

A. Voter List Maintenance in Nevada

Voter list maintenance in Nevada is governed by a complex mix of state and federal law. Together, these laws attempt to strike a balance between, on the one hand, ensuring that ineligible voters do not remain on Nevada's voter rolls, and, on the other, ensuring that eligible Nevadans are not stripped of their right to vote. *See, e.g.,* Leg. History (Senate Bill 335, 1991 Leg., 66th Sess. at 707, 713–15 (Nev. 1991) (discussing this balance in the context of mail registration);[1] 52 U.S.C. § 20501 (stating purposes of the National Voter Registration Act of 1993 ("NVRA")).

County clerks,[2] with guidance from the Secretary of State and U.S. Department of Justice, are the elections professionals who perform most list maintenance in Nevada. They "may use any reliable and reasonable means available" to correct the list for their respective counties. NRS 293.530(1)(a). This includes national change of address ("NCOA") data and data from the Department of Motor Vehicles ("DMV"). NRS 293.5307; 293.5752(4).[3] However, to ensure that eligible voters aren't swept off the rolls by these list maintenance activities, both Nevada and federal law regulate how county clerks can use this data. *See e.g.,* U.S. Dep't of Justice, Voter Registration List Maintenance: Guidance under Section 8 of the National Voter Registration Act, 52 U.S.C. § 20507, 3 (September 2024)[4] ("DOJ Guidance") (providing examples of data uses that may violate the NVRA); Office of the Attorney General, Opinion No. 85-3, 1985 Nev. Op. Atty. Gen 12

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[1] *Available at* https://tinyurl.com/kzzttas5.

[2] Registrars of voters are included in the definition, and are thus "synonymous with," "county clerks" in NRS Chapter 293. *See* NRS 293.040, 293.044. This Response's reference to county clerks includes registrars of voters.

[3] After identifying voters whose residences may have changed, county clerks mail a written notice and postage-guaranteed return postcard on which a voter may indicate continued residence or write in any new address. NRS 293.530(1)(c)(1)–(2). If a voter returns the postcard with updated information, the county clerk will correct the voter registration list. NRS 293.530(f). However, if a voter does not return the postcard within 33 days of its mailing, the county clerk will designate the voter as inactive. NRS 293.530(1)(d), (g). And if a noticed voter fails to respond or appear to vote for two general elections after the mailing of the notice, and the voter's registration information is not updated, the county clerk cancels the registration. NRS 293.530(1)(c)(3)–(4).

[4] *Available at* https://www.justice.gov/crt/media/1366561/dl.

(Mar. 14, 1985) (use of data from external data sources); 52 U.S.C. § 20507(d) (safeguards against immediate removal).

These restrictions exist in part because these data sources are unreliable proxies for voter residence or eligibility; they can also present significant challenges in terms of matching individuals across lists. As a result, improper use of these data sources can disenfranchise eligible voters. *See, e.g., Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1346 (11th Cir. 2014) (noting that Congress recognized the risk of error in systemic list-maintenance programs and built safeguards into the NVRA to prevent disenfranchisement). For example, NCOA data—the data that Petitioners claim to have used to generate their challenges, *see* Decl. of Charles Muth in Supp. of Mot. for Prelim. Inj. ("Muth Decl.") Ex. 2 at 3, Ex. 5 at 1—discloses only that an individual has completed a change of address form—not that they are ineligible to vote in the county in which they are registered. *See* NCOALink, USPS, https://postalpro.usps.com/mailing-and-shipping-services/NCOALink. For example, a notation that a move is "permanent" in the NCOA data means only that an individual wants their mail forwarded for more than six months. *See, e.g.*, Ex. 1 at 3, USPS, USPS.com Official Change-of-Address, https://moversguide.usps.com/mgo/disclaimer ("Are you planning on returning to your old address in six months or less?" "Selecting 'Yes' will classify your Change-of-Address as Temporary." "Selecting 'No' will classify your Change-of-Address as Permanent."). This could apply to a range of individuals, like military personnel, college students, or temporary workers, who have no intention of abandoning their residence in Nevada. As a result, all that can be said definitively about these voters is that, at some point, they have provided some information relating to where they want their mail sent (and, in some cases, for less than six months), not that they have in fact changed their permanent residence.

The NVRA also imposes strict limitations on a state's ability to remove voters from the voter rolls more generally. For example, voters may not be removed from the rolls based on data indicating a change in residency until they have been provided notice and have failed to either respond or vote in two general elections. 52 U.S.C. § 20507(d)(1).

And the NVRA's 90-day restriction period prohibits states from operating any program aimed at "systematically" removing ineligible voters later than 90 days before a federal election. 52 U.S.C. § 20507(c)(2)(A). It only permits "individualized" removals during this period, "based on more 'rigorous' registrant-specific inquiries 'leading to a smaller chance for mistakes.'" *Mi Familia Vota v. Fontes*, 691 F. Supp. 3d 1077, 1093 (D. Ariz. 2023) (citation omitted).

B. Voter Participation in List Maintenance under Nevada Law

Under Nevada law, voters may also contribute to list maintenance. But the Legislature has carefully circumscribed their role to ensure that Nevada complies with federal law and protects against disenfranchisement of eligible voters. *See, e.g.*, Leg. History of Assembly Bill 619, 1995 Leg., 68th Sess. at 81–82, 98–99 (Nev. 1995) (conforming NRS 293.530 and 293.535 to the requirements of the NVRA);[5] Leg. History of Assembly Bill 652, 1991 Leg., 66th Sess. at 22 (discussion of abusive challenges).[6] NRS 293.535, which governs the challenges at issue in this case, permits a challenge by "an elector or other reliable person" only under very specific circumstances. As relevant here, the challenger must file an affidavit, under penalty of perjury,

> stating that . . . (b) [t]he registrant has (1) Moved outside the boundaries of the county where he or she is registered to another county, state, territory or foreign country, with the intention of remaining there for an indefinite time and with the intention of abandoning his or her residence in the county where registered; and (2) Established residence in some other state, territory or foreign country, or in some other county of this state, naming the place.

NRS 293.535(1). In addition, "[t]he affiant must state that he or she has personal knowledge of the facts set forth in the affidavit." *Id.*

C. Petitioners' Challenges and This Lawsuit

For several months, Petitioners have unsuccessfully attempted to use Nevada's challenge statutes to conscript clerks to perform Petitioners' own version of NCOA-based

[5] *Available at* https://tinyurl.com/mryya9zc.
[6] *Available at* https://tinyurl.com/bdzff4kw.

list maintenance. Muth Decl. Ex. 2 at 4. Petitioners first attempted a mass challenge based on NCOA data before the June 11 Primary Election. *Id.* At that time, they attempted to file challenges pursuant to NRS 293.547. *Id.* Ultimately, these challenges were rejected by county officials. *Id.* In July and August 2024, Petitioners took a different tack; they submitted thousands of voter registration challenges in counties across the state under NRS 293.535. *See* Petition for Writ of Mandamus ("Petition") at ¶¶ 1, 29. Those are the challenges at issue here.

Like the June challenges, Petitioners' July and August challenges purport to be based on NCOA Data. *See, e.g.*, Muth Decl. Ex. 5 at 1. Perhaps in recognition of NCOA data's unreliability as a proxy for voter eligibility, Petitioners' challenges do not state definitively that the voter at issue is ineligible. Instead, they state that, according to an NCOA database, "the above-challenged voter appears to be listed as having moved outside the boundaries of the state of Nevada with the intention of remaining there for an indefinite time." *Id.* (internal quotations removed).

Petitioners provided no evidence supporting their challenges and no information on how they performed the alleged matching, either with the challenge, the Petition, or the Motion. Petitioners' claimed facts in their challenges are subject to substantial doubt. For instance, some challenges identify voters who appear to have moved within the same county, but the challenges claim that the voter appears to have moved outside of the state and registered to vote in another state. *E.g.*, Ex. 2, July 29, 2024, Challenge to SOS Voter ID 5989239.

As Nevada's Chief Officer of Elections, with the obligation to execute and enforce state and federal election law, *see* NRS 293.124, in late August 2024, Secretary Aguilar issued guidance Memo 2024–026, clarifying the "personal knowledge" required to challenge a registered voter under NRS 293.535 and NRS 293.547 and the requirements of the 90-day blackout period in connection with such challenges.[7]

[7] Petitioners characterize this guidance as a "private memorandum." Pet. ¶¶ 3, 6; Mot. at 2. This is inaccurate. The Secretary routinely provides guidance memoranda to clerks when questions of election

Petitioners filed their Petition on September 23, 2024, to challenge the Registrar's non-processing of challenges submitted pursuant to NRS 293.535. *See generally* Petition. The Secretary intervened in this action and now opposes the Petition[8] to ensure uniformity and compliance with both Nevada and federal election laws in connection with these challenges.

III. ARGUMENT

A. Petitioners Are Not Entitled to the Extraordinary Remedy of Mandamus

The Petition must be denied at the outset because Petitioners have not pleaded or otherwise demonstrated facts showing they have any right to relief under NRS 293.535. Additionally, any relief sought by Petitioners is barred under both federal law (NVRA) and Nevada law (laches).

1. Petitioners' Challenges Do Not Meet the Requirements for Challenges Under NRS 293.535

Petitioners argue that NRS 293.535 requires a county clerk to process and notify a registrant of a challenge, no matter how baseless or flawed it is—starting a process that, without any action by the voter, may end in cancellation of the voter's registration. *See* Mot. at 8; *see also* Pet. ¶¶ 27, 39, 42. The language of the statute, unsurprisingly, does not support that extreme position. Instead, NRS 293.535 permits county clerks to act on a residence-based challenge only when an affidavit states certain facts: "The county clerk **shall notify** a registrant **if** any elector or other reliable person files an affidavit with the county clerk **stating that** . . . [t]he registrant has . . . [m]oved" out of the county "with the intention of remaining" in the new location "for an indefinite time and with the intention of abandoning" the old residence. NRS 293.535(1) (emphasis added). The affidavit must also state that the challenger has "personal knowledge" of these facts, *i.e.*, that the

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administration arise. *See* NRS 293.247(4), (5)(b). And the memorandum is subject to public records requests and therefore is neither "private" nor "secret." *See* NRS 239.0107; Pet. ¶¶ 3, 5–6.

[8] In its order issued on October 4, 2024, this Court instructed the parties to construe Petitioners' Petition and Motion collectively as Petitioners' opening brief.

registrant (i) has moved out of the county where registered (ii) with the intention of remaining in the new location for an indefinite time and (iii) "with the intention of abandoning" the old residence. *Id.* In other words, NRS 293.535 enumerates *specific facts* to which a challenger must attest *personal knowledge* before a county clerk may take further action on a challenge. If the affidavit does not meet these requirements, there is no legal basis to require a county clerk to notify the challenged registrant and start the process ending in cancellation of registration.

a. The Challenges Do Not Say that the Voter Has Moved and Established Residence Elsewhere

Petitioners' challenges did not meet these requirements. They do not assert that the individual at issue "**has** . . .[m]oved" at all, much less "outside the boundaries of the county where he or she is registered."[9] *See generally*, *e.g.*, Muth Decl. Ex. 5; NRS 293.535(1)(b). Instead, they assert that "[a]ccording to the National Change of Address (NCOA) database maintained by the United States Postal Service (USPS), the above-challenged voter ***appears to be listed as*** having 'moved outside the boundaries' of the state of Nevada 'with the intention of remaining there for an indefinite time." Muth Decl. Ex. 5 at 1 (emphasis added). Nor do the challenges meet the separate requirement of stating, based on personal knowledge, that the individual at issue had the "intention of abandoning" the old residence. Instead, the challenges attempt to make a *legal* argument that Nevada law creates a presumption that the challenged individual intends to abandon their residence if it *appears* from change-of-address data that someone has moved outside the county. *Id.* at 2. But a legal argument is not what the statute requires on this point—it requires a statement by the challenger, based on their own personal knowledge, that the challenged individual

[9] Even assuming that (i) Petitioners' written challenges were based on personal knowledge of (ii) the fact that a challenged registrant had, in fact, "[m]oved" with the intention of remaining in the new residence and abandoning the old residence, 5,293 of these purported affidavits—nearly half of all challenges—are still deficient because they merely assert that each challenged registrant "ha[s] moved *within* their county of registration but out of their precinct they were registered in." Pet. ¶ 30 (emphasis added). Personal knowledge of an *intra*-county change of residence does not satisfy NRS 293.535; the provision requires personal knowledge of a registrant's move "*outside the boundaries of the county* where [the registrant] is registered *to another county, state, territory or foreign country* . . ." NRS 293.535(1)(b) (emphases added).

intends to abandon their old residence. NRS 293.535(1)(b)(1). Regardless, for the presumption to apply, the voter would have had to "break[] up" her home in Nevada and "remove[] to another state, territory or foreign country." NRS 293.495. The challenges are entirely silent on whether voters have broken up their homes.

These failures are fatal to all of Petitioners' challenges. The facts about which Muth claims to have personal knowledge simply are not the facts that NRS 293.535 requires before triggering any mandatory action by a county clerk. Nor are these distinctions trivial. NCOA data is based on "change-of-address (COA) records constructed from names and addresses of individuals, families, and businesses who have filed a change-of-address with the Postal Service." NCOALink, USPS, https://postalpro.usps.com/mailing-and-shipping-services/NCOALink. In other words, the NCOA database is not designed to be used in connection with voter registration, much less to satisfy the exacting requirements Nevada election law imposes before a member of the public can initiate a process that may end in stripping a Nevadan's right to vote. To take just one example, an individual's appearance on an NCOA database does not indicate that he or she "has . . . [m]oved" out of the county "with the intention of remaining" in the new location "for an indefinite time and with the intention of abandoning" the old residence. NRS 293.535(1)(b). Instead, it simply indicates that a change-of-address record was found for the individual, indicating that they want their mail to be sent to another address for either more or less than six months. *See supra*, § II.A.

The unsuitability of third-party list maintenance based on NCOA data is evident in Muth's challenges. For instance, Muth challenges one voter who appears, based on NCOA data, to have requested a change of address to a military overseas location. Ex. 3, August 28, 2024, Challenge to SOS Voter ID 1420421; Ex. 4, USPS, 225 Military Addresses, https://pe.usps.com/text/pub28/28c2_010.htm (explaining that overseas military locations must contain certain designations). Nothing from that indicates the voter intended to abandon his or her residence in the county where registered. *See* NRS 293.487(1).

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Muth exercised care to carefully cabin his declarations and not claim to have the knowledge required by statute. But as a result, his challenges were deficient and thus appropriately rejected.

Petitioners' contention that subsection (2) of NRS 293.535 nonetheless requires clerks to start the cancellation process—even if the affidavit does not meet the standards of subsection (1)(b)—violates basic rules of statutory interpretation. NRS 293.535(2) states that:

> Upon the filing of an affidavit pursuant to paragraph (b) of subsection 1, the county clerk shall notify the registrant in the manner set forth in NRS 293.530. . . . If the registrant fails to respond or appear to vote within the required time, the county clerk shall cancel the registration.

Under the most logical reading of this provision, affidavits like Petitioners', which fail to satisfy NRS 293.535(1)(b), are facially deficient and thus ineffective. Petitioners' contrary reading would produce conflict among the sections of the statute and eliminate the express requirements of NRS 293.535(1). Under Petitioners' reading, challengers could (as Petitioners seek to do here) file an affidavit that does not comply with *any* of the express requirements of subsection (1), but still initiate a process that could result in the cancellation of a voter's registration. NRS 293.535(2). "Statutes should be read as a whole, so as not to render superfluous words or phrases or make provisions nugatory." *Clark Cnty. v. S. Nev. Health Dist.*, 128 Nev. 651, 656, 289 P.3d 212, 215 (2012). And, finally, forcing clerks to accept baseless or facially deficient challenges would violate the NVRA. Under the NVRA, states must ensure that voters "may not be removed" from the rolls except "at the request of the registrant," or because of "criminal conviction or mental incapacity," "death of the registrant" or "change in residence of the registrant." 52 U.S.C. § 20507(a)(3)–(4); *accord* DOJ Guidance at 2–3. The requirements of NRS 293.535(1) ensure that Nevada complies with this requirement, and that there is some permissible basis for the challenge.

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b. The Challenges Are Not Based on Personal Knowledge

i. NRS 293.535's Plain Language Shows that Challenges Cannot Be Based on Databases

Petitioners' challenges also are not based on personal knowledge, as required by NRS 293.535. As explained above, Petitioners do not claim to have personal knowledge of the facts required by NRS 293.535, but even assuming the challenges had included the required statements, the statements would not be based on personal knowledge. Personal knowledge is "[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said." *Personal Knowledge*, Black's Law Dictionary (12th Ed. 2024). Muth formed his beliefs about voters' changes of residence based on what the USPS said, not based on any firsthand observation. The plain language of NRS 293.535 makes clear that third-party databases are insufficient.

Petitioners are also incorrect in suggesting that personal knowledge can be drawn in all circumstances from a review of business records.[10] Mot. at 9. Muth does not maintain or compile the NCOA database; that is done by the USPS. As a result, he cannot testify about its contents based on personal knowledge. *See, e.g.*, *Commonwealth v. Trotto*, 487 Mass. 708, 732 (2021) (finding statements about databases inadmissible hearsay where research analyst did not have "personal knowledge of how the databases that she consulted were created and maintained"); *Mackey v. State*, 333 So. 3d 775, 779 (Fla. App. 2022) ("Sergeant Boyette did not have any personal knowledge of the NCIC database. Nor did he testify about how NCIC records were created, whether they were created at or near the time of the event by a person with knowledge, or whether they were kept in the ordinary course of a regularly conducted business activity."). Nevada law is in accord; NCOA data would be inadmissible hearsay under the record of regularly conducted activity exception absent supporting testimony or affidavit from a USPS custodian or other qualified person. *See* NRS 51.135.

[10] Petitioners' primary case citation, *Kroll v. IVGID*, 130 Nev. 1206 (2014) (unpublished disposition), violates the Nevada Rules of Appellate Procedure. NRAP 36(c)(3) (Unpublished Nevada Supreme Court cases may be cited only if they were decided after 2016).

This is a good and sensible rule. Muth's own data comparisons are subject to substantial doubt. For instance, Muth challenges voters where the NCOA data indicates they remained in the same county, yet Muth also claims that they appear to have moved outside of the state and to have registered in another state. *E.g.*, Ex. 2, July 29, 2024, Challenge to SOS Voter ID 5989239. Data comparisons such as the ones Petitioners performed are notoriously error-prone for a host of reasons, and should not be the catalyst to potentially removing an eligible voter from the voter rolls.

ii. Legislative History Supports that Personal Knowledge Cannot Be Based on Databases

Further, to the extent there is any ambiguity in the "personal knowledge" requirement, legislative history supports that it cannot be based on information in third-party databases. *See Nev. State Democratic Party v. Nev. Republican Party*, 256 P.3d 1, 7 (Nev. 2011). "[W]hen the same word is used in different statutes that are similar with respect to purpose and content, the word will be used in the same sense, unless the statutes' context indicates otherwise." *Savage v. Pierson*, 123 Nev. 86, 95, 157 P.3d 697, 703 (2007). Here, personal knowledge is also used in another voter challenge statute, NRS 293.547. The legislative history of NRS 293.547 reflects that, in adding the personal knowledge requirement in 1991 through Assembly Bill 652 ("AB 652"), the Legislature considered mass voter challenges based on data comparisons with DMV records. Muth Decl. Ex. 6 at 7. The commentary states that "[w]hen over 6,000 challenges are filed against voters in one county, something is wrong." *Id.* Where that happens, "[c]hallenges . . . become nothing short of intimidation." *Id.* By disallowing DMV records to form the basis for challenges, it would "restore[] the original intent of challenging a voter based upon personal knowledge that the voter is not qualified to vote." *Id.*

Petitioners argue, however, that the legislative history shows that challenges based on databases are permitted because draft language specifically disallowing challenges based on the records of the department of motor vehicles and public safety was ultimately omitted from AB 652. Mot. at 10. Even after agreeing to that deletion, however, the

legislative history continues to reflect that the personal knowledge requirement was intended to curtail organized challenges based on databases. Muth Decl. Ex. 6 at 61–62. The Deputy Secretary for Elections, Robert Elliott, clarified that the intent of the bill was to "restrict the information upon which a person could base a challenge." *Id.* at 61. The then-Secretary of State, Cheryl Lau, also responded to a concern about organized challengers by indicating that they would not have personal knowledge if "[a]ll they're doing is comparing lists." *Id.* at 62. In context, it is far more likely that the specific language relating to DMV data was omitted to avoid the argument that any other database could constitute personal knowledge—for example, based on the doctrine of *expressio unius est exclusio alterius*. *See State v. Javier C.*, 128 Nev. 536, 541, 289 P.3d 1194, 1197 (2012).

Next, in 2007, NRS 293.547 was amended again through Assembly Bill 569 to ensure that all challenges be made based on personal knowledge. The legislative history indicates that the amendment was intended to rectify the fact that, as then-codified, NRS 293.547 did not "require the challenger to have any personal or first-hand knowledge of why he or she is challenging a particular voter." Minutes of the Assemb. Comm. on Elections, Procedures, Ethics, & Constitutional Amendments at 3–4 (Apr. 3, 2007)[11] (statement of Larry Lomax, Registrar of Voters, Clark County). The minutes show the amendment was written to root out "blind, scattered challenges" and require firsthand knowledge—knowledge "a person who, through his own experience, knows . . . to be true," for all challenges under the statute. *Id.* at 4.

2. The NVRA Bars Relief Until After the General Election

Petitioners also lack any clear right to their requested relief because such relief is barred by the NVRA's 90-day restriction period before an election ("Quiet Period"). *See* 52 U.S.C. § 20507; *see also* DOJ Guidance at 3–4. This section of the NVRA prohibits the State from engaging in "any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters" during the statutory Quiet Period. The U.S. Department of Justice has clarified that this prohibition includes

[11] *Available at* https://tinyurl.com/3ddzku7k.

processing NCOA-based challenges from private parties: "**This [90-day] deadline also applies to list maintenance programs based on third-party challenges derived from any large, computerized data-matching process.**" DOJ Guidance at 4 (emphasis in original). And the case law is to the same effect. *See, e.g.*, *Arcia*, 772 F.3d at 1344, 1348 (State's use of "a mass computerized data-matching process to compare the voter rolls with other state and federal databases, followed by the mailing of notices" during the Quiet Period violated the NVRA); *Majority Forward v. Ben Hill Cnty. Bd. of Elections*, 512 F. Supp. 3d 1354, 1369–70 (M.D. Ga. 2021) (sustaining mass challenge based on NCOA data without individualized probable cause inquiry would violate 90-day Quiet Period provision); *Mont. Democratic Party v. Eaton*, 581 F. Supp. 2d 1077, 1083 (D. Mont. 2008) ("A voter cannot be required to confirm his or her address" based on NCOA-based challenges during the 90-day Quiet Period.). This inclusion of third-party, NCOA-based challenges makes good sense; the State may not outsource to third-party challengers the list removal activities that it could not do itself during the Quiet Period. Accordingly, NRS 293.535 is preempted to the extent it would permit the challenges here to be processed during the Quiet Period—for the reasons above, it does not.

Petitioners nonetheless claim that the Court can provide relief because "the results of Petitioners' actions do not remove any registrant from the 'official eligible list.'" Mot. at 10. That position cannot be reconciled with their own argument on harm—or the apparent aim of this lawsuit. *See, e.g., id.* at 11 ("[T]he notice will not be timely *to have the registrant's registration cancelled* . . . .") (emphasis added). Cancellation is the result of a successful NRS 293.535 challenge. "If the registrant fails to respond or appear to vote within the required time, the county clerk *shall cancel the registration*." NRS 293.535(2) (emphasis added). And to the extent Petitioners mean that the *immediate* result of their challenge is not cancellation, Petitioners' argument is a non-sequitur. Nevada's own systematic list maintenance activities based on NCOA data do not result in immediate cancellation, either—the NVRA prohibits immediate cancellation based on change of address. 52 U.S.C. § 205027(d)(1). But as the DOJ Guidance and cases cited above

demonstrate, Nevada could not run its own NCOA-based systematic list maintenance program after 90 days before the election. DOJ Guidance at 4 ("90-day deadline applies to State list maintenance verification activities *such as general mailings* . . . .") (emphasis added).

Likewise, Petitioners' invocation of *Common Cause/New York v. Brehm*, 344 F. Supp. 3d 542, 548 (S.D.N.Y. 2018), Mot. at 11, sheds no light on this issue; that case did not concern the Quiet Period under 52 U.S.C. § 20507(c)(1) at all, but, instead, 52 U.S.C. § 20507(d)(1), a different section of the NVRA dealing with the notice period before a voter may be removed from the rolls. It is irrelevant here.

3. Laches Also Bars Relief

"Laches is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable." *Carson City v. Price*, 113 Nev. 409, 412, 934 P.2d 1042, 1043 (1997) (quoting *Bldg. & Constr. Trades v. Pub. Works*, 108 Nev. 605, 610–11, 836 P.2d 633, 636–37 (1992)). "To determine whether a challenge is barred by the doctrine of laches, this court considers (1) whether the party inexcusably delayed bringing the challenge, (2) whether the party's inexcusable delay constitutes acquiescence to the condition the party is challenging, and (3) whether the inexcusable delay was prejudicial to others." *Miller v. Burk*, 124 Nev. 579, 598, 188 P.3d 1112, 1125 (2008) (citing *Bldg. & Constr. Trades*, 108 Nev. at 611, 836 P.2d at 636–37).

Time is of the essence in election matters, both in terms of initiating and resolving disputes, so that election officials can timely and properly administer elections. This is because "[b]allots and elections do not magically materialize. They require planning, preparation, and studious attention to detail if the fairness and integrity of the electoral process is to be observed." *Perry v. Judd*, 471 F. App'x 219, 226 (4th Cir. 2012). As such, laches properly—and especially—applies in the election context. *See Miller*, 124 Nev. at 597–99, 188 P.3d at 1124–25 (applying laches to Legislature's challenge to language adopted through initiative petition); *Paher v. Cegavske*, Case No. 3:20-cv-00243-MMD-

WGC, 2020 WL 2748301, at *5–6 (D. Nev. May 27, 2020) (applying laches to request for injunctive relief to stop the implementation of an all-mail election); *cf. Harris v. Purcell*, 973 P.2d 1166, 1169 (Ariz. 1998) (en banc) ("In election matters, time is of the essence because disputes concerning election and petition issues must be initiated and resolved, allowing time for the preparation and printing of absentee voting ballots."). A delay of even 11 days in the election context justifies the application of laches. *See Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980).

Here, both delay and prejudice exist and thus justify the Court's application of laches to Petitioners' lawsuit—a "Hail Mary" filed nearly two months after initially submitting written challenges, and just five weeks before the 2024 General Election. Petitioners submitted their first written challenges to the Registrar on July 29, 2024. Pet. ¶ 1; Muth Decl. ¶ 1. One month passed, and the NVRA's 90-day Quiet Period had begun. Then, on August 27, 2024, the Secretary issued his guidance to county clerks reminding them that personal knowledge is required for challenges made under NRS 293.535 and 293.547, and clarifying what constitutes "personal knowledge" for the purpose of such challenges. *See generally* Pet. Ex. 1; *see also* Muth Decl. ¶ 2. On August 28, 2024, Petitioner Muth published a blog post about Secretary Aguilar's guidance. *See* Muth Decl. Ex. 2 at 1. And by September 8, Muth sent a 20-page "open letter" to the Secretary and local elections officials, in which Muth responded to the guidance. *Id.* Two days later, on September 10, Petitioners' counsel sent county district attorneys, including Washoe County's, a letter (i) alleging county clerks' "failure to process several voter/registration challenges" filed by Petitioners and (ii) threatening "the Court's involvement on Thursday, September 12, 2024," if clerks continued to ignore Petitioners' flawed challenges. *Id.*, Ex. 4 at 1–2. Yet Petitioners sat on their hands for 13 more days before filing their Petition on September 23, and another three days before moving for a preliminary injunction on September 26—again, roughly five weeks before the general election. *See Kay*, 621 F.2d at 813 (11-day delay justifying application of laches).

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Petitioners' delays in (i) submitting their flawed and deficient written challenges and (ii) filing this lawsuit have inexcusably prejudiced the Secretary and the Registrar such that laches should bar Petitioners' request for relief. Petitioners had the same concerns about NRS 293.535's requirements for written challenges (and the validity of their own challenges) since at least July 29, 2024. *See* Pet. ¶ 1; Mot. at 2, 3, 4; Muth Decl. ¶ 1. Petitioners waited until after the Secretary issued his August 27, 2024, guidance—nearly one month later—to further escalate their dispute. All of Petitioners' subsequent actions occurred weeks after the NVRA's 90-day Quiet Period had begun on August 7, 2024, for the 2024 general election. Petitioners waited to sue until three days after county clerks across Nevada were required to start distributing mail ballots to voters (September 20, 2024)—registered voters that could be subject to one of Petitioners' challenges. *See* 52 U.S.C. § 20302(a)(8); NRS 293D.320(1). Petitioners' inaction during these times suggests that they had accepted their fate as purported challengers pursuant to NRS 293.535—that is, "acquiescence to the condition the party is challenging," *Miller*, 124 Nev. at 598, 188 P.3d at 1125— especially when compared to the speed with which they penned the blog post and 20-page "open letter" criticizing the Secretary's guidance (*i.e.*, one and 12 days, respectively). Nowhere in their Petition or Motion do Petitioners explain, much less justify, why they waited so long to ask this Court to force the Registrar to mail notices to over 11,000 registered voters before the November 5 general election.

Petitioners' delays are not only inexcusable; they also prejudice the Secretary, the Registrar, and the roughly 11,000 registered voters named in Petitioners' challenges. Granting Petitioners relief would undermine the integrity of Nevada's elections in several ways. First, it would force the Registrar to violate the NVRA by (i) systematically purging over 11,000 voters from the rolls "based on third-party challenges derived from a[] large, computerized data-matching process" (ii) during the 90-day Quiet Period. DOJ Guidance at 2; *see* 52 U.S.C. § 20507(c)(2)(A).

Second, granting relief here would force wildly inconsistent voter roll maintenance practices among county clerks, thus causing the Secretary's betrayal of his duty to

faithfully and consistently apply Nevada's election laws. *See* NRS 293.124; *Miller v. Burk*, 124 Nev. 579, 588, 188 P.3d 1112, 1118 (2008) (recognizing that the Secretary is "mandated to, among other things, uphold Nevada's Constitution, execute and enforce Nevada's election statutes, and administer Nevada's election process"); *Heller v. Legis. of State of Nev.*, 120 Nev. 456, 461, 93 P.3d 746, 750 (2004) (per curiam) (highlighting that the Secretary "must obtain and maintain consistency in the application, operation and interpretation of election laws").

And third, mailing written challenges by November 1, just four days before the 2024 general election, would likely confuse the thousands of affected voters and deter them from going to the polls. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and incentive to remain away from the polls. As an election draws closer that risk will increase."). Petitioners cannot now, on the eve of an election, force these voters (and the Registrar) to bear the costs of their inaction and defective challenges. Because "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy," this Court should reject Petitioners' request for relief. *Id.* at 4; *see also Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring) ("The important principle of judicial restraint not only prevents voter confusion but also prevents election administrator confusion—and thereby protects the State's interest in running an orderly, efficient election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election.").

B. Petitioners Failed to Verify Their Claims Through an Affidavit as Required by NRS 34.170, Thus Rendering the Writ Petition Deficient

Nevada law requires a petitioner seeking mandamus relief to verify his or her petition with an affidavit. *See* NRS 34.170; *MountainView Hosp. v. Dist. Ct.*, 128 Nev. 180, 185, 273 P.3d 861, 865 (2012) ("An affidavit is a written statement sworn to by the declarant before an officer authorized to administer oaths. . . . To prove that an affidavit was made under oath, it typically includes a jurat.") (citations and quotation marks omitted).

Yet here, Petitioners have ignored this requirement and failed to support their claims by affidavit. *See generally* Pet. A court may only issue a writ of mandamus "upon affidavit, on the application of the party beneficially interested." NRS 34.170; *cf.* NRS 34.030 (requiring supporting affidavit before issuing writs of certiorari/review), NRS 34.330 (same requirement for writs of prohibition); NRAP 21(a)(5) (requiring mandamus petitions to "be verified by the affidavit or declaration of the petitioner" or the petitioner's attorney, to "be filed with the petition"). Nevada courts routinely deny petitions for mandamus relief on the ground that a petition is unsupported by affidavit. *See, e.g.*, *White v. Eighth Jud. Dist. Ct.*, Case No. 85312, 2022 WL 4769408, at *1 (Nev. Sept. 30, 2022) (unpublished disposition) (denying mandamus relief because pro se petitioner failed to "verify the petition by affidavit or declaration of the petitioner" in violation of NRS 34.170 and NRAP 21(a)(5), among other requirements); *Sgro & Roger v. Eighth Jud. Dist. Ct.*, Case No. 76418, 2018 WL 3624635, at *1 & n.1 (Nev. July 20, 2018) (unpublished disposition) (denying mandamus relief—an "extraordinary and discretionary intervention"—due in pertinent part to "Petitioner's failure to provide an affidavit of the party beneficially interested [under] NRS 34.170" as a "bas[i]s on which to deny this writ petition"); *United Road Towing, Inc. v. Eighth Jud. Dist. Ct.*, Case No. 69538, 2016 WL 606001, at *1 & n.1 (Nev. Feb. 12, 2016) (unpublished disposition) (similar).

As repeatedly applied by the Nevada Supreme Court, NRS 34.170's affidavit requirement constitutes an independent ground warranting denial of mandamus relief when not satisfied. Because Petitioners did not file any supporting affidavit[12] verifying their Petition, thus failing to comply with statutory requirements, the Petition is facially deficient and warrants denial on this independent ground.[13] To condone Petitioners' failure

[12] NRS 53.045 allows a party to use an unsworn declaration in lieu of an affidavit to establish the truth or existence of a matter. *Accord MountainView Hosp.*, 128 Nev. At 185-86, 273 P.3d at 865. Even so, Petitioners failed to include an unsworn declaration with their Petition—"signed by the declarant under penalty of perjury, and dated," among other requirements, NRS 53.045—in lieu of a proper affidavit.

[13] On September 26, 2024, Petitioners filed the Declaration of Charles Muth in Support of Motion for Preliminary Injunction. As the document's title illustrates, this unsworn declaration was filed in support of Petitioners *preliminary injunction motion*, not for purposes of verifying their request for mandamus relief. *See generally* Muth Decl.

to base their mandamus claim "upon affidavit, on the application of the party beneficially interested," would lead this Court to impermissibly interpret NRS 34.170 in a way "that renders language meaningless or superfluous." *Williams v. State Dep't of Corr.*, 133 Nev. 594, 596, 599, 402 P.3d 1260, 1262, 1264 (2017) (citation omitted).

C. Petitioners Lack Standing to Seek Declaratory Relief

As in their request for mandamus relief, Petitioners—both COF and Muth—are also not entitled to declaratory relief because they lack standing. "[A] party must demonstrate standing for each individual claim," and Petitioners have failed to meet their burden for their declaratory relief claim. *Nat'l Ass'n of Mut. Ins. Cos. v. Dep't of Bus. & Indus., Div. of Ins.*, 524 P.3d 470, 477 (Nev. 2023). In seeking declaratory relief, Petitioners would have to demonstrate that they suffered an injury-in-fact. *Id.* at 476–77. The injury-in-fact showing required under Nevada law is the same as the showing required in federal cases under Article III. *See id.* at 476. Petitioners would therefore have to show an injury-in-fact that is concrete, meaning "real and not abstract," and "particularized," meaning it affects them "in a personal and individual way." *FDA v. All. for Hippocratic Medicine*, 602 U.S. 367, 381 (2024) (citation omitted). Petitioners have not met their burden.

Petitioners claim harm based on a "public . . . right to make sure the voter rolls are clean," and protecting "Petitioners and the citizens of Nevada, and the integrity of the election process." Mot. at 2, 12. This is nothing more than Petitioners "raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the . . . laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large." *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam). Petitioners' generalized grievance is quintessentially insufficient to establish standing. *Id.*; *Drake v. Obama*, 664 F.3d 774, 782 (9th Cir. 2011) (holding that plaintiff voter lacked standing to challenge Barack Obama's eligibility to serve as U.S. President because plaintiff had "no greater stake in this lawsuit than other United States citizen," as this was "too generalized to confer standing").

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D. Petitioners Request Relief That Cannot Be Granted

Petitioners seek an injunction requiring the Registrar "to remove any mail-in ballot that they receive [*sic*] from any of the challenged registrants until such time as the [Registrar] can confirm that the challenged registrant is eligible to vote, and in fact, the ballot was voted by the challenged registrant." Mot. at 13. There is no authority under Nevada law that would allow this extraordinary relief that could disenfranchise voters and cause substantial chaos. *See Ribar v. Washoe Cnty.*, Case No. 88901, 2024 WL 3665320, at *2 (Nev. Aug. 5, 2024) (unpublished disposition) (extraordinary relief not warranted where there was no clear legal duty to do what was requested).

All active voters are generally sent mail ballots. NSR 293.269911(1). If the challenges are processed, inactivation could only occur 33 days after they are sent. NRS 293.535(2) (notification must be made "in the manner set forth in NRS 293.530); NRS 293.530(1)(d) ("date of notice is deemed to be 3 days after it is mailed"); NRS 293.530(1)(g) (county clerk to designate voter inactive if voter does not respond to notice within 30 days). Inactivation therefore could not occur before the November 2024 general election. Nothing in the law allows for mail ballots submitted by active voters to be thrown out wholesale.

V. CONCLUSION

For all the reasons above, the Court should deny Petitioners' requests for mandamus and declaratory relief.

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AFFIRMATION

The undersigned affirms that this document does not contain the personal information of any person.

DATED this 9th day of October 2024.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 9th day of October, 2024, I served a true and correct copy of the foregoing **SECRETARY AND REGISTRAR'S RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS** by electronic service to the participants in this case who are registered with the Second Judicial District Court's eFlex system to this matter.

/s/ Aaron D. Van Sickle
AG Legal Secretary

INDEX OF EXHIBITS

EXHIBIT NO.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1	USPS, USPS.com Official Change-of-Address	6
2.	July 29, 2024, Challenge to SOS Voter ID 5989239	2
3.	August 28, 2024, Challenge to SOS Voter ID 1420421	2
4.	USPS, 225 Military Addresses	2