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10 *Attorneys for Intervenor-Defendants*
Vet Voice Foundation and Nevada Alliance for Retired Americans

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12
13 IN THE UNITED STATES DISTRICT COURT
14 FOR THE DISTRICT OF NEVADA

15 REPUBLICAN NATIONAL COMMITTEE;
NEVADA REPUBLICAN PARTY; DONALD
16 J. TRUMP FOR PRESIDENT 2024, INC.; and
DONALD J. SZYMANSKI,

17 Plaintiffs,

18 v.

19 CARI-ANN BURGESS, *in her official*
20 *capacity as the Washoe County Registrar of*
Voters; JAN GALASSINI, *in her official*
21 *capacity as the Washoe County Clerk*;
LORENA PORTILLO, *in her official capacity*
22 *as the Clark County Registrar of Voters*;
LYNN MARIE GOYA, *in her official capacity*
23 *as the Clark County Clerk*; FRANCISCO
AGUILAR, *in his official capacity as Nevada*
24 *Secretary of State*,

25 Defendants.

Case No. 3:24-cv-00198=MMD-CLB

**INTERVENOR-DEFENDANTS’
MOTION TO DISMISS¹**

26
27 ¹ Intervenor-Defendants filed this Motion to Dismiss as a Proposed Motion to Dismiss on June 5, 2024, ECF
28 No. 69, pending adjudication of their Motion to Intervene. Intervention was granted on June 6,
2024. ECF No. 70.

1 Vet Voice Foundation (“Vet Voice”) and the Nevada Alliance for Retired Americans
 2 (“Alliance”) (together, “Intervenors”) move to dismiss the Complaint in this action under Federal
 3 Rules of Civil Procedure 12(b)(1) and 12(b)(6).

4 INTRODUCTION

5 Nevada law includes a commonsense measure under which mail ballots are counted if they
 6 are “[p]ostmarked on or before the day of the election;” and “[r]eceived by the clerk not later than
 7 5 p.m. on the fourth day following the election.” NRS 293.269921(1). This avoids disenfranchising
 8 eligible and qualified voters who timely cast mail ballots on or before election day that are
 9 delivered shortly after. More than twenty states and territories have similar laws.

10 Plaintiffs—the Republican National Committee, Nevada Republican Party, Donald J.
 11 Trump for President 2024, Inc., and Donald J. Szymanski (“Plaintiffs”)—seek to strike down this
 12 sensible rule by arguing that it conflicts with the federal Election Day Statutes, 2 U.S.C. §§ 1, 7
 13 and 3 U.S.C. § 1, and, as a result, violates Plaintiffs’ constitutional rights to vote and stand for
 14 office. *See* Compl. ¶¶ 62–82, ECF No. 1. They ask this Court to order that Nevada election officials
 15 reject and refuse to count all mail ballots that arrive after election day, despite their being timely
 16 cast by qualified Nevada voters. There is no legal basis for that demand.

17 Plaintiffs have tried this gambit before. Just months ago, they filed a nearly identical
 18 complaint in Mississippi challenging that state’s similar ballot receipt deadline. *See generally*
 19 Compl., *Republican National Committee v. Wetzel*, Case No. 1:24-cv-25 (S.D. Miss. Jan. 6, 2024),
 20 ECF No. 1 (“*Wetzel* Compl.”). Prior to that suit, four different courts—including yet another case
 21 where the RNC was plaintiff—rejected the precise claims the Plaintiffs raise here, either on
 22 standing, the merits, or both.² Undeterred by this uniform record of failure, the Plaintiffs now ask
 23 this Court to be the first in the nation to strike down such a ballot receipt law.

24
 25 ² *See, e.g., Bognet v. Sec’y Commonwealth of Pa.*, 980 F.3d 336, 348–49 (3d Cir. 2020), *cert.*
 26 *granted, judgment vacated sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021); *Bost v. Ill.*
 27 *State Bd. of Elections*, 684 F. Supp. 3d 720, 739 (N.D. Ill. July 26, 2023), *appeal pending* No. 23-
 28 2644 (7th Cir.); *Splonskowski v. White*, No. 1:23-CV-00123, 2024 WL 402629, at *4 (D.N.D. Feb.
 2, 2024); *Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354, 366 (D.N.J. 2020)
 (“*Way P*”); *see also Donald J. Trump for President, Inc. v. Way*, No. 20-10753 (MAS) (ZNQ),
 2020 WL 6204477, at *11 (D.N.J. Oct. 22, 2020) (“*Way IP*”).

1 The fifth or sixth time is not the charm. Plaintiffs lack standing to bring their claims. They
 2 fail to allege any organizational injury because they do not allege any concrete, non-speculative
 3 diversion of resources, or cognizable harm to their candidates' electoral prospects, as a result of a
 4 deadline that merely allows more ballots mailed by qualified and eligible voters on or before
 5 election day to be counted. Plaintiffs also fail to state a claim for which relief may be granted.
 6 Their statutory claim fails because Plaintiffs have no private right of action to enforce the Election
 7 Day Statutes, and because Nevada law does not conflict with those statutes in any event. And their
 8 constitutional claims fail because they show no constitutional violation under the governing
 9 *Anderson-Burdick* analysis. Nevada's ballot receipt deadline is fully compatible with federal law.
 10 The Court should dismiss Plaintiffs' claims in full.

11 BACKGROUND

12 I. Nevada's mail ballot voting laws.

13 Voting by mail is extremely popular in Nevada.³ For "every election," the county clerk
 14 sends a mail ballot to "each active registered voter in the county and each person who registers to
 15 vote or updates his or her voter registration information not later than the 14 days before the
 16 election," unless the voter chooses to opt out of receiving a mail ballot. NRS 293.269911. If the
 17 voter opts to return their ballot by mail, it must be "[m]ailed to the county clerk, and: (1)
 18 [p]ostmarked on or before the day of the election; and (2) [r]eceived by the clerk not later than 5
 19 p.m. on the fourth day following the election." NRS 293.269921(1)(b). "If a mail ballot is received
 20 by mail not later than 5 p.m. on the third day following the election and the date of the postmark
 21 cannot be determined, the mail ballot shall be deemed to have been postmarked on or before the
 22 day of the election." NRS 293.269921(2).

23 NRS 293.269921's "Mail Ballot Receipt Deadline" was enacted in 2021. *See* Act of June
 24 2, 2021, Ch. 248, 2021, 2021 Nev. Laws 1213, 1214. It shortened the pre-existing mail ballot
 25 receipt deadline by three days, from "5 p.m. on the seventh day following the election" to 5 p.m.
 26

27 ³ *See* Nev. Sec'y of State, *Voter Turnout*, <https://silverstateelection.nv.gov/vote-turnout/> (last
 28 accessed May 9, 2024) (showing 56.7% of primary voters and 51.21% of general election voters
 cast mail ballots in 2022).

1 on the *fourth* day following the election. *Id.* Over twenty states and territories have similar laws
 2 allowing mail ballots to be counted if they are received within a certain period after election day.⁴
 3 Among these states and territories, Nevada’s Mail Ballot Receipt Deadline is relatively modest—
 4 most allow even *more* time for timely-cast ballots to arrive after election day.

5 Many other key acts of election administration in Nevada also happen after election day by
 6 both necessity and statutory design. *E.g.*, NRS 293.269927 (signature confirmation process,
 7 including curing, occurring up to six days after election day); NRS 293.413 (election contest must
 8 be filed no later than 14 days after election); NRS 293.403 (recount must be requested no later
 9 than three days after canvass); NRS 293.391 (requiring preservation of ballots for certain period
 10 of time and two week notice before their destruction). This includes the actual counting of mail
 11 ballots, NRS 293.269931 (count must be completed by seventh day following election, or three
 12 days after the Mail Ballot Receipt Deadline), as well as the canvass, NRS 293.387(1) (canvass
 13 must be completed by tenth day following election).

14 **II. Plaintiffs’ Complaint and Similar Lawsuits**

15 Plaintiffs seek an injunction prohibiting Defendants from counting any absentee ballots
 16 received by mail after election day in all future congressional and presidential elections in Nevada,
 17 as well as a declaration that the Ballot Receipt Deadline deprives them of rights secured by the
 18 Constitution and Acts of Congress. *See* Compl. at 15–16 (Prayer for Relief). Since 2020, similarly-
 19 situated plaintiffs have made at least five prior attempts to challenge ballot receipt deadlines in
 20 federal court under similar theories—including two cases brought by the RNC (with others) and
 21 one brought by the Trump Campaign. All have failed.

22 In the first case, *Way I*, the RNC, the Trump campaign, and the New Jersey Republican
 23 Party alleged that a New Jersey law allowing officials to canvass ballots received within two days
 24 of election day was preempted by the Election Day Statutes. 492 F. Supp. 3d at 369. The district
 25 court rejected the plaintiffs’ motion for a preliminary injunction, finding they were unlikely to

26
 27 ⁴ *See Tbl. 11: Receipt & Postmark Deadlines for Absentee/Mail Ballots*, Nat’l Conf. of State Legs.
 28 (Mar. 18, 2024), <https://www.ncsl.org/elections-and-campaigns/table-11-receipt-and-postmark-deadlines-for-absentee-mail-ballots>.

1 succeed on the merits. *Id.* at 373. It later dismissed the action for lack of standing. *Way II*, 2020
 2 WL 6204477, at *11 (finding alleged injury speculative and generalized grievance).

3 Next, a Pennsylvania Republican congressional candidate and voters brought a similarly-
 4 reasoned suit challenging the Pennsylvania Supreme Court’s decision that Pennsylvania’s
 5 constitution required a three-day post-election receipt deadline. *See Bognet*, 980 F.3d at 345–46.⁵
 6 The district court declined to issue injunctive relief and the Third Circuit affirmed, finding the
 7 plaintiffs lacked standing. *Id.* at 364–65.⁶

8 The third case, *Bost*, involved nearly identical challenges to Illinois’ 14-day ballot-receipt
 9 deadline as here, alleging a “Violation of the Right to Vote,” “Violation of the Right to Stand for
 10 Office,” and “Violation of [the Election Day Statutes].” Compl. at 7–10, *Bost*, No. 22-cv-2754,
 11 (N.D. Ill. May 25, 2022), ECF No. 1 (“*Bost* Compl.”). Plaintiffs asserted standing as voters based
 12 upon the “dilution” of their votes by “invalid” ballots counted after election day, and as a candidate
 13 based on the possibility that “invalid” votes would be counted and because the law “forces [him]
 14 to spend money and time campaigning after Election Day.” 2023 WL 4817073, at *1, *7. The
 15 district court dismissed, rejecting each asserted basis for standing and further holding that the
 16 plaintiffs had not stated a claim upon which relief may be granted. *Id.* at *14.⁷

17 In July 2023, a county elections administrator brought a fourth case, this one challenging
 18 a North Dakota statute that permits mail ballots to be counted if postmarked by the day before
 19 election day and received within 13 days of the election. *See Splonskowski*, 2024 WL 402629, at
 20 *1. The district court dismissed the case for lack of standing. *Id.* at *2.

21 Finally, the RNC, the Mississippi Republican Party, and others brought a suit nearly

22 ⁵ In the underlying state court action, the Pennsylvania Supreme Court noted that the Election Day
 23 Statutes were consistent with “federal and state law allowing for the tabulation of military and
 24 overseas ballots received after Election Day.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345,
 368 n.23 (Pa. 2020).

25 ⁶ The Supreme Court’s vacatur of *Bognet* as moot was not based on the merits but rather in keeping
 26 its practice of vacating opinions that become moot on appeal. *See United States v. Munsingwear,*
 27 *Inc.*, 340 U.S. 36, 39 (1950). The vacated decision remains persuasive. *See Melot v. Bergami*, 970
 28 F.3d 596, 599 n.11 (5th Cir. 2020) (finding persuasive a “thoughtful opinion” that was “vacated
 as moot on rehearing”).

⁷ The plaintiffs’ appeal of that ruling is currently pending, with argument scheduled to be heard by
 the Seventh Circuit on March 28, 2024. *See Bost*, No. 23-2644 (7th Cir. Aug. 21, 2023).

1 identical to this one in federal court in Mississippi. *See Wetzel* Compl. Cross motions for summary
2 judgment are currently pending.

3 STANDARD OF LAW

4 Rule 12(b)(1) requires dismissal when a plaintiff fails to show it has standing to adjudicate
5 its claims in federal court. A plaintiff must show it has (1) “suffered an injury-in-fact,” (2) that is
6 “fairly traceable to the challenged action of the defendant,” and (3) that is “likely” to be “redressed
7 by a favorable [judicial] decision.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)
8 (cleaned up). An injury-in-fact requires: (1) the “invasion of a legally protected interest,” (2) an
9 injury that is both “concrete and particularized,” and (3) an injury that is “actual or imminent, not
10 conjectural or hypothetical.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan*, 504
11 U.S. at 560).

12 Rule 12(b)(6) requires that a complaint “state[s] a claim to relief that is plausible on its
13 face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S.
14 544, 570 (2007)). “Threadbare recitals of the elements of a cause of action, supported by mere
15 conclusory statements, do not suffice.” *Id.* at 678. Dismissal is appropriate if plaintiffs “failed to
16 plead more than conclusory allegations and [their] complaint lacked any cognizable legal
17 theories[.]” *Sherstad v. Countrywide Home Loans, Inc.*, No. 2:10-CV-946 JCM (PAL), 2010 WL
18 3021614, at *1 (D. Nev. July 29, 2010).

19 ARGUMENT

20 I. Plaintiffs lack standing.

21 Plaintiffs assert three theories of standing: organizational injury based on a diversion of
22 resources, a competitive injury to their candidates’ electoral prospects, and vote dilution. Plaintiffs
23 do not adequately allege an injury in fact under any of these theories.

24 A. Organizational Plaintiffs have not suffered a cognizable diversion of resources 25 injury.

26 Organizations can show standing if a challenged law “frustrated their organizational
27 missions and . . . they diverted resources” as a result. *Friends of the Earth v. Sanderson Farms*,

1 *Inc.*, 992 F.3d 939, 942 (9th Cir. 2021) (citing *Am. Diabetes Ass’n v. U.S. Dep’t of the Army*, 938
2 F.3d 1147, 1154 (9th Cir. 2019)). Here, this requires facts showing that the Mail Ballot Receipt
3 Deadline “perceptibly impaired [Plaintiffs’] ability to provide the services they were formed to
4 provide.” *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 765 (9th Cir. 2018) (cleaned up).
5 That means they “affirmative[ly]” “expended additional resources that they would not have
6 otherwise expended” because of the challenged law, not that they merely conducted “business as
7 usual” in continuing “existing advocacy.” *Friends of the Earth*, 992 F.3d at 942–43 (internal
8 quotations omitted). And the diversion must be in response to a concrete, imminent, actual harm.
9 *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 402 (2013).

10 Plaintiffs do not satisfy these requirements. They allege that the Mail Ballot Receipt
11 Deadline forces them to “divert resources from in-person voting activities and election-integrity
12 measures, and instead spend money on mail ballot chase programs and post-election activities.”
13 Compl. ¶¶ 14, 17–19. But they provide no specificity on those “programs” and “activities,” and
14 they do not explain why the need for them is attributable specifically to mail ballots received after
15 election day, the sole subject of Plaintiffs’ claims. Regardless of what happens in this case, mail
16 ballots will be a central component of Nevada elections, and many of them will be counted after
17 election day. Plaintiffs fail to allege any basis for concluding that their mail ballot chase programs
18 and post-election activities are specifically attributable to ballots that arrive after election day,
19 rather than “business as usual.” *Friends of the Earth*, 992 F.3d at 942–43.

20 No surprise, then, that the *Bost* court rejected almost identical allegations as inadequate.
21 *See* 684 F. Supp. 3d at 726, 728–34. As that court explained, “Spending time and money on
22 campaigning is an inevitable feature of running for office” *Id.* at 739. And the idea that
23 Plaintiffs would need to expend more resources specifically due to ballots received after election
24 day “is not certainly impending” and is “mere conjecture[.]” *Id.* at 733. Even under Nevada law,
25 all mail ballots must be in the mail by Election Day, NRS 293.269921(1)(b), so Organizational
26 Plaintiffs’ “electoral fate is sealed at midnight on Election Day, regardless of the resources [they]
27 expend[] after the fact.” *Bost*, 684 F. Supp. 3d at 733–34; *see also Way II*, 2020 WL 6204477, at
28

1 *7 (finding the “unlikely chain of events where a ballot would be 1) cast after Election Day; 2)
 2 happen to lack a postmark against Postal Service policy, which is both rare and not correlated to
 3 the date the ballot is mailed; and 3) arrive faster than the Postal Service’s most optimistic
 4 expectations” to be “too speculative and remote to satisfy Article III’s actual or imminent injury
 5 requirement”); *Bognet*, 980 F.3d at 351–52 (“[F]or Bognet to have standing to enjoin the counting
 6 of ballots arriving after Election Day, such votes would have to be sufficient in number to change
 7 the outcome of the election to Bognet’s detriment. . . . Bognet does not allege as much, and such
 8 a prediction was inherently speculative when the complaint was filed. The same can be said for
 9 Bognet’s alleged wrongfully incurred expenditures and future expenditures.”). Thus, Plaintiffs do
 10 not allege any “concrete, non-speculative injuries.” *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d
 11 640, 662 (9th Cir. 2021).

12 At bottom, Plaintiffs allege that the Mail Ballot Receipt Deadline “harms” them because it
 13 allows more ballots cast by qualified voters to be counted. Compl. ¶¶ 14, 46, 56, 60. It is unclear
 14 that enfranchising more voters *could* cause anyone to be harmed in a legally cognizable way. *Cf.*
 15 *Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018) (explaining that a law that “makes it easier for
 16 some voters to cast their ballots by mail” “does not burden anyone’s right to vote”). But even if it
 17 could, that alleged “harm”—that too many qualified voters will have their timely cast ballots
 18 counted—has nothing to do with any purported diversion of resources. Regardless of what
 19 deadline is enforced, every Nevada voter will be entitled to vote by mail, and Plaintiffs will have
 20 every incentive to expend all available resources campaigning for their votes.⁸

21 A contrary ruling would mean that a plaintiff could invoke federal jurisdiction whenever a
 22 law facilitated voter turnout and broadened the voting pool. That contravenes basic democratic

23 _____
 24 ⁸ The same is true of Plaintiffs’ asserted rights to “be represented on county mail ballot central
 25 counting boards” and “to observe the handling and counting of mail ballots.” Compl. ¶ 48 (first
 26 citing NRS 293.269929(2) then citing NRS 293.269931(1); and then citing Nev. Admin. Code
 27 293.322(3), (4), 356(1)). Regardless of what happens in this case, many Nevada ballots will be
 28 counted after election day and Plaintiffs’ alleged desire to observe that counting will be the same.
 And Plaintiffs have no non-generalized right with respect to these issues in any event. *See* NRS
 293.269929(2) (providing only that election board officers “must not all be of the same political
 party”); Nev. Admin. Code 293.356 (conditional right, subject to county clerk’s discretion, for
 “any person” to observe processing and counting of ballots at central counting place). Nev. Admin.
 Code 293.322(4) (allowing for observation by “members of the general public”).

1 principles and raises Article III traceability concerns. *See Donald J. Trump for President, Inc. v.*
2 *Cegavske*, 488 F. Supp. 3d 993, 1002 (D. Nev. 2020) (observing that in cases where courts have
3 recognized organizational standing to challenge an election rule, “the challenged law has a direct
4 and specific impact on a voter’s ability to vote”); *cf. Short*, 893 F.3d at 677, 679 (rejecting
5 *Anderson-Burdick* claim challenging law that “ma[de] it easier for some voters to cast their ballots”
6 and kept “access to the ballot [] exactly the same” for other voters, and explaining plaintiffs’ theory
7 would “essentially bar a state from implementing any pilot program to increase voter turnout”).
8 Rather, where a “challenged law expands access to voting through mail without restricting prior
9 access to in-person voting . . . plaintiffs need not divert resources to enable or encourage their
10 voters to vote.” *Cegavske*, 488 F. Supp. 3d at 1002 (emphasis omitted). Their alleged choice to
11 divert any resources is purely their own, and not traceable to Defendants’ enforcement of the Mail
12 Ballot Receipt Deadline.

13 **B. Plaintiffs have not demonstrated any injury to their candidates.**

14 Plaintiffs also fail to adequately allege standing based on threatened harm to their electoral
15 prospects. To invoke “competitive standing,” a candidate must “make [a] showing of ‘an unfair
16 advantage in the election process.’” *Cegavske*, 488 F. Supp. 3d at 1003 (quoting *Drake v. Obama*,
17 664 F.3d 774, 783 (9th Cir. 2011)). But the Mail Ballot Receipt Deadline applies equally to *all*
18 candidates and to *all* voters, so no one “is specifically disadvantaged” by it. *Bost*, 684 F. Supp. 3d
19 at 737–38 (quoting *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020)); *see also*
20 *Bognet*, 980 F.3d at 351 (noting “all candidates in Pennsylvania, including Bognet’s opponent, are
21 subject to the same rules”). The Mail Ballot Receipt Deadline therefore does not threaten Plaintiffs
22 with any “harms that are unique from their electoral opponents.” *Cegavske*, 488 F. Supp. 3d at
23 1003. The voters that support them stand to be benefitted as much by the deadline as those who
24 support their opponents.

25 Intervenor are unaware of any case in which a court found that it had jurisdiction because
26 a plaintiff thought that *throwing out ballots cast by qualified voters* would likely hurt their
27 opponent more than them. As the Third Circuit observed in *Bognet*, is it not clear “how counting
28

1 *more* timely cast votes would lead to a *less* competitive race.” 980 F.3d at 351. And Plaintiffs’
2 claim that many Democratic voters across the country vote by mail and may do so closer to election
3 day, Compl. ¶¶ 56–59, does not demonstrate that the deadline threatens Plaintiffs’ electoral
4 prospects through any “unfair advantage” or “harms that are unique from their electoral
5 opponents.” *Cegavske*, 488 F. Supp. 3d at 1003.

6 Plaintiffs’ concern that ballots voted before, but received after, election day will
7 “disproportionately break for Democrats,” cutting into “fragile” “early Republican leads in close
8 races,” Compl. ¶¶ 56, 58, also does not state a cognizable injury for standing purposes—
9 competitive or otherwise. Any “lead” before all ballots are counted is an arbitrary consequence of
10 the order in which ballots are counted. Unlike a game of musical chairs, where the winner is
11 whoever happens to be sitting when the music stops, American elections end when all the ballots
12 are counted. Nevada law confirms: the certificate of election is ultimately delivered to the
13 “person[] having the highest number of votes,” NRS 293.393, 293.034—not whoever happens to
14 be leading at some point on election night. Plaintiffs have no legal entitlement to any “early lead”
15 in an election; this basis for standing must be rejected as well.

16 **C. Plaintiffs’ alleged vote dilution injuries are insufficient to confer standing.**

17 The Court should also reject Plaintiffs’ claim that “timely, valid ballots are *diluted* by
18 untimely, invalid ballots” due to the Mail Ballot Receipt Deadline. Compl. ¶ 4 (emphasis added);
19 *see also id.* ¶¶ 50–55, 79–80 (Count III). This exact theory was rejected in *Bost*, 684 F. Supp. 3d
20 at 731–33, and in *Bognet*, 980 F.3d at 356–60, as well as by a “veritable tsunami” of decisions that
21 have considered it, *O’Rourke v. Dominion Voting Sys. Inc.*, No. 20-CV-03747-NRN, 2021 WL
22 1662742, at *9 (D. Colo. Apr. 28, 2021) (collecting cases), *aff’d*, No. 21-1161, 2022 WL 1699425
23 (10th Cir. May 27, 2022), including from this same Court, *see Paher v. Cegavske*, 457 F. Supp. 3d
24 919, 926 (D. Nev. 2020) (Du, J.).

25 Plaintiffs contend that “honest votes” carry less overall weight because the Mail Ballot
26 Receipt Deadline allows “illegitimate” ballots to be counted in violation of federal law. Compl. ¶¶
27 51, 79–80. This allegedly injures them because more Democrats voted by mail than Republicans

1 in recent elections. *Id.* ¶¶ 55–60. But if Plaintiffs were correct that their votes have been “diluted”
2 by “illegitimate” votes, then so, too, were the votes of every other “honest” Nevada voter. This is
3 a “paradigmatic generalized grievance that cannot support standing.” *Bognet*, 980 F.3d at 356
4 (internal quotation omitted); *see also Bost*, 684 F. Supp. 3d at 730, 733 (finding plaintiffs alleging
5 same injuries lacked standing and noting that “[c]ourts faced with similar allegations have rejected
6 plaintiffs’ claims that they possessed standing”).

7 Numerous plaintiffs attempted to secure federal jurisdiction under this very theory in
8 litigation during and after the 2020 elections, without success, with courts uniformly finding that
9 this type of “vote dilution argument fell into the ‘generalized grievance’ category.” *Feehan v. Wis.*
10 *Elections Comm’n*, 506 F. Supp. 3d 596, 608 (E.D. Wis. 2020); *see also Wood*, 981 F.3d at 1314–
11 15 (“[N]o single voter is specifically disadvantaged’ if a vote is counted improperly, even if the
12 error might have a ‘mathematical impact on the final tally and thus on the proportional effect of
13 every vote.’” (quoting *Bognet*, 980 F.3d at 356)); *O’Rourke*, 2021 WL 1662742, at *6–9
14 (collecting over a dozen decisions from 2020 election cycle rejecting voter dilution theory); *Page*
15 *v. Tri-City Healthcare Dist.*, 860 F. Supp. 2d 1154, 1162–63 (S.D. Cal. 2012) (“Plaintiff must
16 show how his averred injury is peculiar to himself, distinguished from an injury shared equally
17 with his fellow citizens.”). As this Court correctly put in *Paher*: “Plaintiffs’ purported injury of
18 having their votes diluted due to ostensible election fraud may be conceivably raised by any
19 Nevada voter. Such claimed injury therefore does not satisfy the requirement that Plaintiffs must
20 state a concrete and particularized injury.” 457 F. Supp. 3d at 926. That holding is no less true now
21 than when the Court first reached it four years ago.

22 The “vote dilution” cases cited in the Complaint which concern apportionment or
23 redistricting illustrate the point. Compl. ¶ 79. Those cases recognize an injury when a law
24 *minimizes* a voter’s or a group of voters’ voting strength or ability to access the political process
25 *as compared to other voters*. *See, e.g., Baker v. Carr*, 369 U.S. 186, 207–08 (1962) (“The injury
26 which appellants assert is that this classification disfavors the voters in the counties in which they
27 reside, placing them in a position of constitutionally unjustifiable inequality vis-a -vis voters in
28

1 irrationally favored counties.”); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (“[A]n individual’s
 2 right to vote . . . is unconstitutionally impaired when its weight is in a substantial fashion diluted
 3 when compared with votes of citizens living on other parts of the State.”).⁹ As the Third Circuit
 4 put it in *Bognet*, these cases were “concerned with votes being weighed *differently*.” 980 F.3d at
 5 355 (emphasis added). “Vote dilution can be the basis for standing when voters are harmed
 6 compared to ‘irrationally favored’ voters from other districts.” *Clark v. Weber*, No. 2:23-CV-
 7 07489-DOC-DFMx, 2023 WL 6964727, at *3 (C.D. Cal. Oct. 20, 2023) (quoting *Wood*, 981 F.3d
 8 at 1314). “Here, by contrast, no single voter is disadvantaged relative to another voter[.]” *Id.*
 9 Indeed, no single Nevada voter’s ballot is alleged to be diluted more than any other, unlike in the
 10 redistricting context. Plaintiffs’ alleged “vote dilution” harm is thus insufficiently particularized
 11 to satisfy Article III’s injury-in-fact requirement.

12 **D. The bare allegation of illegality does not confer standing.**

13 With Plaintiffs’ organizational, associational, and vote dilution injuries inadequate, what
 14 is left is Plaintiffs’ bare assertion that the Mail Ballot Receipt Deadline violates federal law. *See*,
 15 *e.g.*, Compl. ¶¶ 67–69, 73, 78, 80. Plaintiffs claim that they should not have to conform their
 16 behavior to an allegedly invalid law, *id.* ¶¶ 14, 46, 74, or that their candidates’ electoral prospects
 17 are harmed and their votes are diluted by the counting of allegedly invalid ballots because of the
 18 challenged law, *id.* ¶¶ 4, 50–55, 60, 73, 79. But a claim that “the law . . . has not been followed”
 19 is a “generalized grievance about the conduct of government” that is insufficient to show standing.
 20 *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam); *see also Allen v. Wright*, 468 U.S. 737,
 21 754 (1984) (“This Court has repeatedly held that an asserted right to have the Government act in
 22 accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.”);
 23 *Clark v. Metro. Life Ins. Co.*, No. ED CV 17-385-JGB (SPx), 2017 WL 10589997, at *4 (C.D.
 24 Cal. Dec. 22, 2017) (“[I]f making sure the law is followed as a general matter were sufficient to
 25 give a party standing to bring a motion, the standing requirement would be illusory; anyone at any
 26

27 ⁹ Plaintiffs also cite *Anderson v. United States*, 417 U.S. 211 (1974), which was a criminal case
 28 involving a conspiracy to cast fraudulent votes in violation of federal law. That case did not have
 anything to do with standing.

1 time would have standing to bring a motion where they believe the law is not being followed, even
2 where the failure in no way affected them.”). For this reason, courts have repeatedly found similar
3 plaintiffs lacked standing to pursue similar challenges based on similar theories of injury. *See*
4 *Bognet*, 980 F.3d at 349; *Bost*, 684 F. Supp. 3d at 731–34. Plaintiffs provide no reason for this
5 Court to find otherwise here.

6 **II. Plaintiffs fail to state a claim.**

7 **A. Plaintiffs have no private right of action for their statutory claim in Count I.**

8 In Count I, Plaintiffs allege that the Mail Ballot Receipt Deadline violates three federal
9 statutes, two which set out the “day for the election” of members of Congress, and the third which
10 sets the day on which “[t]he electors of President and Vice President shall be appointed.” 2 U.S.C.
11 §§ 1, 7; 3 U.S.C. § 1. This statutory claim fails at the threshold because Plaintiff has no private
12 right of action to enforce these statutes. “Like substantive federal law itself, private rights of action
13 to enforce federal law must be created by Congress.” *Alexander v. Sandoval*, 532 U.S. 275, 286
14 (2001). “If the statute itself does not display an intent to create a private remedy, then a cause of
15 action does not exist and courts may not create one, no matter how desirable that might be as a
16 policy matter, or how compatible with the statute.” *Ziglar v. Abbasi*, 582 U.S. 120, 133 (2017)
17 (cleaned up). That is true even where a state statute is alleged to conflict with federal law, because
18 “the Supremacy Clause is not the source of any federal rights, and it certainly does not create a
19 cause of action.” *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324–25 (2015) (cleaned
20 up); *see also Tex. Voters All. v. Dallas Cnty.*, 495 F. Supp. 3d 441, 461 (E.D. Tex. 2020) (same as
21 to Election Clause). Suits for declaratory and injunctive relief rather than damages are no
22 exception: *Alexander* itself was such a case. *See Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1244
23 (M.D. Ala. 1998), *rev’d*, *Alexander*, 532 U.S. 275.

24 Plaintiffs’ reliance on *Ex parte Young* does not change this. *Ex parte Young* provides a
25 cause of action in one, specific circumstance: where an “individual claims federal law immunizes
26 him from state regulation” and sues for “an injunction upon finding the state regulatory actions
27 preempted.” *Armstrong*, 575 U.S. at 326. Thus, the Ninth Circuit allowed an action under *Ex parte*
28

1 *Young* where tenants challenged as a violation of the Due Process Clause an eviction procedure
2 under which state courts issued eviction orders without a hearing. *Moore v. Urquhart*, 899 F.3d
3 1094, 1098, 1103 (9th Cir. 2018). But as the Sixth Circuit has explained, “matters differ when
4 litigants wield *Ex parte Young* as a cause-of-action creating *sword*. In that setting—today’s
5 setting—the State is not threatening to sue anyone,” and the plaintiff seeks an affirmative change
6 to state conduct, not just immunity from unlawful regulation. *Mich. Corr. Org. v. Mich. Dep’t of*
7 *Corr.*, 774 F.3d 895, 906 (6th Cir. 2014). That is the situation *Armstrong* addresses, and it requires
8 a statutory cause of action—*Ex parte Young* does not suffice. *Armstrong*, 575 U.S. at 324–25.

9 Plaintiffs do not cite any statutory cause of action in support of their statutory claims, and
10 no such cause of action exists. In particular, 42 U.S.C. § 1983 does not authorize Plaintiffs’
11 statutory claims. For a plaintiff to sue under § 1983 based on a violation of a federal statute: (1)
12 “Congress must have intended that the provision in question benefit the plaintiff”; (2) “the plaintiff
13 must demonstrate that the right assertedly protected by the statute is not so vague and amorphous
14 that its enforcement would strain judicial competence”; and (3) “the statute must unambiguously
15 impose a binding obligation on the States.” *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997)
16 (cleaned up). Section 1983 therefore allows suit only for deprivations of “rights, privileges, or
17 immunities secured by the Constitution and laws of the United States . . . not the broader or vaguer
18 ‘benefits’ or ‘interests.’” *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). And on determining
19 “whether Congress intended to create a federal right . . . the question . . . is definitively answered
20 in the negative whe[n] a statute by its terms grants no private rights to any identifiable class.”
21 *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc. v. Kauffman*,
22 981 F.3d 347, 358–59 (5th Cir. 2020) (quoting *Gonzaga*, 536 U.S. at 283–84). “Accordingly,
23 whe[n] the text and structure of a statute provide no indication that Congress intends to create new
24 individual rights, there is no basis for a private suit, whether under § 1983 or under an implied
25 right of action.” *Id.* (quoting *Gonzaga*, 536 U.S. at 286).¹⁰

26
27 ¹⁰ While the Supreme Court addressed a statutory claim under 42 U.S.C. § 1983 based on a
28 violation of the Election Day Statutes in *Foster v. Love*, 522 U.S. 67 (1997), the Court addressed
only the meaning of the Election Day Statutes and not the existence of a cause of action. The Fifth

1 Plaintiffs’ statutory claims clearly fail the first element of the *Blessing* test, as clarified in
2 *Gonzaga*. The Election Day Statutes do not contain “rights-creating language” that unambiguously
3 creates an “*individual* entitlement.” 536 U.S. at 287 (cleaned up). The Election Day Statutes speak
4 only to the time for holding an election. They make no reference to individual rights, nor do they
5 create any entitlements for any individual. Because no federal statute confers an individual right
6 on Plaintiffs, the Court “need not proceed further than this first step of the *Blessing* test” to
7 conclude that Plaintiffs’ statutory claim for a violation of the Election Day Statutes may not be
8 brought under § 1983. *Guzman v. Shewry*, 552 F.3d 941, 953 (9th Cir. 2009). Only Plaintiffs’
9 constitutional claims are the proper subject of a § 1983 lawsuit, and those claims fail for other
10 reasons. *See infra* Part II.C.

11 **B. The Mail Ballot Receipt Deadline does not conflict with the Election Day**
12 **Statutes.**

13 Regardless, the Mail Ballot Receipt Deadline does not conflict with the Election Day
14 Statutes, so it is not preempted by them. The governing preemption analysis differs in this area,
15 because the Elections Clause of the U.S. Constitution expressly grants states the power to set the
16 “Times, Places and Manner of holding Elections for Senators and Representatives,” subject to
17 Congress’s power to “by Law make or alter such Regulations.” U.S. Const., art. I, § 4, cl.1.
18 Similarly, the Constitution vests Congress with the power to determine when electors for the office
19 of the President and Vice President are chosen, *id.*, art II, § 1, cl. 4, but otherwise reserves the
20 manner of such selection to the states, *id.* art. II, § 1, cl. 2. The Supreme Court has held that as a
21 result of these provisions, federal law “alter[s]” state election laws only when the state law cannot
22 possibly “operate harmoniously” with the federal law “in a single procedural scheme.” *Gonzalez*
23 *v. Arizona*, 677 F.3d 383, 394 (9th Cir. 2012), *aff’d sub nom. Arizona v. Inter Tribal Council of*
24 *Ariz., Inc.*, 570 U.S. 1 (2013); *see also Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775

25 _____
26 Circuit had expressly declined to address that issue below, emphasizing that among the “issues not
27 considered in this opinion” was “whether plaintiffs have stated a claim enforceable under 42
28 U.S.C. § 1983.” *Love v. Foster*, 90 F.3d 1026, 1032 n.8 (5th Cir. 1996). And that decision predated
by several years the Supreme Court’s narrowing of the scope of permissible § 1983 claims in
Gonzaga, 536 U.S. at 283 (“We now reject the notion that our cases permit anything short of an
unambiguously conferred right to support a cause of action brought under § 1983.”).

1 (5th Cir. 2000) (“[A] state’s discretion and flexibility in establishing the time, place and manner
2 of electing its federal representatives has only one limitation: the state system cannot directly
3 conflict with federal election laws on the subject.”). Congress’s power to regulate the “Times,
4 Places, and Manner” of congressional elections supersedes “inconsistent” State laws “so far as it
5 is exercised, *and no farther.*” *Arizona*, 570 U.S. at 9 (quoting *Ex parte Siebold*, 100 U.S. 371, 392
6 (1880)) (emphasis added).

7 There is no conflict here. Plaintiffs argue otherwise only by putting forward an impossibly
8 broad interpretation of the statutory term “day for the election” in the Election Day Statutes. But
9 the plain meaning of that term requires only that voters *cast* their ballots by election day. Plaintiffs’
10 argument that the Election Day Statutes require “receipt” contradicts the statutes’ plain text,
11 purpose, structure, and history—not to mention ample federal case law.

12 **1. Plaintiffs’ interpretation is inconsistent with the statutory text.**

13 Statutory interpretation begins with the text. *Ross v. Blake*, 578 U.S. 632, 638 (2016). When
14 Congress exercises its power under the Elections Clause, “the reasonable assumption is that the
15 statutory text accurately communicates the scope of Congress’s pre-emptive intent.” *Arizona*, 570
16 U.S. at 14. Thus, Courts should “read Elections Clause legislation simply to mean what it says.”
17 *Id.* at 15. The text of the Election Day Statutes simply designates when the “election” must occur.
18 2 U.S.C. §§ 1, 7; 3 U.S.C. §§ 1, 21(1). There is no mention of procedures for the transmission,
19 receipt, processing, or counting of ballots. Those decisions are thus left to the states.

20 As multiple federal courts have explained: “[f]ederal law does not provide for *when* or *how*
21 ballot counting occurs,” *Bognet*, 980 F.3d at 353, and the Election Day Statutes “are silent on
22 methods of determining the timeliness of ballots,” *Way I*, 492 F. Supp. 3d at 372. Because
23 Congress has not codified a competing receipt deadline, “compliance with both [the Receipt
24 Deadline] and the federal election day statutes does not present ‘a physical impossibility,’” and no
25 preemption has occurred. *Millsaps v. Thompson*, 259 F.3d 535, 549 (6th Cir. 2001) (quoting *Fla.*
26 *Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)). “Put another way, there is
27 no reason to think that simply because Congress established a federal election day it displaced all
28

1 State regulation of the times for holding federal elections.” *Id.*; *see also Bost*, 684 F. Supp. 3d at
2 736 (holding Illinois’ post-election-day receipt deadline “operates harmoniously with the federal
3 statutes that set the timing for federal elections”).

4 Contemporaneous dictionary definitions confirm this. Congress first enacted the Election
5 Day Statutes in the mid-nineteenth century. *See* Act of Jan. 23, 1854, 5 Stat. 721 (1845)
6 (predecessor to 3 U.S.C. § 1); Act of Feb. 2, 1872, 17 Stat. 28 (1872) (predecessor to 2 U.S.C.
7 § 7). As the Supreme Court has observed, nineteenth century dictionaries define “election” as
8 “[t]he day of a public choice of officers.” *Foster*, 522 U.S. at 71 (defining an “election” as the
9 voters “act of choosing a person to fill an office” (quoting N. Webster, *An American Dictionary of*
10 *the English Language* 433 (Charles Goodrich & N. Porter eds. 1869))). That is, “election” day is
11 the day on which the “public” make their “choice.”

12 Applying that definition, there is no conflict. Nevada’s Ballot Receipt Deadline ensures
13 that voters make their “choice” by no later than election day. Once the voter mails the ballot—on
14 or before that day—the voter has made their choice. The RNC’s assertion that the Mail Ballot
15 Receipt Deadline “holds voting open” after election day, Compl. ¶ 69, is therefore simply wrong.
16 *See Bost*, 684 F. Supp. 3d at 736–37 (“By counting only th[o]se ballots that are postmarked no
17 later than Election Day, the Statute complies with federal law that set[s] the date for Election
18 Day.”); *Way I*, 492 F. Supp. 3d at 372 (“New Jersey law prohibits canvassing ballots *cast* after
19 Election Day, *in accordance with the Federal Election Day Statutes.*” (emphasis added)).

20 **2. *Foster v. Love* does not support Plaintiffs’ position.**

21 *Foster v. Love*, 522 U.S. 67 (1997), does not support Plaintiffs’ position. In *Foster*, the
22 Supreme Court addressed a Louisiana “open primary” system under which the election of
23 candidates for Congress could be *concluded* as a matter of law *before* the federally-mandated
24 “election day.” 522 U.S. at 70. Under that system, if any candidate received a majority of the
25 votes cast in the open primary, they would be “elected,” and *no* general election would be held on
26 the federal election day. *Id.* The Court concluded this system was inconsistent with the Election
27 Day Statutes, but it emphasized that its ruling was narrow, holding “only that if an election does
28

1 take place, it *may not be consummated prior to* federal election day.” *Id.* at 72 n.4 (emphasis
2 added). It did not purport to “isolat[e] precisely what acts a State must cause to be done on federal
3 election day . . . in order to satisfy the [Election Day Statutes].” *Id.* at 72.

4 Nevada’s Ballot Receipt Deadline does not “consummate[]” an election “prior to federal
5 election day,” or set a competing date on which the voters’ selection “is concluded as a matter of
6 law.” *Id.* at 72 & n.4. It ensures that the voters’ selection is made on or before election day. *Foster’s*
7 holding therefore simply does not apply here.

8 The RNC seizes on *Foster’s* statement that the term “election” refers to “combined actions
9 of voters and officials meant to make a final selection of an officeholder,” *Id.* at 71, to suggest that
10 *all* such actions—including ballot receipt—must occur *on* election day. Compl. ¶ 45. That cannot
11 be right. It cannot be reconciled with the *Foster* Court’s “express disavowal . . . that it was
12 establishing any particular actions a State must perform on election day to comply with the federal
13 statutes.” *Millsaps*, 259 F.3d at 546 (citing *Foster*, 522 U.S. at 72 & n.4). And the RNC’s
14 interpretation would lead to absurd and catastrophic results. Ballot receipt is no different from the
15 counting, canvassing, and any number of other ministerial actions that election officials routinely
16 take after election day. *See id.* at 546 n.5 (recognizing that “official action to confirm or verify the
17 results of the election extends well beyond federal election day”); *see also Bush v. Gore*, 531 U.S.
18 98, 116 (2000) (Rehnquist, C.J., Scalia & Thomas, JJ., concurring) (cataloguing administrative
19 actions occurring in Florida after election day to conclude the election process). There is no
20 principled reason to distinguish “receipt” from these other administrative actions. *See Millsaps*,
21 259 F.3d at 545–46 (the “‘final selection’ of an officeholder requires more than mere receipt of
22 ballots cast by voters.”).

23 There is a far simpler, and less disruptive, answer to what the “the combined actions of
24 voters and officials” refers to. The Court itself supplied the answer in *Foster*: the “combined
25 actions of voters and officials” “may not be *consummated prior to* federal election day.” 522 U.S.
26 at 71, 72 n.4. *Foster* pointedly says nothing more.

1 **3. The Mail Ballot Receipt Deadline is consistent with the purpose and**
2 **legislative history of the Election Day Statutes.**

3 The Mail Ballot Receipt Deadline is also consistent with the purpose and legislative history
4 of the Election Day Statutes. The legislative history shows that the Election Day Statutes were
5 enacted to prevent (1) “distortion of the voting process threatened when the results of an early
6 federal election in one State can influence later voting in other States” and (2) the “burden on
7 citizens forced to turn out on two different election days to make final selections of federal officers
8 in presidential election years.” *Bomer*, 199 F.3d at 777; *see also Foster*, 522 U.S. at 73–74; Cong.
9 Globe, 42d Cong., 2d Sess. 141 (1871). Congress also wished to prevent a situation where voters
10 could travel “from one part of the Union to another[] in order to vote” in multiple States. Cong.
11 Globe, 28th Cong., 1st Sess. 679 (1844). Nevada’s Ballot Receipt Deadline thus does not implicate
12 any of the evils targeted by the Election Day Statutes because it requires voters to make their final
13 decision on or before election day.

14 In contrast, declining to count ballots cast on or before election day, but received after
15 election day, would disenfranchise large numbers of Nevadans. In fact, Plaintiffs *admit* that is why
16 they brought this suit. They believe that mail ballots “disproportionately break for Democrats,”
17 cutting into “fragile” “early Republican leads in close races,” Compl. ¶¶ 56–60. Based on these
18 concerns, they ask the Court to issue an order that would require Nevada to *reject* mail ballots cast
19 by lawful, qualified voters, simply because they arrive after election day—even when the postmark
20 proves they were timely cast. As the Fifth Circuit explained, “we cannot conceive that Congress
21 intended the federal Election Day Statutes to have the effect of impeding citizens in exercising
22 their right to vote. The legislative history of the statutes reflects Congress’s concern that citizens
23 be able to exercise their right to vote.” *Bomer*, 199 F.3d at 777 (citing Cong. Globe, 42d Cong., 2d
24 Sess. 3407–08 (1872)). Plaintiffs’ argument runs directly contrary to this purpose and denigrates
25 the very constitutional rights that Plaintiffs claim they seek to safeguard.
26
27
28

1 **4. Related statutory provisions confirm the plain text meaning of the**
2 **Election Day Statutes.**

3 The Election Day Statutes are not Congress’s sole enactment governing congressional or
4 presidential elections. And elsewhere in the U.S. Code, federal law acknowledges and respects
5 that many states have post-election ballot receipt deadlines. *See Exxon Mobil Corp. v. Allapattah*
6 *Servs., Inc.*, 545 U.S. 546, 558 (2005) (“[W]e must examine the statute’s text in light of context,
7 structure, and related statutory provisions.”).

8 The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) expressly
9 acknowledges and incorporates state ballot receipt deadlines. UOCAVA generally requires states
10 to permit military and overseas voters to vote absentee in federal elections. 52 U.S.C.
11 § 20302(a)(1). If a UOCAVA voter does not receive a write-in ballot from state authorities by the
12 required deadline, then that voter may instead utilize an alternative “federal write-in absentee
13 ballot.” *Id.* § 20303(a)(1). Such federal write-in ballots shall not be counted, however, if the voter
14 also votes a state absentee ballot and that ballot “is received by the appropriate State election
15 official not later than *the deadline for receipt of the State absentee ballot under State law.*” *Id.*
16 § 20303(b)(3) (emphasis added). When this provision was first enacted in 1986, *see* UOCAVA,
17 Pub. L. No. 99-410, § 103(b)(3), 100 Stat. 924 (1986), many states had post-election-day receipt
18 deadlines. Rather than choose to displace such laws, Congress expressly recognized them in a
19 federal statute.

20 The MOVE Act, passed in 2009, also defers to state-law ballot receipt deadlines. It
21 requires officials to ensure that overseas servicemembers’ ballots “for regularly scheduled general
22 elections for Federal office” are delivered “to the appropriate election officials” “not later than *the*
23 *date by which an absentee ballot must be received in order to be counted in the election.*” 52
24 U.S.C. § 20304(b)(1); National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-
25 84, div. A, tit. V., subtit. H, § 580(a), 123 Stat. 2190 (2009). This language makes no sense if the
26 Election Day Statutes categorically preempted longstanding post-election-day receipt deadlines.
27 And Congress could have just as easily required that such ballots be delivered to election officials
28 “by Election Day.” Instead, it again deferred to the states’ constitutional prerogative to set this

1 deadline. Thus, “even federal laws governing elections allow ballots received after Election Day
2 to be counted.” *Bost*, 684 F. Supp. 3d at 737. “These longstanding efforts by Congress and the
3 Executive Branch to ensure that ballots cast by Americans living overseas are counted, so long as
4 they are cast by Election Day, strongly suggest that statutes like the one at issue here are compatible
5 with the Elections Clause.” *Id.*¹¹

6 In contrast, in 1942, Congress required states to permit members of the armed services to
7 vote absentee in federal elections in times of war, providing that “no official war ballot shall be
8 valid . . . if it is received by the appropriate election officials . . . after the hour of closing the polls
9 on the date of the holding of the election.” Act of Sept. 16, 1942, ch. 561, 56 Stat. 753, § 9. This
10 shows that, when Congress wishes to set Election Day as a categorical deadline for receipt of
11 ballots, it knows how to clearly do so. *See Jama v. Immigr. & Customs Enf’t*, 543 U.S. 335, 341
12 (2005). And if the Election Day Statutes already required an election day receipt deadline, then
13 there would have been no need for Congress to specify election day as the receipt deadline for
14 military absentee ballots.

15 **5. The Mail Ballot Receipt Deadline is consistent with historical practice.**

16 As described above, post-election absentee ballot receipt deadlines are commonplace in
17 modern elections. But they also have a long pedigree in the United States. In the State of
18 Washington, as early as 1918, voters who were unable to vote in their home counties could cast a
19 ballot in another county which would then be “sealed and returned to the voter’s home county.” P.
20 Orman Ray, *Absent-Voting Laws, 1917*, 12 Am. Pol. Sci. Rev. 251, 253 (May 1918). To be counted
21 the ballot must have been received by the home county auditor within six days from the date of
22

23 ¹¹ Plaintiffs’ position is also inconsistent with the longstanding practice of federal courts
24 remedying UOCAVA violations. Courts frequently extend ballot receipt deadlines to remedy such
25 violations—even though UOCAVA itself only requires post-election receipt deadlines in limited
26 circumstances. *See Cases Raising Claims Under the Uniformed and Overseas Citizen Absentee*
27 *Voting Act*, Dep’t of Just. (Mar. 24, 2022), <https://www.justice.gov/crt/cases-raising-claims-under-uniformed-and-overseas-citizen-absentee-voting-act>. Plaintiffs’ reading of the Election Day
28 Statutes, if correct, would preclude that remedy. *See INS v. Pangilinan*, 486 U.S. 875, 883 (1988)
(explaining that even courts of equity cannot “disregard statutory [] requirements” or “create a
remedy in violation of law”); *Perkins v. City of Chi. Heights*, 47 F.3d 212, 217–18 & n.4 (7th Cir.
1995) (recognizing that judicially-imposed consent decree must both remedy a violation of *and*
comply with federal law) (emphasis added).

1 the election or primary. *Id.* The Mail Ballot Receipt Deadline likewise requires voters to transmit
2 their ballots by election day, but allows for those ballots to be counted as long as they are received
3 by the relevant election official within five days thereafter. Handing a ballot to a county election
4 official who is not empowered to count or process it, for delivery to the correct county election
5 official, is no different from handing the ballot to a postal worker.

6 “[Y]et Congress has taken no action to curb this established practice.” *Bomer*, 199 F.3d at
7 776. As the Ninth Circuit explained in the related context of absentee voting: “What persuades us
8 of the proper outcome in this difficult case is the long history of congressional tolerance, despite
9 the federal election day statute, of absentee balloting and express congressional approval of
10 absentee balloting when it has spoken on the issue.” *Voting Integrity Proj., Inc. v. Keisling*, 259
11 F.3d 1169, 1175 (9th Cir. 2001). “Despite these ballot receipt deadline statutes being in place for
12 many years in many states, Congress has never stepped in and altered the rules.” *Bost*, 684 F. Supp.
13 3d at 736. That acquiescence is not a product of mere Congressional inattention. Against the
14 backdrop of these longstanding state election laws, Congress has amended the Election Day
15 Statutes several times without addressing ballot receipt deadlines—including most recently in
16 December 2022. *See* Electoral Count Reform and Presidential Transition Improvement Act of
17 2022, Pub. L. No. 117-328, div. P, tit. I, 136 Stat. 4459, 5233 (2022) (“ECRA”). *Cf. Bob Jones*
18 *Univ. v. United States*, 461 U.S. 574, 599 (1983) (finding “unusually strong case of legislative
19 acquiescence” where Congress was “constantly reminded” and “aware[]” of the issue “when
20 enacting other and related legislation”).

21 **C. The Mail Ballot Receipt Deadline does not violate the right to vote or the right to**
22 **stand for office.**

23 Counts II and III of the Complaint assert violations of Plaintiffs’ rights to vote and stand
24 for office. As to these constitutional claims, Plaintiffs do have a private cause of action under 42
25 U.S.C. § 1983: if indeed Plaintiffs’ rights to vote and stand for office were threatened, § 1983
26 would allow them to sue. But Plaintiffs fail to allege facts showing a violation of either of those
27 rights, so these counts fail to state a claim for which relief can be granted, for two independent
28 reasons.

1 First, each of Plaintiffs’ constitutional counts expressly and entirely depends on Plaintiffs’
2 misreading of the Election Day Statutes. Plaintiffs’ only basis for alleging that their rights to vote
3 and stand for office are violated is their assertion that the Mail Ballot Receipt Deadline violates
4 federal law. *See* Compl. ¶¶ 73–74, 78–80. Because the Mail Ballot Receipt Deadline is valid, these
5 allegations fail on their own terms. *See supra* Part II.B.

6 Second, if Plaintiffs were right that the Mail Ballot Receipt Deadline conflicts with the
7 Election Day Statutes, they still do not allege facts showing that the resulting conflict violates their
8 constitutional rights. Not every statutory violation abridges a constitutional right. And Plaintiffs
9 make no effort to show that these alleged statutory violations do so. Alleged burdens on the right
10 to vote and to stand for office under the First and Fourteenth Amendments are reviewed under the
11 *Anderson-Burdick* standard. *See Short*, 893 F.3d at 676; *Pub. Integrity All., Inc. v. City of Tucson*,
12 836 F.3d 1019, 1024 (9th Cir. 2016) (en banc); *Mecinas v. Hobbs*, 30 F.4th 890, 904 (9th Cir.
13 2022). “This is a sliding scale test, where the more severe the burden, the more compelling the
14 state’s interest must be, such that a state may justify election regulations imposing a lesser burden
15 by demonstrating the state has important regulatory interests.” *Soltysik v. Padilla*, 910 F.3d 438,
16 444 (9th Cir. 2018) (quotation marks omitted).

17 The first step in the constitutional analysis is thus to determine the extent of the burden on
18 Plaintiffs’ rights. There is none. The Mail Ballot Receipt Deadline law does not make it harder for
19 anyone to exercise the right to vote. And laws that “make[] it easier for some voters to cast their
20 ballots by mail” “do[] not burden anyone’s right to vote.” *Short*, 893 F.3d at 677. On its face, the
21 Mail Ballot Receipt Deadline *protects* the right to vote by ensuring that qualified voters do not
22 have their timely-cast ballots rejected. Indeed, the *stated purpose* of this lawsuit is to prevent the
23 counting of lawfully cast votes because Plaintiffs believe those voters—though undisputedly
24 qualified—are more likely to vote for their opponents. Compl. ¶¶ 56–60. Plaintiffs cannot state a
25 constitutional claim by couching their attack on the voting rights of certain voters as an attempt to
26 vindicate their own voting rights. Thus, even if Plaintiffs were right about the Election Day
27 Statutes, they do not allege a resulting violation of their constitutional right to vote.

28

1 Nor can Plaintiffs plausibly identify any burden on their “right to stand for office.” Compl.
2 at 14. “[T]he right to stand for office is to some extent derivative from the right of the people to
3 express their opinions by voting,” and refers to the right to have one’s name placed on the ballot.
4 *Nader v. Keith*, 385 F.3d 729, 737 (7th Cir. 2004); *see also Ariz. Green Party v. Reagan*, 838 F.3d
5 983, 988 (9th Cir. 2016). That right is not implicated here at all: Donald Trump is on the ballot.
6 He will stand for office.

7 Moreover, the Mail Ballot Receipt Deadline is supported by strong state interests that fully
8 justify any conceivable burden it imposes. Nevada has a strong interest in ensuring that qualified
9 voters who cast timely votes do not have those ballots arbitrarily rejected, and in avoiding the
10 confusion that would follow if the law was suddenly changed as Plaintiffs demand. The Mail Ballot
11 Receipt Deadline and the Election Day Statutes share common purposes in expanding the franchise
12 and protecting the right to vote. “These state interests constitute the very backbone of our
13 constitutional scheme—the right of the people to cast a meaningful ballot.” *Utah Republican Party*
14 *v. Cox*, 892 F.3d 1066, 1084 (10th Cir. 2018); *Soltysik*, 910 F.3d at 447 (“[A]voiding voter
15 confusion . . . is an important government interest.”).

16 The Mail Ballot Receipt Deadline sets a clear, predictable rule for voters to know when
17 they must mail their ballot to ensure that it is counted, enabling eligible voters to consume more
18 information about candidates as it becomes available closer to election day, which benefits both
19 candidates and voters. It also accounts for significant mail delays that have plagued previous
20 elections. Because Plaintiffs lack standing to bring this case, they complain of an illusory conflict
21 between rights reserved to Nevada and federal law, and they fail to state a cognizable constitutional
22 claim, Intervenor-Defendants are entitled to judgment as a matter of law.

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CONCLUSION

For the foregoing reasons, Intervenor-Defendants respectfully request that the Court dismiss Plaintiffs' claims as a matter of law.

Dated: June 7, 2024

Respectfully submitted,

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By: /s/ Daniel Bravo

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2024, a true and correct copy of Intervenors' Motion to Dismiss was served via the United States District Court's CM/ECF system on all parties or persons requiring notice.

By: /s/ Danielle Fresquez
Danielle Fresquez, an employee of
Bravo Schragger LLP

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