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Fair Maps Nevada PAC, Sondra Cosgrove,
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FAIR MAPS NEVADA, a Nevada political action committee, SONDRA COSGROVE, DOUGLAS GOODMAN, and ROBERT MACDONALD,

Plaintiffs,

v.

BARBARA CEGAVSKE, in her official capacity as Nevada Secretary of State, JOSEPH P. GLORIA, in his official capacity as Clark County Registrar of Voters, DEANNE SPIKULA, in her official capacity as Washoe County Registrar of Voters, KRISTINA JAKEMAN, in her official capacity as Elko County Clerk, SADIE SULLIVAN, in her official capacity as Lander County Clerk, LACEY DONALDSON, in her official capacity as Pershing County Clerk-Treasurer, VANESSA STEVENS, in her official capacity as Storey County Clerk-Treasurer, NICHOLE BALDWIN, in her official capacity as White Pine County Clerk, SANDRA MERLINO, in her official capacity as Nye County Clerk, TAMMI RAE SPERO, in her official capacity as Humboldt County Clerk, KATHY LEWIS, in her official capacity as Douglas County Clerk-Treasurer, LINDA ROTHERY, in her official capacity as Churchill County Clerk-Treasurer, LACINDA ELGAN, in her official capacity as Esmeralda County Clerk-Treasurer, LISA C. LLOYD, in her official capacity as Lincoln County Clerk, LISA HOEHNA, in her official capacity as Eureka County Clerk, CHRISTOPHER NEPPER, in his official

Case No.: 3:20-cv-00271-MMD-WGC

PLAINTIFFS' REPLY TO OPPOSITIONS TO MOTION TO MOTION FOR PRELMIINARY INJUNCTION

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capacity as Mineral County Clerk-Treasurer, NIKKI BRYAN, in her official capacity as Lyon County Clerk-Treasurer, and AUBREY ROWLATT, in her official capacity as Carson City Clerk-Recorder,

Defendants.

Plaintiffs Fair Maps Nevada ("Fair Maps"), Sondra Cosgrove, Douglas Goodman and Robert MacDonald, by and through their undersigned counsel, submit this consolidated reply to Nevada Secretary of State's Consolidated Motion to Dismiss and Opposition to Motion for Preliminary Injunction (ECF 25) ("Secretary's Opposition")[1], Rural County Defendants' Opposition to Motion for Preliminary Injunction (ECF 19) ("Rural Counties Opposition"), and Rev. Leonard Jackson and Nevada Resort Association's ("NRS PAC") proposed Opposition to Motion for Preliminary Injunction (ECF 15-3) ("Intervenors Opposition").

I. INTRODUCTION

The people of Nevada have "reserve[d] to themselves the power to propose, by initiative petition, statutes and amendments to statutes and amendments to this Constitution, and to enact or reject them at the polls." Nev. Const. art. 19 § 2(1). Federal courts can and do act as a safeguard of this type of core political speech as the "First Amendment requires vigilance in [separating valid ballot-access provisions from invalid interactive speech restrictions], to guard against undue hindrances to political conversations and the exchange of ideas." *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 183 (1999). Plaintiffs are not challenging the facial unconstitutionality of Nevada's election statutes or regulations or any of the emergency declarations related the COVID-19 pandemic or the Stay-at-Home Orders. Rather, Fair Maps requests limited relief in the form of two reasonable accommodations: 1) permitting the electronic circulation and signing of Fair Maps' Initiative and 2) extending (not abrogating) the deadline for

[1] Defendants Deanne Spikula and Aubrey Rowlatt joined the Secretary's Opposition. (Rowlatt Joinder (ECF 27)); (Gloria Joinder (ECF 28). Defendants Deanne Spikula and Rural County Defendants joined the Secretary's Motion to Dismiss (ECF 25).

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submitting the Initiative for verification. The stark reality is that without accommodation and flexibility by the Nevada Secretary of State in light of these unprecedented challenges to public health and the election process, Nevadans will lose their right to enact or reject initiative petitions this election cycle.

The Secretary of State has already reacted to the pandemic by implementing an all-mail primary. *Paher v. Cegavske*, Case No. 3:20-CV-00243-MMD-WGC, 2020 WL 2089813 (D. Nev. Apr. 30, 2020). The Massachusetts Supreme Judicial Court ordered that, due to the difficulty of obtaining signatures on nomination papers during the current pandemic, the Massachusetts Secretary of State must "allow the submission and filing of nomination papers with electronic rather than 'wet' signatures." *Goldstein v. Sec'y of Commonwealth*, 142 N.E.3d 560, 564 (Mass. 2020). This past Sunday, May 17, 2020, the Governor of Colorado signed executive orders suspending statutory provisions requiring registered electors to sign petitions in the presence of a petition circulator and requiring the Secretary of State to authorize "registered electors to sign petitions by a means that does not require a petition circulator, including but not limited to providing electronic mail and mail-in options." Ex. A. There is no reason why Nevada should not follow suit.

Under the *Anderson-Burdick* test, this Court must weigh the total elimination of the initiative process in this election cycle against the administrative inconvenience that would result from accommodating Plaintiffs' requests for relief. Rather than postpone the democratic process, Nevada should follow the lead of the Governor of Colorado who declared: "[W]e must not sacrifice our democracy and the right of citizens to petition due to the pandemic. Protecting our democracy, access to the ballot and making sure citizens can qualify ballot measures and can qualify as candidates to run for office during this time is critical." *Id.*

II. ARGUMENT

A. Strict Scrutiny is appropriate in this case.

Defendants and Intervenors argue that strict scrutiny is not applicable in this case. (ECF, 10-13); (ECF 19, 9); (ECF 15-3, 6-9.) The Secretary of State's application of Nevada's statutes and regulations, including NRS 295.056(3), NRS 295.0575(1) and (5), and NRS 293.12758, to

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Plaintiffs results in the untenably severe result of precluding them from a reasonable opportunity to quality Initiative Petition C-02-2019 ("Initiative") for the ballot and to associate themselves with the same through voting. Consequently, strict scrutiny is appropriate.

The *Anderson-Burdick* framework is the appropriate means by which to evaluate challenges to laws that regulate the election process. *See Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016). The *Anderson-Burdick* framework calls for a means-end fit analysis, wherein strict scrutiny is applied when the First and Fourteenth Amendment rights are subject to "'severe restrictions.'" *Id*. (quoting *Burdick v. Takushi*, 504 U.S. 428 (1992)); *Angle v. Miller*, 673 F.3d 1122 (9th Cir. 2012) (holding that "Under the First Amendment, election 'regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest." (citing *Prete v. Bradbury*, 438 F.3d 949, 961 (9th Cir. 2006) (quoting *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1007 (9th Cir. 2003).) However, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id*.

In this case, there is no doubt that the *Anderson-Burdick* framework is applicable to Plaintiffs' claims and that strict scrutiny is the appropriate level of scrutiny under that framework. The Ninth Circuit has previously held that "restrictions in the initiative process can severely burden "core political speech,"" subjecting them to a First Amendment analysis. *Angle*, 673 F.3d at 1132. The *Angle* court noted that the Supreme Court has "identified at least two ways in which restrictions on the initiative process can severely burden 'core political speech.'" *Id*. (quoting *Meyer v. Grant*, 486 U.S. 414, 422 (1988).) The first is where the regulation restricts "one-on-one communication between petition circulators and voters." *Id*. (citing *Meyer*, 486 U.S. at 422-23.) The second is where the regulation "make[s] it less likely that proponents will be able to garner the signatures necessary to place an initiative on the ballot 'thus limiting their ability to make the matter the focus of statewide discussion.'" *Id*. (citing *Meyer*, 486 U.S. at 423.)

As to the applicability of strict scrutiny, the Sixth Circuit's recent decision in *Esshaki v. Whitmer*, 2020 WL 2185553 (6th Cir. 2020) is also persuasive. There, the appellant, the State of

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Michigan, petitioned the Sixth Circuit for a stay of the district court's order enjoining the enforcement two statutory ballot access provisions that required potential primary candidates to obtain a certain number of valid signatures by April 21 to qualify for the primary ballot. *Esshaki*, 2020 WL 2185553 at *1. The plaintiffs in the case sued because "the State intended to enforce the ballot-access provisions strictly, without exception for or consideration of the COVID-19 pandemic or the Stay-at-Home Orders . . . ." *Id.*

On appeal, the Sixth Circuit upheld the district court's injunction of the "rigid application" of the ballot-access provisions at issue, finding that: (1) "the district court properly applied the *Anderson-Burdick* test" to the plaintiffs' claims; (2) the district court "correctly determined that the combination of the State's strict enforcement of the ballot-access provisions and the Stay-at-Home Orders imposed a severe burden on the plaintiffs' ballot access, so strict scrutiny applied; and (3) "even assuming that the State's interest (i.e., ensuring each candidate has a reasonable amount of support) is compelling, the provisions are not narrowly tailored *to the present circumstances*" and therefore the State's application of the ballot-access provisions "is unconstitutional as applied here." *Id.* at *1-2 (emphasis in original).

In this case, the restrictions at issue trigger strict scrutiny as they make it substantially less likely—nearly impossible—for Fair Maps to place the Initiative on the ballot. *See Angle*, F 3d. at 1132. As set forth in Plaintiffs' Motion for Preliminary Injunction, the social distancing requirements associated with COVID-19 make it essentially impossible to engage in the interpersonal contact that traditionally results in effective signature gathering. (ECF 2, 14 (citing Declaration of Laura Hale (ECF 2-1).) Nevadans have been ordered to stay at home and avoid unnecessary interpersonal contact, large gatherings have been prohibited and many retail establishments that result in socialization remain closed. (*Id.*) Thus, in combination with the Secretary's rigid application of the relevant ballot access provisions, it is nearly impossible for Plaintiffs to qualify the Initiative for the ballot. Therefore, strict scrutiny is appropriate. *See Angle*, F.3d at 1132; *Esshaki*, WL 2185553 at *1-2.

The Secretary of State attempts to avoid this conclusion by asserting that Plaintiffs' lawsuit "challenges legislative processes as opposed to electoral processes," and therefore "judicial

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deference" is applicable. (ECF 25, 12.) However, this is not the case. As stated above, the Ninth Circuit has held that the initiative process can severely burden core political speech and as such may be subject to strict scrutiny. *Angle*, 673 F.3d at 1132. Where, as here, the initiative process requirements impose a severe burden, strict scrutiny applies. *See id.*; *City of Tucson*, 836 F.3d at 1024; *Esshaki*, WL 2185553 at *1-2. For these reasons, Defendants and Intervenors claim of a lower standard of scrutiny should be rejected.

B. This Court Has Subject Matter Jurisdiction.

Defendants challenge this Court's subject matter jurisdiction because the core right at issue was created by the Nevada Constitution, not the U.S. Constitution. (*E.g.*, ECF No. 24, 15). While the political process for amending the Nevada Constitution is not found in the U.S. Constitution, the First and Fourteenth Amendments nevertheless protect the exercise of political rights that are created under state law. *Buckley*, 525 U.S. at 183. This is an uncontroverted precept in case law and so Defendants' objections to this Court's jurisdiction are puzzling.

Defendants seem to posit that only "discriminatory or targeted burdens" are impermissible under the Equal Protection Clause. *Id.* And this is the first half of the Ninth Circuit's decision in *Angle*. But the second half of *Angle* provides that there are "at least two ways in which restrictions on the initiative process can severely burden core political speech." *Angle*, 673 F.3d at 1132 (quotations omitted). First, regulations "can restrict one-on-one communication between petition circulators and voters", and second regulations can "it less likely that proponents will be able to garner the signatures necessary to place an initiative on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." *Id.* (quotations omitted). It is therefore not necessary for the restrictions to be imposed on a discriminatory basis or unevenly among petition proponents.

Here the restrictions restrict one-on-one communications by preventing alternative methods of signature gathering. Again, Plaintiffs are not challenging Nevada's responses to the pandemic, they are only recognizing that in light of those responses that make in-person signature gathering nearly impossible, the current prohibition against electronic signature gathering denies proponents of the Initiative any opportunity to speak to other voters and encourage them to sign

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the Initiative. The restrictions also make it less likely that Plaintiffs will be able to garner the necessary signatures by not expanding the window of time for in-person signature gathering and by not accepting alternative signature methods. This results in an overall decrease in the quantum of speech this election cycle, largely eliminating speech and political discourse concerning ballot initiatives.

C. Plaintiffs are likely to succeed on the merits of their claims.

The Defendants and Intervenors argue that Plaintiffs will not succeed on the merits of their claims for essentially two reasons. (*E.g.*, ECF 25, 122; ECF 11-16.) The Secretary of State specifically contends that the circulator's affidavit requirements and the signature verification deadline are mandatory and have been upheld by the courts and therefore constitute reasonable and non-discriminatory restrictions on the petition process such that they survive constitutional scrutiny. (*See* ECF at 15-22.) The other defendants and Intervenors offer variations on this argument. Second, she appears to argue that there is no less restrictive means available to satisfy the state's interest in preventing fraud and ensuring that initiative petitions have sufficient popular support to be presented to the voters than the strict application of NRS 295.056 and NRS 295.0575. (*See id*.) The other Defendants and Intervenors offer variations on these same core arguments. (ECF 19, 14; ECF 15-3, 9-14.) The Secretary of State is wrong as to both arguments.

With respect to her claim that the application of NRS 295.056 and NRS 295.9575 does not impose a severe burden on Plaintiffs' constitutional rights, the Secretary of State cites a number of cases she says stand for the proposition that the requirements of those statutes have been upheld by courts and may not be waived. (*Id*. at 16-17.) However, that those statutes may have been upheld as constitutional in other cases is irrelevant as to the nature of the burden the application of those statutes pose on Plaintiffs under COVID-19 social distancing restrictions. The instant case is an as applied challenge to the Secretary of State's decision to apply those statutes to require Plaintiffs to gather hand signatures affixed in the physical presence of a initiative circulator. (*See e.g.*, ECF 1, ¶¶ 76 through 83.) As such, that the application of the statute at issue may have been upheld previously under different circumstances does not resolve the question of their constitutionality here—as applied during the midst of a historical pandemic. *See Hoye v. City of*

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Oakland, 653 F.3d 835, 857 (9th Cir. 2011) (noting that "[a] paradigmatic as-applied attack . . . challenges only one of the rules in a statute, a subset of the statute's applications, *or the application of the statute to a specific factual circumstance*, under the assumption that a court can 'separate valid from invalid subrules or application.'" (quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1334 (2000) (emphasis added).) To determine the constitutionality of these provisions as applied in this case, the Court must apply the appropriate constitutional test. *See id*. And here that test requires the application of strict scrutiny.

The Secretary of State also errs in contending that she has no authority to modify the application of the statutes to accommodate Plaintiffs' constitutional rights. In *Paher v. Cegavske*, Case No. 3:20-CV-00243-MMD-WGC, 2020 WL 2089813 (D. Nev. Apr. 30, 2020) the Secretary of State defended her authority to take necessary steps to preserve Nevadans' right to participate in the electoral process amidst a global pandemic:

> [Secretary] Cegavske, as Nevada's chief election officer, has an obligation to conduct the primary election in a manner that protects Nevada's citizens by allowing them to exercise their right to vote securely while not being denied this right by being forced to make a Hobson's choice between their franchise and their health. Granting injunctive relief now will force Nevada's citizens to do so.

Paher, 2020 WL 2089813, ECF 28, *12-13.

The Secretary of State was particularly pointed in critiquing the plaintiffs' request to enjoin the implementation of the all mail primary, arguing as follows as follows:

> [T]here is no genuine doubt that Nevada has the power to protect the health of its citizens, particularly in an emergency such as this. Prior to ratification of the Constitution, various colonies had quarantine laws, thereby establishing the legal tradition of local and state jurisdiction over matters of public health reflected in the Constitution's reservation of power to the states to regulate public health, safety, and morals. *Gibbons v. Ogden*, 22 U.S. 1 (1824). It is in this context that Plaintiffs seek to substitute their judgment of the public interest for those representing us in the local, state, and federal government. Plaintiffs' contention that the preliminary injunction favors the public interest in contrast to the global pandemic respectfully does not pass the laugh test.

Id. at 13-14 (internal citations omitted).

Thusly, the Secretary articulated the legal and policy justification for her action to preserve access to the ballot for Nevadans who otherwise would be subject to substantial public health risks and argued vociferously against maintaining the status quo—an predominantly in person election.

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The Washoe County Registrar of Voters supported the Secretary of State's argument for the need to take swift action to protect Nevadans, describing the unprecedented and exigent need to take action to protect the electoral process in Nevada:

> Voters should not be placed in the tenuous position of having to choose between their health and their civic duty of voting. The world is faced with the unprecedented restrictions necessitated by the emergency COVID-19 pandemic. Citizens are told not to go out unless necessary. They are told not to go to work unless necessary. Many businesses, including casinos, in Nevada, have been closed. Schools have been closed for the remainder of the current school year. All forms of spectator sports have been put on hold indefinitely. Even with these restrictions, the pandemic continues with no end in sight.
>
> The emergency situation requiring multiple forms of restrictions was not anticipated by anyone, including our Legislature, in addressing the conduct of the election.

Id., Washoe County Registrar's Opposition to Motion for Preliminary Injunction (ECF 25) at 23. For its part, the Court identified the Secretary of State's general authority to "take other actions necessary for the effective administration of the statutes and regulations governing the conduct of the primary, general, special and district elections in this State," as supporting the Secretary of State's implementation of an all mail primary. *Paher*, 2020 WL 2089813 at *8-10 (citing NRS 293.247(4)). Pursuant to the Secretary of State's own assertion of authority in *Paher* and NRS 293.247(4), the Secretary of State has the authority to take all actions necessary to conduct the general election in a manner that protects Plaintiffs' right to qualify the Initiative for the ballot without having to make the "hobson's choice" of sacrificing their own health and the health of others—to say nothing of the legal jeopardy that might attach if Plaintiffs circulate the Initiative in violation of the Governor's emergency directives. The Secretary of State's authority includes authorizing the electronic circulation and signing of the Initiative and extending the deadline for submission of the Initiative. And to be sure, if it does not, this Court certainly has that authority.

With respect to the argument that there is not a less restrictive means available to satisfy the State's interests in preventing fraud in the circulation of the Initiative, the Secretary of State contends that Plaintiffs have not demonstrated how electronic signatures can be verified such that the State's interest in preventing fraud from "overtaking the People's legislative power" is satisfied. (ECF 25, 18.) The Secretary of State argues that Plaintiffs assert that the she "could use the same process used to verify voter registrations made automatically at the Department of Motor

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Vehicles," which she contends is distinguishable because in that case the registrant physically appears at the DMV and a DMV employee can verify the person's identify. (*Id.*)

The Secretary of State, however, appears to misunderstand Plaintiffs' proposal. Plaintiffs do not propose to use the same process for voter registrations made online. Instead, Plaintiffs have merely pointed out that either DMV or Social Security Administration ("SSA") information, including the pen and ink signature on file with the DMV, is used to verify the identity of voters that register to vote via the Secretary's own website, without ever appearing before a person at all. As the Secretary of State's elections deputy pointed out previously, when a voter registers to vote online, the voter provides his or her personal identifying information, including name, address and Nevada Driver's License or identification number. (ECF 2-5, ¶ 2.) That information is then matched to the identifying information on file with the DMV. (*Id.*) Indeed, the Secretary of State's website even displays a picture of the signature on file with the DMV that corresponds to the personal identifying information input by the registrant and asks the registrant to confirm that it is the person's signature.

Once that takes place, the Secretary of State accepts the person's registration, and the person is eligible to vote. (*Id.* at 3.) Voters whose identifies are so confirmed "are not required to present identification and proof of residency before voting, even if they are voting for the first time in Nevada." (*Id.*) No "additional verification processes" are necessary. (*Id.*) They can even vote by mail without appearing at a polling place. (*Id.*) Most relevant here, the only in person interaction that takes place is the unrelated in person interaction that took place before the registration application was filed wherein the individual appeared at the DMV to obtain a driver's license or identification number. In the case of information confirmed via SSA information, there may never have been an in person interaction at all.

If verification of the identify of registrants to vote via an online comparison of information provided at the time of registration online to information previously provided to either the DMV or SSA is sufficient to ensure against voter fraud, it passes understanding as to why a heightened standard—*i.e.*, the need for an in person observation of a hand signature—is needed to ensure against fraud in qualifying the Initiative for the ballot. The absurdity of this position is highlighted

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by the fact that the Secretary of State's position essentially means a more stringent standard will apply to the qualification of the Initiative for the ballot than will be applied to those who want to vote for it.

What's more, and adding further support for the argument that a less restrictive means is satisfactory in the current environment, the Secretary recently announced plans to use a "signature cure service" to ensure that Nevada voters who participate in the election by mail have the opportunity to cure any defects in the signature requirement for vote by mail ballots. Testimony of Deputy Secretary of State Wayne Thorley before the Interim Finance Committee, April 30, 2020, at 3:12:33 available at http://nvleg.granicus.com/MediaPlayer.php?clip_id=13348. According to Deputy Secretary of State Wayne Thorley, the service will allow Nevadans who forget to sign their ballots or whose signatures on the ballot do not match the signature on file with the DMV to "cure" their signature "on their phone or tablet." *Id*. It is unclear how an electronic signature can be sufficient to guard against voter fraud in a vote by mail election whereas the same interest requires a hand signature executed in the physical presence of a person to qualify an initiative petition for the ballot.

The Secretary of State also contends that any delay in the time for submitting the Initiative for verification will result in "minimum opportunity for normal verification to ensure that ballot initiatives changing Nevada's constitution would be accurate and free from fraud, much less new procedures to verify 'electronic signatures.'" (ECF 25, 20.) The Secretary further states that "there would be limited to insufficient time to prepare necessary ballot materials." (*Id*.) For these reasons, the Secretary of State contends Plaintiffs do not have a likelihood of success on the merits of its claim that there is a less restrictive means available to ensure against fraud than applying NRS 295.056(3) to require the submission of signatures by June 24. (*See id*. at 19-22.) This is not the case.

Indeed, the Secretary's careful language is telling. The Secretary does not insist that there is no opportunity for verification or that ballot printing will necessarily be delayed if the Court grants Plaintiffs' request for an additional six weeks to gather signatures, requiring the Initiative to be submitted for verification no later than the Constitutionally prescribed ninety days before

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the election. Rather, the Secretary states only that there would be a "minimum" opportunity to properly verify the Initiative and that there would be "limited to insufficient time" to prepare the ballots. (ECF 25, 20.) Thus, it appears even the Secretary agrees there is some opportunity to verify the Initiative and print ballot materials using the schedule proposed by Plaintiffs. Given the significance of the interest at stake—the ability of Nevadans to propose amendments to their own constitution—requiring expedited verification and the preparation of ballot materials would not pose an undue burden on the state.

That the necessary verification steps can take place even if the deadline for submitting the Initiative for verification is extended to August 5 is also supported by the declaration of Douglas County Clerk Treasurer Kathy Lewis, who also serves as the President of the Nevada Association of County Clerks and Election Officials. She states that "any shortening of the statutory time periods would place a substantial burden on the State and Counties ability to complete the ballot and conduct all of our other responsibilities relative to the 2020 General Election." (ECF 20, ¶ 10.) Thus, it appears that the state's chief election officer and the chief election offers of the counties agree that verification of the Initiative can be complete even extending the deadline for submission for verification to the constitutionally prescribed August 5 date.

An analysis of the schedule set forth by the Secretary that assumes an August 5 verification submission seems to confirm this. While the schedule generally sets for the applicable timeframes accurately, it assumes that the full time allotted for each set of the verification process will be used, and it further assumes that each step of the verification process will take place notwithstanding the fact that the law does not require that. For example, the schedule described by the Secretary correctly indicates that twelve business days are allotted to conduct an additional signature count in the event the total number of signatures is between 90-100% of the number needed. NRS 293.1279(3). However, she does not make clear that the Secretary does not have to order further verification. Rather, pursuant to NRS 293.1279(2), the Secretary "may" order such verification but is not required to. She further correctly points out that the proponent of an initiative is allotted five working days to file an appeal with the Secretary contesting the

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Secretary's determination that the initiative petition is not sufficient for inclusion on the ballot. *Id*. at § 293.12793(1)(a).

However, if Plaintiffs gather a sufficient number of signatures to qualify the Initiative for the ballot and that is clear based on the initial signature verification process, 17 working days plus intervening weekends and holidays will be removed from the schedule. There would be no need for the Secretary to order "Further signature verification" pursuant to NRS 293.1279(3), nor would Fair Maps have reason to appeal the Secretary's determination. Assuming that is the case, the Initiative would be deemed sufficient and ready for inclusion on the ballot no later than August 25, leaving 26 days to prepare the ballots.

Under this scenario it is hard to understand how ballots could not be prepared in time for distribution to overseas voters. Douglas County Clerk Treasurer Kathy Lewis states in her declaration in support of the Rural County Defendants Opposition that ballots need to be complete by "mid-August to allow enough time to distribute ballots to military personal [sic] and their families 45 days before the election as required by Federal Law." (ECF 20, ¶ 5.) However, in the next paragraph, she states that "there are about eight weeks from the deadline to submit signatures for a petition to when the ballots need to be completed to be sent to military personnel." (*Id*. at Paragraph 6.) If ballots need to be prepared by mid-August, an additional 10 days to complete the verification process does not appear to impose a severe burden or make it impossible for the ballots to be prepared for transmittal overseas. If the timeline actually requires preparation eight weeks from submission for verification, then there would be even less of a burden. Eight weeks from June 24, the original deadline, runs on August 19. Thus, if verification was actually complete no later than August 25, that would only add six days to the schedule. That said, even if all steps in the verification process were needed, no election official in the case has stated that it cannot be done or that it will unlawfully delay the distribution of ballots.

The Secretary's contention that a "new" verification process would need to be developed to deal with electronic signatures is also misplaced. As indicated above, the Secretary of State already employs a verification process that confirms electronic signatures—the online voter registration portal on her own website. Furthermore, she has contracted to procure a similar

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system to allow the use of electronic signatures on mail ballots for the upcoming all mail election. Thus, it is not credible for the Secretary of State to argue here that the modification of the verification process to address electronic signatures would result in substantial electoral delays.

For these reasons, the Court should reject the Secretary of State's contention that Plaintiffs do not have a likelihood of success on the merits regarding its claims.

D. Plaintiffs will suffer irreparable harm unless the Court remedies the Secretary of State's unconstitutional application of Nevada law.

The Defendants and Intervenors contend that Plaintiffs will not suffer irreparable harm if the Secretary's application of NRS 295.056 and NRS 295.0575 stand. (ECF 25, 22; ECF, 16-17; ECF, 15-16.) For her part, the Secretary of State argues first that Plaintiffs do not need access to the 2020 ballot to pursue their policy proposal—the establishment of an independent redistricting commission. (*Id*. at 22.) The Secretary contends that Plaintiffs proposal is merely a "legislative policy proposal" that may be "accepted or rejected in the give-and-take milieu of partisan politics" and Plaintiffs may pursue it "through traditional political channels." (*Id*.) This argument is misguided.

Plaintiffs do not promote and support a legislative policy proposal. Plaintiffs promote and support an amendment to the governing document of our state the purpose of which is to remove the influence of partisan gerrymandering in our politics. If enacted, the proposal will be embedded in the Nevada Constitution and will have the same force and effect of any other constitutional provision. Namely, any statute that conflicts with it will be rendered unconstitutional and only an amendment of the Nevada Constitution could remove it. Plaintiffs cannot achieve this effect through, for example, the legislative process. That process can only result in the enactment of statutes which are subject to the requirements of the Nevada Constitution and may be amended from time to time by the Legislature. Thus, the Secretary of State's insistence that no harm will result from the inability of Plaintiffs to reach the ballot is simply untrue. Plaintiffs must have access to the ballot to amend propose an amendment to the Nevada Constitution. Nev. Const. art. 19 § 2.

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Second, the Secretary of State and other Defendants and Intervenors argue that Plaintiffs must demonstrate that the pandemic and resulting social distancing directives were "causally related" to their inability to gather the requisite number of signatures. (*Id*. at 23; ECF 19, 15-16; ECF 15-3, 16-17.) The Secretary of State states more specifically that in the absence of evidence that signature gathering was "progressing toward a successful outcome" prior to the pandemic, the Plaintiffs cannot meet that burden. (ECF 25, 23.)

As Laura Hale states in her attached declaration, Fair Maps halted signature gathering efforts while state court litigation unfolded for fear that the district court would order a modification to the description of effect, rendering signatures gathered on prior versions of the Initiative invalid, and because many interested financial supporters were hesitant to donate while litigation was pending. (Ex. B, Decl. of Laura Hale, ¶¶ 5-6.) The district court did order changes to the description of effect, and Rev. Jackson despite having prevailed in the district court appealed to the Nevada Supreme Court, casting further uncertainty on signature gathering and related fundraising efforts. (*Id*. ¶ 7.) Fair Maps hoped the litigation would resolve quickly so that it could initiate signature gathering efforts promptly after the final order; however, the case remains pending despite efforts by Fair Maps to expedite the appeal. (*Id*. ¶ 8.)

That said, Fair Maps grew frustrated with the delay in gathering signatures while the litigation remained pending, so it began the process of gathering signatures using only grassroots efforts and word-of-mouth, collecting 10,000 signatures between the middle of January 2020 and the beginning of March 2020. (*Id*.) The success of gathering signatures encouraged Fair Maps to consult with political professionals experienced in signature gathering for initiative petitions. (*Id*. ¶ 9.) Fair Maps was determined and able to hire those professionals beginning in early April 2020. (*Id*.) Those professionals advised Fair Maps that the requisite number of signatures could be obtained under normal circumstances. (*Id*.) However, because COVID-19 was in full effect by that time, signature gathering was effectively ended. (*Id*.)

Ms. Hale's declaration makes clear that the pandemic and associated social distancing directives are causally related to Fair Maps' inability to gather more signatures than it has by now. It further makes clear that any expectation that Fair Maps would be further along is unreasonable

and inconsistent with normal election practices. Therefore, the Court should not have an expectation that in this instance Fair Maps would have collected more signatures; to the contrary, it should conclude that Fair Maps reasonably pursued its objective of qualifying the Initiative for the ballot and but for COVID-19 and the associated social distancing requirements would have met that goal.

For these reasons, Plaintiffs have shown a causal relationship between the pandemic, emergency directives and the Defendants and Intervenors arguments to the contrary should be rejected.

E. The balance of equities weighs in favor of Plaintiffs, not Defendants.

The Secretary contends that Plaintiffs are attempting to "exploit the public health emergency for its benefit," and therefore it is in the public interest to "uphold the rule of law." (ECF 25, 24.) The other Defendants and Intervenors similarly argue that the balance of equities weigh against Plaintiffs' requested relief. (ECF 15-3, 17-18; ECF 19, 16-17.) Nothing could be further from the truth. Plaintiffs are not attempting to exploit the public health emergency. Plaintiffs are merely seeking relief from the Secretary of State's rigid application of Nevada election laws the result of which will preclude their ability to access the ballot. Plaintiffs request the same type of accommodation that the Secretary of State has already offered Nevada voters—which accommodation has been upheld by this Court. That is, Plaintiffs want to be able to access the ballot in the constitutionally prescribed manner without risking their health or the health of others and without triggering civil and criminal liability. It is difficult to conceive of how the balance of equities does not weigh in favor of Plaintiffs in this instance. Preserving our democratic principles in the time of stress should be of utmost importance, not the reflexive bureaucratic interest in simplifying the election espoused by the Secretary of State and other Defendants and Intervenors.

F. Plaintiffs do not lack standing.

Intervenors assert that Plaintiffs lack standing. (ECF 15-3, 2.) Intervenors argue that Plaintiffs have not satisfied the standing requirements because they failed to articulate how

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Defendants' conduct caused their injury in fact. (*Id*. at 3.) They further argue that Plaintiffs have failed to describe how their injury will be redressed by the relief sought. (*Id*. at 4.)

"The 'irreducible constitutional minimum of standing' consists of three elements: (1) injury in fact, (2) causation, and (3) likelihood that a favorable decision will redress the injury." *Preminger v. Peake*, 552 F.3d 757, 762-63 (9th Cir. 2008) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). With respect to Intervenors argument as to injury in fact, they contend that Plaintiffs have not produced evidence of an attempt to circulate the Initiative that was stymied by the COVID-19 outbreak. (*Id*. at 3.) However, that is not the case.

As described above, the Declaration of Laura Hale attached to this Reply contains ample evidence of the existence of an injury in fact and a description of how it was caused by COVID-19, the associated social distancing restrictions imposed by the Governor, and the Secretary of State's rigid application of Nevada's ballot access statutes regarding initiative petitions. Fair Maps diligently pursued signature gathering in light of the complications presented by pending litigation and COVID-19. Indeed, Fair Maps incurred substantial risk in seeking signatures, having grown tired and concerned about the delays associated with litigation, gathering approximately 10% of the signatures it needed in less than two months before the pandemic struck. (Decl. of Laura Hale ¶ 8.) Plaintiffs have also presented evidence that Fair Maps was advised that under normal circumstances it would likely be able to obtain the necessary signatures. (*Id*. ¶ 9.) It further provided evidence that it was willing and able to professionalize its signature gathering effort but did not because of the onset of the public health crisis and the associated restrictions. (*Id*.) Plaintiffs have also pointed out that Fair Maps itself sought the Secretary of State's approval to engage in an alternative form of signature gathering to accomplish its result but was rebuffed. (ECF 2-1, ¶ 19.) This is more than sufficient evidence upon which to conclude that Fair Maps have been injured in fact—it cannot qualify the Initiative without relief sought—and the injury was the result of Defendants actions—namely, the Secretary of State's rigid application of Nevada's ballot access statutes.

Plaintiffs Cosgrove, Goodman and MacDonald all suffered related injuries as a result of Defendants conduct. Plaintiff Cosgrove signed the Initiative previously and hopes to vote for it

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on the November ballot. (ECF 2-4, ¶¶ 7-9.) Thus, her injury is the inability to associate herself with the Initiative on the ballot, which occurred as a result of the Secretary's actions. She therefore has met the injury prong of the standing test. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986) ("Restrictions upon the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively and may not survive scrutiny under the First and Fourteenth Amendments." (internal citation omitted).)

Plaintiff MacDonald also satisfies the injury prong. Plaintiff MacDonald wants to sign the Initiative but cannot due to the social distancing restrictions imposed by the Governor resulting from COVID-19, in conjunction with the fact that his health will not accommodate accepting any risk related to the pandemic. (ECF 2-2, ¶¶ 2-8.) Intervenors argue Plaintiff MacDonald should provide evidence that he has pursued other options for signing the Initiative, including having a member of his household, if any, act as the circulator. (ECF 15-3.) This is an absurd argument. Assuming there is another member of Plaintiff MacDonald's household that could do that, that person would still have to take the signed Initiative to the relevant county clerk, if the office is open, risking the possibility of that personal interaction resulting in the contraction of COVID-19 which is then transmitted to Plaintiff MacDonald. The point is that it is enough that the normal method of executing the Initiative is not available to Plaintiff MacDonald as a result of the Secretary of State's actions to conclude Plaintiff MacDonald has suffered an injury in fact caused by her conduct. We should not ask Plaintiffs to risk their health beyond what would be normally required to execute the Initiative to satisfy Intervenors claims regarding standing.

Plaintiff Goodman also satisfies the injury in fact prong. Plaintiff Goodman hoped to circulate the Initiative but not cannot because of COVID-19 and social distancing requirements. (ECF 2-3, ¶¶ 4-5.) He does not, as Intervenors argue, have to show that he had already intended to circulate the Initiative to establish standing. This case is about the effect of the Secretary of State's interpretation and application of Nevada's ballot access statutes to the potential circulation of the Initiative. That the Secretary of State's actions resulted in the cessation of that activity effectuates the injury regardless of what action Plaintiff Goodman took in the past.

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Plaintiffs have also met their burden to show that relief granted by this Court will redress their injury, contrary to Intervenors argument. "To establish redressability, a plaintiff must show that it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) (quoting *Lujan*, 504 U.S. at 561). In this case, Plaintiffs have provided evidence that Fair Maps has collected approximately 10,000 signatures in a relatively short period of time, (Decl. of Laura Hale ¶ 8), is ready and able to work with the Secretary of State to develop an online mechanism to circulate the Initiative, (ECF 2-1, ¶ 18), including through the use of the Secretary of State's online system for voter registration, (*Id.*), and it has further shown that it has access to individuals willing to support the electronic signature gathering and even sign the Initiative electronically, (ECF 2-2, ¶ 7; ECF 2-3, ¶ 9). Plaintiffs firmly believe that they have a reasonable probability—indeed, that it is likely—that they will be able to gather the necessary signatures if the deadline for submitting those signatures for verification is extended and if electronic means can be used to circulate and sign the Initiative. As indicated above, other courts throughout the country have reached similar conclusions and this Court should not diverge from that approach. *See e.g.*, *Esshaki*, 2020 WL 2185553 at *1-2.

G. The *Purcell* principal does not bar Plaintiffs' request.

Rural Counties Defendants argue that the *Purcell* principal prohibits Plaintiffs' requested relief. (ECF 19, 17.) The *Purcell* principal stands for the proposition that courts should be reticent to "disturb long-established expectations that might have unintended consequences" with respect to "imminent" elections. *Liar v. Bullock*, 697 F.3d 1200, 1214 (9th Cir. 2012). In *Purcell*, the Supreme Court vacated an injunction issued by the Ninth Circuit, concluding that "[g]iven the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules." *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006). The appellate court in that cause considered an application to enjoin voter identification procedures "just weeks before an election." Id. at 4. Thus, under the *Purcell* principal, the imminence of the election and sufficiency of time to resolve factual disputes are necessary conditions of its application.

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Purcell is not applicable here. Plaintiffs do not seek to "disrupt" an "imminent election" with a material change to the election rules themselves. We are not days or weeks away from the 2020 election; to the contrary, the November election is five and half months from today. What's more, there is no significant factual dispute in this matter. Indeed, there seem to be no factual disputes, though some of the Defendants and Intervenors have asked for Plaintiffs to provide additional facts, which Plaintiffs have done. Furthermore, the changes sought by Plaintiffs will not disrupt the election or any long held expectation. If the ballot access rules are modified, Plaintiffs will merely have a reasonable chance to place the Initiative on the ballot. Allowing Plaintiffs this opportunity will not disrupt any long held expectation—to the contrary, it will ensure that it is met. In other words, *Purcell* is at its core, about preserving the expectations of participants in the electoral process. The relief sought here will do just that by ensuring a reasonable probability of initiative petitions appearing on the 2020 ballot. Without relief from this Court, that will not happen and voters will be deprived of a key element of their democracy. Thus, applying *Purcell* is not only inappropriate on its face, but would have the opposite of its intended consequence.

III. CONCLUSION

In light of the foregoing, the Court should grant Plaintiffs' Motion for Preliminary Injunction.

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Respectfully submitted:

By */s/ Adam Hosmer-Henner*

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