No. 24-5071

In the United States Court of Appeals for the Ninth Circuit

REPUBLICAN NATIONAL COMMITTEE et al.,

Plaintiffs-Appellants,

v.

CARI-ANN BURGESS, in her official capacity as the Washoe County Registrar of Voters, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Nevada
Case No. 3:24-cv-00198-MMD-CLB

ANSWERING BRIEF OF THE DEMOCRATIC NATIONAL COMMITTEE

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INTRODUCTION

The District Court properly dismissed the complaint filed by Plaintiffs-Appellants Republican National Committee; Nevada Republican Party; Never Surrender, Inc.; and Donald Szymanski ("Plaintiffs").

First, as the District Court recognized, Plaintiffs failed to establish Article III standing. Political-party organizations and candidates certainly *can* have standing to challenge illegally structured competitive environments, but Plaintiffs did not plausibly allege that the receipt of mail-in ballots after election day causes them any electoral disadvantage or requires them to undertake otherwise-unnecessary responsive activities. Competitive standing requires a more concrete showing of actual injury than Plaintiffs' meager offering; the District Court properly dismissed their claims on standing grounds, and this Court should affirm.

Second, dismissal is, in any event, proper on the merits. Like many states that accept mail-in ballots, Nevada has adopted a commonsense rule that allows time for ballots to arrive in the mail after election day so long as those ballots are cast—which is to say, put in the mail—on or before election day. Nevada law provides that these ballots will be counted as long as election officials receive them within four days after the election.

That framework is clearly consistent with federal statutes establishing the Tuesday after the first Monday in November—election day—as the date of the "election" of members of Congress, 2 U.S.C. §§ 1, 7, and the "appoint[ment]" of presidential electors, 3 U.S.C. § 1. The federal statutes establishing a single election day require only that the "election"—the "act of choosing a person to fill an office"—occur by the close of election day. *Foster v. Love*, 522 U.S. 67, 71 (1997). Once voters have made their final choices by placing their ballots in the mail (and thus irretrievably casting them), the relevant "election" or "appoint[ment]" ends. Federal law therefore requires only that voters make their choices by casting their ballots by the close of election day. Because the federal election day statutes do not speak to when properly cast ballots must be received (or processed, or counted), states are free to adopt a mailbox rule like Nevada's, which accepts mail-in ballots cast before but received after election day.

Nevada's approach is also consistent with longstanding practice—and, consequently, upending these well-settled expectations would constitute a seismic shift in election administration, changing the way tens of millions of Americans vote in most states. For more than a century, states have used frameworks like Nevada's, which require ballots to be mailed by election day but permit them to be received and counted afterward. Those statutes remain

prevalent today: Fifteen states and the District of Columbia allow election officials to count mail-in ballots that arrive after election day for *all* absentee voters, while a majority of states count mail-in ballots that arrive after election day for at least some voters. Members of the military serving our country abroad are among the principal beneficiaries of this system, which ensures that a mail-in ballot is not rejected for reasons outside the voter's control. Embracing Plaintiffs' radical theory would invite chaos, confusion, and disenfranchisement—not least of all for servicemembers and overseas voters whose mail-in ballots need the extra time afforded by Nevada's ballot-receipt deadline to reach election officials.

Intervenor-Defendant-Appellee Democratic National Committee (the "DNC") respectfully requests that the Court affirm the District Court's order dismissing Plaintiffs' claims.

JURISDICTIONAL STATEMENT

The DNC agrees with the jurisdictional statement submitted by Plaintiffs.

STATEMENT OF THE ISSUES

1. Do Plaintiffs lack standing to challenge Nevada's ballot-receipt deadline where they failed to plausibly allege any injury or electoral

disadvantage stemming from the purportedly unlawful competitive environment?

2. Even if Plaintiffs had standing, was dismissal of their claims nonetheless appropriate on the merits where Nevada's ballot-receipt deadline is consistent with the federal election day statutes?

STATUTORY ADDENDUM

Except for the statutes, regulations, and rules included in the Statutory Addendum included with this brief, all applicable federal and state statutes are contained in the addendum submitted by Plaintiffs.

STATEMENT OF THE CASE

For almost a hundred years, "each State" was free to fix its federal elections "upon a different day." *Foster*, 522 U.S. at 74 (cleaned up). This practice caused two significant problems. First, when states could set different election days, those that held elections earlier could "influence later voting in other States" and thus hold an "undue advantage" in influencing federal elections. *Id.* at 73–74. This practice threatened to (and did) "distort[]" the voting process. *Id.* at 73. Second, when a state held congressional elections on a different day than presidential elections, residents were burdened with turning out for two different federal election days in a single year. *Id.* at 73–74.

In 1872, Congress set a specific date for federal elections to curb these adverse effects. Today, the federal election day statutes establish the Tuesday after the first Monday in November "as the day for the election" of members of Congress in every even-numbered year, 2 U.S.C. §§ 1, 7, and the day for the "appoint[ment]" of presidential electors in every fourth year, 3 U.S.C. §§ 1, 21.

Nevada law likewise requires that general elections "be held throughout the State on the first Tuesday after the first Monday of November in each even-numbered year." Nev. Rev. Stat. § 293.12755. In 2021, the Nevada Legislature adopted universal mail voting. A.B. 321, 81st Leg., Reg. Sess. (Nev. 2021). The new law took effect January 1, 2022. *Id.* Nevada law requires county clerks and registrars to mail every active registered voter a ballot with some limited exceptions. Nev. Rev. Stat. § 293.269911(1)–(2). Voters who receive a ballot may return it either by mail or by dropping it in a designated drop box. *Id.* § 293.269921(1). To be counted, mail-in ballots must be postmarked on or before election day and received no later than 5:00 p.m. on the fourth day after election day. *Id.* § 293.269921(1)(b).

Plaintiffs filed suit to enjoin the portions of Nevada law that allow election officials to count ballots received up to four days after election day. *See generally* ER-20–36. Plaintiffs specifically alleged that the ballot-receipt

deadline runs afoul of the federal election day statutes because it permits state officials to count ballots received after election day. The problem, they insisted, is that "[t]here is only one federal election day," ER-25, and Nevada violates federal law "[b]y holding voting open beyond the federal election day." ER-28. Plaintiffs also brought two claims under 42 U.S.C. § 1983. The first contended that Nevada has deprived them of their constitutional right to stand for office by "forcing [them] to spend money, devote time, and otherwise injuriously rely on unlawful provisions of state law in organizing, funding, and running their campaigns." ER-33. The second claimed that Nevada's statutory scheme infringes on the right to vote by counting illegitimate votes and thus diluting "honest votes." ER-34.

On May 30, 2024, the DNC and other Defendants moved to dismiss the case. *See* ER-53. On July 17, 2024, the District Court dismissed Plaintiffs' claims because they "lack standing to challenge the Nevada mail ballot receipt deadline." ER-5. The District Court did not reach the merits.

SUMMARY OF THE ARGUMENT

The District Court should be affirmed for two independent reasons.

First, Plaintiffs lack standing to assert their claims. On appeal, Plaintiffs devote the bulk of their opening brief to discussing the requirements and nuances of competitive standing. While this doctrine can

and should be reaffirmed by the Court as a theory of standing political parties and candidates can use to challenge unlawful election practices, there is a striking disconnect between the requirements of competitive standing as articulated by Plaintiffs and the allegations they actually included in their complaint. Because Plaintiffs failed to allege electoral injury or other competitive disadvantage with the plausibility required to survive a motion to dismiss, the District Court properly dismissed their claims.

Second, even if Plaintiffs had standing to sue, dismissal would still be appropriate because they failed to state a claim upon which relief can be granted. Plaintiffs' legal theory is inconsistent with the plain language of federal law, longstanding practice across multiple jurisdictions, and the purpose of the federal election day statutes Plaintiffs ostensibly seek to vindicate. The vast majority of courts to consider similar ballot-receipt deadlines agree: Such laws can and do operate harmoniously with the federal election day statutes. To embrace Plaintiffs' vision of these federal statutes is to invite chaos; taken to its logical end, Plaintiffs' position would require that *all* election activities take place on a single day—a practical impossibility that is plainly not required by law.

Plaintiffs also brought two claims under Section 1983, alleging that Nevada law improperly infringes their right to vote and right to stand for

office. Because the Nevada law expands (rather than burdens) the right to vote and does not affect anyone's ability to run for office one way or the other, these two claims are easily dispensed with and were appropriately dismissed.

ARGUMENT

Legal determinations regarding standing are jurisdictional and thus reviewed de novo. *See Ochoa v. Pub. Consulting Grp., Inc.*, 48 F.4th 1102, 1106 (9th Cir. 2022). This Court, moreover, may "affirm the dismissal 'on any basis fairly supported by the record.'" *Id.* (quoting *Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir. 2001)).

I. The District Court properly concluded that Plaintiffs lack standing.

In concluding that Plaintiffs lack standing to assert their claims, the District Court relied on the long-standing, uncontroversial premise that "an injury must be 'concrete, particularized, and actual or imminent'" to satisfy Article III. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 n.2 (1992) (cleaned up).

Plaintiffs did not clear this threshold requirement: Although they have identified theoretically cognizable bases for political-party standing, they failed to actually plead facts sufficient to take their claimed injuries from the merely possible to the sufficiently plausible.

On appeal, Plaintiffs effectively try to spin straw into gold. Though they expend considerable ink discussing the intricacies of political-party and organizational standing, they necessarily gloss over a critical detail: The allegations in their complaint, which are the *only* thing at issue here, fell short of the mark. Though political parties and candidates can indeed establish Article III standing by challenging an illegally structured competitive environment, *something more* than the unlawfulness itself is needed—competitive disadvantage, compelled responsive activity, or some other nonabstract, colorable injury. Here, however, Plaintiffs did not plausibly allege any harm they have experienced as a consequence of Nevada's ballot-receipt deadline, and so the District Court correctly dismissed their claims on standing grounds.

A. Political parties and candidates can claim Article III standing based on competitive injury.

As the District Court and Plaintiffs both recognize, "[c]andidates and political parties may possess 'competitive standing' stemming from their

shared interest in fair competition." ER-6 (cleaned up) (quoting *Mecinas v. Hobbs*, 30 F.4th 890, 898 n.3 (9th Cir. 2022)); *see also* Opening Br. 14.

The doctrine of competitive standing is particularly well established in this circuit. More than four decades ago, the Court considered whether Republican operatives had standing to challenge a U.S. Postal Service practice that allegedly benefited Democratic candidates. *See Owen v. Mulligan*, 640 F.2d 1130, 1131–32 (9th Cir. 1981). The Court analogized the case to an earlier lawsuit in which "John Tunney, a United States Senate candidate, sought an injunction to prevent another candidate, George Brown, a Congressman from another district, from using his franking privilege to mail literature to voters which Tunney contended was campaign material"—and concluded that the *Owen* plaintiffs did indeed have standing:

> [T]he [plaintiffs'] stake in the outcome of this case is the same as a candidate's in the franking cases. Like Tunney, Owen and the Republic[an] Committee members seek to prevent their opponent from gaining an unfair advantage in the election process through abuses of mail preferences which "arguably promote his electoral prospects." The plaintiffs have a continuing interest in preventing such practices and, thus, have standing.

Id. at 1132–33 (quoting *Schiaffo v. Helstoski*, 492 F.2d 413, 417 (3d Cir. 1974)); *see also Rising v. Brown*, 313 F. Supp. 824, 826 (C.D. Cal. 1970) ("It is clear that plaintiff Tunney has such a personal stake in the outcome of the upcoming primary election wherein he and defendant Brown are rivals as to

assure 'concrete adverseness[.]'" (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))). The Court later reaffirmed *Owen* and the concept of competitive standing, noting in the process that the theory "has been recognized by several circuits." *Drake v. Obama*, 664 F.3d 774, 782–83 (9th Cir. 2011).[1]

Most recently, the *Mecinas* panel endorsed *Owen* and *Drake* and further explored the contours of competitive standing, explaining, "If an allegedly unlawful election regulation makes the competitive landscape worse for a candidate or that candidate's party than it would otherwise be if the regulation were declared unlawful, those injured parties have the requisite concrete, non-generalized harm to confer standing." 30 F.4th at 898.[2]

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[1] *See, e.g.*, *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 585–87 (5th Cir. 2006) (Texas Democratic Party had standing to challenge Republican congressional candidate's eligibility because, if Republican Party "were permitted to replace [challenged candidate] with a more viable candidate, then [Democratic Party's] congressional candidate's chances of victory would be reduced" and down-ballot Democratic candidates "would suffer due to the change's effect on voter turnout and volunteer efforts"); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (party representative had standing in ballot-access case because party might "suffer a concrete, particularized, actual injury—competition on the ballot from candidates that . . . were able to avoid complying with the Election Laws and a resulting loss of votes" (cleaned up)).

[2] "That both a candidate and a candidate's political party can assert standing based on their shared interest in 'fair competition' follows not only from [the Court's] decision in *Owen*, which held as much, but also from the fact that typically . . . , 'after the primary election, a candidate steps into the shoes of his party, and their interests are identical.'" *Mecinas*, 30 F.4th at

There is, however, a catch—one that Plaintiffs come close to covering up. It is inaccurate to say that "the 'illegal structuring of a competitive environment' directly harms political candidates" such that the illegality on its own satisfies Article III, as Plaintiffs seem to suggest. Opening Br. 15 (quoting *Shays v. FEC*, 414 F.3d 76, 85 (D.C. Cir. 2005)).[3] While an unlawfully structured competitive environment might be *necessary* to establish competitive standing, it is not alone *sufficient* to satisfy Article III.

Shays itself illustrates this point. Analogizing to administrative-law cases, the D.C. Circuit concluded that the "illegal structuring of a competitive environment" is "sufficient to support Article III standing." 414 F.3d at 85. But this oft-quoted language from *Shays* must be read in context—it does not, in fact, suggest as expansive a conception of competitive standing as Plaintiffs advanced before the District Court and feint towards here. After all, such a position would be in obvious tension with the well-settled rule that an "undifferentiated, generalized grievance about the conduct of government"

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898 n.3 (citations omitted) (first quoting *Drake*, 664 F.3d at 782; and then quoting *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 588 (5th Cir. 2006)).

[3] This was, notably, the position that Plaintiffs took before the District Court, which rightly rejected it. *See* ER-9 ("[T]he Court disagrees with the contention that being forced to participate in an illegally structured competitive environment, without more, is sufficient to confer competitive standing." (cleaned up)).

is insufficient under Article III. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam). Moreover, *Shays* emphasized the practical impact of the illegal structuring, explaining that the plaintiffs would "need to adjust their campaign strategy" in order to counteract the increased competition engendered by the campaign-finance scheme they were challenging. 414 F.3d at 86–87.

Read properly, *Shays* confirms what other competitive-standing cases have emphasized: *Something more* than an unlawful competitive environment is required to satisfy Article III. This is in line with the Ninth Circuit's precedent going back to *Owen*; even though the challenged postal practices in that case did not *directly* harm the Republican plaintiffs, standing was nonetheless conferred because those practices required them to work "to prevent their opponent from gaining an unfair advantage in the election process." 640 F.2d at 1133. And it is consistent with the District Court's order now on appeal, which correctly explained that "[p]laintiffs asserting competitive standing in the Ninth Circuit have two means through which they may fulfill the injury-in-fact requirement." ER-6.

The first option for a political party or candidate invoking competitive standing is to allege "that they have been injured by the 'potential loss of an election,'" *id.* (quoting *Drake*, 664 F.3d at 783)—which is to say, claim some

form of actual competitive disadvantage, usually in the form of lost votes. The paradigmatic example of this injury is found in ballot-order cases like *Mecinas*; there, the plaintiffs alleged that the challenged "Ballot Order Statute . . . divert[ed] more votes to Republicans than Democrats, thereupon giving the Republican Party an unfair advantage." 30 F.4th at 897; *see also, e.g.*, *Nelson v. Warner*, 12 F.4th 376, 384–85 (4th Cir. 2021) ("Given the expert testimony credited by the district court that it was extremely likely that the primacy effect would have a negative impact on [candidate plaintiff's] vote tally, we hold that [he] showed a substantial risk of injury that was particular and concrete.").

"[A]lternatively," the second option for plaintiffs claiming competitive standing in the election context is to allege "that they are 'forced to compete under the weight of a state-imposed disadvantage,' in which case they need not show that the challenged law 'has changed (or will imminently change) the actual outcome of a partisan election.'" ER-6 (quoting *Mecinas*, 30 F.4th at 899). This is the type of injury explored in *Shays*—rather than allege electoral disadvantage, a plaintiff can instead plead the need to undertake otherwise-unnecessary responsive activities to remain competitive in the illegally structured environment. *See, e.g.*, *Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990) (minor political party had standing in ballot-access case

because allegedly improper placement of major-party candidates on ballot resulted in injury of "increased competition" that required "additional campaigning and outlays of funds"). These plaintiffs are confronted with a Hobson's choice: either do something they would not otherwise do or else risk competitive disadvantage.[4]

Under either theory, Plaintiffs had to plead something more than the alleged illegality of Nevada's ballot-receipt deadline—and this is where they fell short.

B. Plaintiffs' pleaded injuries are insufficient to confer competitive standing.

Try as Plaintiffs might to rehabilitate their allegations on appeal, they failed to adequately allege a sufficient injury apart from a purportedly unlawful competitive environment.

In cursory fashion, Plaintiffs attempted to satisfy both strains of competitive standing described above. As to the first option, Plaintiffs alleged that "[t]he mail ballot deadline [] specifically and disproportionately harms Republican candidates." ER-23. As to the second, they claimed that

[4] "The phrase 'Hobson's choice' comes from Thomas Hobson, an English liveryman who required every customer to choose the horse nearest the door. A Hobson's choice is an 'apparently free choice with no real alternative.'" *Cano-Merida v. INS*, 311 F.3d 960, 964 n.3 (9th Cir. 2002) (citation omitted) (quoting *Webster's Seventh New Collegiate Dictionary* 395 (1966)).

they must "spend money on mail ballot chase programs and post-election activities."[5]

It's a hornbook rule of civil procedure that "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This same standard applies to a plaintiff's obligation to plead standing. *See Winsor v. Sequoia Benefits & Ins. Servs., LLC*, 62 F.4th 517, 524–25 (9th Cir. 2023). And here, Plaintiffs failed to plausibly allege a sufficient injury to confer competitive standing; they "stop[ped] short of the line between possibility and plausibility." *Id.* at 524 (quoting *Iqbal*, 556 U.S. at 678).

First, Plaintiffs alleged that late-arriving ballots disproportionately favor Democratic candidates, thus putting Plaintiffs at the sort of electoral disadvantage that would support a competitive-standing claim under *Owen*, *Drake*, and *Mecinas*. The problem, however, is that their complaint does not plausibly allege that Nevada's ballot-receipt deadline actually costs

[5] Plaintiffs no longer rely on the standing of Mr. Szymanski, and for good reason: As the District Court rightly acknowledged, the claimed injury of "vote dilution"—the only injury purportedly suffered by him and other Republican voters—"has been repeatedly rejected by federal courts . . . as an insufficient injury in fact to support standing when the alleged harm is predicated upon the counting of illegitimate or otherwise invalid ballots and equally affects all voters in a state." ER-15 (collecting cases).

Republicans any votes or otherwise places them at an electoral disadvantage. As the District Court observed,

> Democrats in Nevada have returned more mail ballots than Republicans in the past two general elections (42.7% versus 29.2% of all mail ballots in 2022, and 46.2% versus 26.2% in 2020), but around 27.6% of mail voters in each of those elections did not identify as Democrats or Republicans. The partisan lean of the unaffiliated mail ballots is unknown.

ER-7 n.4 (citations omitted). On appeal, Plaintiffs do not grapple with these unaffiliated voters and instead parrot the allegation that Democratic "voters overwhelmingly tend to vote by mail and return those ballots later than Republicans." Opening Br. 11. But the purported voting habits of *Democrats* shed no light on when and for whom the significant plurality of unaffiliated voters cast their mail-in ballots. Absent even an allegation as to the partisan breakdown of these unaffiliated ballots, an electoral disadvantage cannot be plausibly assumed. *Cf. Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 907 (8th Cir. 2020) (per curiam) (party committees had standing to challenge Minnesota's ballot-order statute where they sufficiently demonstrated that "it unequally favors supporters of other political parties").[6]

[6] Nor, given the speculative underpinnings of Plaintiffs' theory, can they "show[] that any harm to their electoral prospects will 'likely' be redressed by enjoining Nevada from counting ballots received after Election Day. . . . How this all would play out for Republican candidates in Nevada

Though a political party or candidate need not show that a challenged practice "has changed (or will imminently change) the actual outcome of a partisan election" to plead competitive standing under this theory, it must at least plausibly allege "an unfair advantage"—for example, "diverting more votes" to one party than another. *Mecinas*, 30 F.4th at 897, 899 (cleaned up). This Plaintiffs have not done; "it does not necessarily follow" from Plaintiffs' allegations "that mail ballots arriving after Election Day will skew Democratic." ER-7.[7]

Second, Plaintiffs' claims of compelled responsive activities fare no better. As the District Court noted, Plaintiffs failed to explain how they "would not round up mail ballots in substantially the same manner if they were due at county clerks' offices on Election Day instead of four days later; they would just conduct those same activities a few days earlier in November or over a shortened period of time." ER-11. Put differently, Nevada's ballot-receipt deadline doesn't require Plaintiffs to engage in responsive activities

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this November is entirely uncertain." ER-8 (quoting *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380 (2024)).

[7] For this same reason, Plaintiffs do not have associational standing on behalf of Republican candidates, *contra* Opening Br. 40–43, since the complaint did not plausibly allege injury to a given candidate's electoral chances any more than it did to the party as a whole.

they would not otherwise undertake; instead, it gives them more time to do the things they would have done anyway.

Similarly, the other responsive activities Plaintiffs would purportedly need to pursue, such as "poll watching and election-integrity trainings," ER-12, are not plausibly connected to the ballot-receipt deadline—these are, again, the types of activities that Plaintiffs would undertake *regardless* of when mail-in ballots must be received. Plaintiffs "therefore are not engaging in additional poll watching and mail ballot counting activities to identify or counteract any harms from the Nevada mail ballot receipt deadline," ER-13, and these activities are thus insufficient for purposes of competitive standing.[8]

* * *

Plaintiffs are ultimately right in theory but wrong in practice. Political parties and candidates can indeed satisfy Article III under a theory of competitive standing by identifying unlawfulness in the electoral machinery and then alleging either a consequent electoral disadvantage or compelled

[8] Plaintiffs fault the District Court for purportedly "requir[ing them] to produce 'evidence' of their injuries in response to the motions to dismiss," Opening Br. 44 (quoting ER-11), but the District Court merely emphasized the logical gaps in Plaintiffs' theory—and assessing the plausibility of a complaint's allegations "require[es] the reviewing court to draw on its experience and common sense," *Iqbal*, 556 U.S. at 663–64.

responsive activities they must undertake to remain competitive. But at this stage of a proceeding, plausibility remains the benchmark—and Plaintiffs have not *plausibly* alleged something more to nudge their opposition to Nevada's ballot-receipt deadline from a generalized grievance to a cognizable competitive injury. The District Court's standing conclusion should therefore be affirmed.

II. Alternatively, the District Court's decision should be affirmed because Nevada's ballot-receipt deadline is consistent with federal law.

Although the District Court concluded only that "Plaintiffs . . . failed to demonstrate that the Court has standing to exercise jurisdiction over this case," ER-17, this Court may "affirm the dismissal 'on any basis fairly supported by the record.'" *Ochoa*, 48 F.4th at 1106 (quoting *Vestar Dev. II*, 249 F.3d at 960). Even if Plaintiffs had standing to bring the claims raised in their complaint (which they do not), dismissal with prejudice was nonetheless appropriate because their claims fail on the merits.

While federal law establishes the "day for the election," this is simply the date by which voters must *cast* their ballots. Federal law does not set a deadline by which mail-in ballots submitted on or before the "day for the election" must be received, nor does it address (let alone limit) the states' ability to set such a deadline. States are thus free to adopt a mailbox rule like

Nevada's. And, indeed, many states have: A majority of states and the District of Columbia count mail-in ballots that arrive after election day for at least some voters.

Plaintiffs' statutory claims fail on the merits because they are premised on a flawed understanding of what federal law requires. Plaintiffs insist a ballot is not lawfully cast until it is *received* by election officials, ER-32, and contend that Nevada thus impermissibly allows ballots to be "cast" after election day when it counts mail-in ballots submitted on or before election day but received up to four days after, ER-33. But Plaintiffs' assumption that a ballot is not "cast" until it is received is not supported by the plain language of the federal statutes, much less common sense. Nor is Plaintiffs' position consistent with the purpose of the federal statutes or longstanding state election procedures in various jurisdictions throughout the country.

Each of these reasons, on its own, warrants dismissal of Plaintiffs' claims and affirmance of the District Court's order.

A. Plaintiffs' position conflicts with the plain language of the federal election day statutes.

Plaintiffs' complaint rests on their contention that Nevada law impermissibly "hold[s] voting open beyond the federal Election Day" by allowing ballots submitted on or before election day to be received and counted after election day. ER-28. But the plain language of the federal

election day statutes requires only that the "election" of members of Congress and the "appointment" of presidential electors happen on a specified day. And, for the reasons discussed below, "election" and "appointment" occur once all voters have chosen their preferred candidates.[9] The statute does not set a deadline by which the state must receive (or count) ballots expressing those choices.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'n Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). The term "election" in the federal election day statutes refers to the "the act of choosing a person to fill an office." Noah Webster, *An American Dictionary of the English Language* 433 (C. Goodrich & N. Porter eds. 1869); *see also Foster*, 522 U.S. at 71. Voters "choose" their preferred candidates when they cast their ballots.

That it might take additional time beyond election day to receive, process, and count ballots and certify results—in other words, to determine

[9] Although federal law refers to the "appointment" of presidential electors rather than the election of presidential candidates, the practical meaning is the same: Because "States appoint[] the electors chosen by the party whose presidential nominee had won statewide," *Chiafalo v. Washington*, 591 U.S. 578, 584 (2020), the popular vote for President of the United States effectively serves as the "final selection" of electors in each state, *Foster*, 522 U.S. at 71.

which candidate won—is widely accepted and legally inconsequential. *See, e.g.*, *Millsaps v. Thompson*, 259 F.3d 535, 546 n.5 (6th Cir. 2001) ("[O]fficial action to confirm or verify the results of the election extends well beyond federal election day[.]"); *RNC v. Wetzel*, 120 F.4th 200, 208–09 (5th Cir. 2024) ("Of course, it can take additional time to tabulate the election results."). The relevant act to which the federal election day statutes refer—the act which must be completed by election day—is the voter's *selection*. That choice is irrevocably made, and the "election" conducted within the meaning of federal law, when the voter *submits* their ballot.

Other provisions in Title 2 likewise equate "election" with voters' choices in this way. For example, 2 U.S.C. § 1, on which Plaintiffs' complaint relies, explains that the date on which a senator "shall be elected" is the day of the "election a Representative to Congress is regularly by law to be *chosen*." (Emphasis added); *see also* 2 U.S.C. § 1a (requiring "the executive of the State from which any Senator has been *chosen* to certify [the] election" (emphasis added)); 2 U.S.C. § 381 (defining "election" as "general or special election to *choose* a Representative" (emphasis added)). Section 1 and other statutes like it affirm that the core of an election is choice. A voter chooses who they wish to elect when they complete and submit their ballot. The

voters' collective choice is thus completed when all ballots are submitted—even if they have not all yet been received and counted.

B. Nevada law does not conflict with federal law.

To prevail on the merits, Plaintiffs need to show that Nevada law conflicts with federal law. It does not.

Under the U.S. Constitution, states are responsible for "the mechanics" of federal elections. *Foster*, 522 U.S. at 69. Pursuant to that authority, states have enacted a variety of laws that control when and how people vote. For example, forty-seven states and the District of Columbia have established periods for early voting.[10] While some states allow mail-in voting only for

[10] *See, e.g.*, Alaska Stat. § 15.20.064 (allowing voting for fifteen days before election); Ark. Code Ann. § 7-5-418 (same); Ariz. Rev. Stat. § 16-541 (requiring that elections "provide for early voting"); Fla. Stat. § 101.657 (requiring early voting ten days before election); 10 Ill. Comp. Stat. 5/19A-15 (providing for early voting forty days before election); Kan. Stat. Ann. § 25-1119 (providing for advance voting); Md. Code Ann., Elec. Law § 10-301.1 (allowing early voting); Neb. Rev. Stat. § 32-938 ("A registered voter shall be permitted to vote early[.]"); N.J. Stat. Ann. § 19:15A-1 (same); N.M. Stat. Ann. § 1-6-5.7 (allowing early voting twenty-eight days before election); N.Y. Elec. Law § 8-600 (allowing early voting ten days before election); N.C. Gen. Stat. § 163-166.40 (allowing early voting "the Third Thursday before an election"); S.C. Code Ann. § 7-13-25 (providing for early voting); Tenn. Code Ann. § 2-6-102 (allowing early voting twenty days before election); Tex. Elec. Code Ann. § 85.0001 (allowing early voting seventeen days before an election); Utah Code Ann. § 20A-3a-601 (allowing early voting fourteen days before election); W. Va. Code § 3-3-3 (allowing early voting thirteen days before election); *see also Early In-Person Voting*, Nat'l Conf. of State Legislatures, https://bit.ly/43aCMhI (Dec. 20, 2024) (listing states and territories with early in-person voting).

specific reasons,[11] others allow for no-excuse mail-in voting or, like Nevada, have adopted an all-mail voting system.[12] Among these states, some require that ballots be received by election day, but Nevada is far from alone in requiring only a postmark by election day for a ballot to be counted.[13]

Nevada's statutory scheme—like those in many states—"operate[s] harmoniously" with the federal election day statutes. *Gonzalez v. Arizona*, 677 F.3d 383, 394 (9th Cir. 2012) (en banc), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013). As discussed above, the federal election day statutes set the date by which voters must choose who to elect. Put differently, federal law establishes the date by which ballots must be *submitted*, but it is silent as to whether there is a deadline by when election officials must receive ballots in order for them to be counted (and, for that matter, when that deadline is). *See Bognet v. Sec'y Commonwealth*

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[11] *See, e.g.*, Conn. Gen. Stat § 9-135; Del. Code Ann. tit. 15, § 5502; Ind. Code § 3-11-10-24; La. Stat. Ann. § 18:1303; Mo. Rev. Stat. § 115.277.

[12] *See, e.g.*, Nev. Rev. Stat. § 293.269911; Colo. Rev. Stat § 1-5-401; Haw. Rev. Stat. § 11-101; Or. Rev. Stat. § 254.465; Vt. Stat. Ann. tit. 17, § 2537a; Wash. Rev. Code § 29A.40.010.

[13] *Compare, e.g.*, Ala. Code § 17-11-18 (requiring that mail-in ballots be received by noon on election day), *with, e.g.*, Cal. Elec. Code § 3020 (requiring that mail-in ballots be received no later than seven days after election day if postmarked on or before election day), *and* Wash. Admin. Code § 434-250-120(1)(c)(i) (allowing ballots to be counted when "postmarked not later than the day of the election and received not later than close of business the day before certification of the election").

of Pa., 980 F.3d 336, 353 (3d Cir. 2020), *vacated on other grounds sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021).

Nevada's ballot-receipt deadline does not change the date by which ballots must be cast because it does not extend the time voters have to choose their candidates. If anything, the deadline *reinforces* the federal requirement that voters make their choices (which is to say, select candidates) no later than the designated federal election day. Nevada law counts mail-in ballots received after election day under just two circumstances. Relevant here, one such circumstance is when the mail-in ballot is postmarked on or before election day and received before 5:00 p.m. on the fourth day after election day. Nev. Rev. Stat. § 293.269921(1). These provisions ensure that all ballots cast on or before election day are counted (and that ballots cast *after* that date are not). This is precisely the kind of discretion federal law allows in the context of elections generally and ballot-receipt deadlines in particular.

C. The Fifth Circuit's recent ruling does not require invalidating Nevada's ballot-receipt deadline.

All but one of the courts to have considered the validity of ballot-receipt deadlines like Nevada's agree such rules are entirely consistent with federal law. *See, e.g.*, *Bost v. Ill. State Bd. of Elections*, 684 F. Supp. 3d 720, 736 (N.D. Ill. 2023), *aff'd*, 114 F.4th 634 (7th Cir. 2024); *Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354, 372 (D.N.J. 2020). The lone

case to the contrary is *RNC v. Wetzel*, which struck down a Mississippi law that allowed ballots received up to five days after election day to be counted. The Fifth Circuit's flawed reasoning in *Wetzel* resulted in a conclusion at odds with that reached by every other court to consider this issue.

Specifically, the Fifth Circuit identified three purportedly "definitional elements" that bear on what the term "election" means in the federal election day statutes: "(1) official action, (2) finality, and (3) consummation." *Wetzel*, 120 F.4th at 207. There are issues with the source of these elements—the Fifth Circuit relied heavily on the U.S. Supreme Court's *Foster* decision, which is readily distinguishable—but, regardless, these three elements (and, accordingly, the term "election" in the federal election day statutes) allow for a system like Nevada's. Despite the Fifth Circuit's conclusion that these three criteria are satisfied only if a state requires all ballots be received on or before election day, the principles of official action, finality, and consummation are entirely consistent with a much wider range of election procedures—including Nevada's ballot-receipt deadline.

1. "Official action" does not require receipt of a ballot.

The Fifth Circuit cited *Foster* for the principle that "elections involve an element of government action." *Wetzel*, 120 F.4th at 207 (citing *Foster*, 522 U.S. at 71). Without much additional explanation, it proceeded to

conclude that the *only* relevant "official action" is the receipt of a ballot. *See id.* But, as Mississippi argued, "offering a ballot and a method to cast it" also constitute official election-related actions, *id.*—as do tabulating ballots and certifying results, which are also "actions of . . . officials meant to make a final selection of an officeholder," *id.* (quoting *Foster*, 522 U.S. at 71). Receipt of a ballot is merely one component of official action, and the Fifth Circuit gave no compelling reason to single it out for dispositive treatment.

Instead, the Fifth Circuit myopically focused on irrelevant hypotheticals to suggest that "a ballot can[not] be 'cast' before it is received." *Id.* ("What if a State changes its law to allow voters to mark their ballots and place them in a drawer?"). But this reasoning merely presupposes, rather than independently confirms, the Fifth Circuit's belief that official "receipt" of a ballot has some special effect that other official actions do not. And it does not address the situation created by Nevada's law, where a voter fills out their mail-in ballot and *irrevocably relinquishes custody of it*, and the ballot is subsequently received by officials. Why such a ballot is not "cast" when mailed was never persuasively addressed by the Fifth Circuit.

2. A vote is final when it is cast, regardless of when it is received.

The Fifth Circuit next addressed "finality," which it pegged to the time when "the result is fixed . . . and the proverbial ballot box is closed." *Wetzel*,

120 F.4th at 207. Again, however, the Fifth Circuit failed to explain why it's not the case that "the proverbial ballot box is closed" when all voters have submitted their ballots by mailing them.[14]

Indeed, the concept of finality is at least as consistent (if not more so) with a reading of the federal election day statutes that focuses on the deadline by which all voters must *cast* their ballots, rather than when officials must *receive* them. As discussed above, the federal election day statutes are best understood as requiring that voters make their *selections* no later than election day. That selection—the voter's choice—is irrevocably made when the voter *submits* their ballot (which, under Nevada law, is when they put it in the mailbox—not "a drawer" in their home or anywhere else).

The Fifth Circuit's suggestion that voters can "recall" mail-in ballots does not require a different conclusion. True, domestic mail can be "redirect[ed]"after it is sent, including back to its sender. *Mailing Standards of the United States Postal Service: Domestic Mail Manual*, U.S. Postal Serv. § 5.1.1 (July 14, 2024), https://bit.ly/430g383. But even if a Nevada voter were to intercept and redirect their mail-in ballot back to them, state law

[14] The Fifth Circuit's conclusion was based at least in part on specific provisions of Mississippi law that define when absentee ballots are considered "final," *Wetzel*, 120 F.4th at 207–08 (citing 01-17 Miss. Code R. §§ 2.1, 2.3(a)), which are, of course, inapplicable here.

would still require that the ballot be submitted *on or before election day* in order to be counted. Accordingly, voters *cannot* "change their votes after Election Day" in Nevada. *Wetzel*, 120 F.4th at 208.

3. "Consummation" of an election is not tethered to receipt of the last ballot.

Finally, the Fifth Circuit read into the federal election day statutes' use of the word "election" a requirement that the election be "consummated." *Wetzel*, 120 F.4th at 208. In support of this reading, the Fifth Circuit pointed to *Foster* and another case involving an early voting scheme—but ignored that *Foster* addressed only whether an election can conclude *before* the designated election day, leaving no "action to be taken *on* federal election day." 522 U.S. at 68–69 (emphasis added). In fact, *Foster* confirmed that its narrow holding meant "only that if an election does take place, it may not be consummated *prior* to federal election day." *Id.* at 72 n.4 (emphasis added). The opinion expressly did *not* "isolate[e] precisely what acts a State must cause to be done on federal election day . . . in order to satisfy the" federal election day statutes. *Id.* at 72.

The Fifth Circuit's attempt to distinguish receipt of mail-in ballots from other official post-election actions like tabulation—"[t]he election is [] consummated because officials know there are X ballots to count, and they know there are X ballots to count because the proverbial ballot box is closed,"

Wetzel, 120 F.4th at 209—leaves much to be desired. Neither here nor elsewhere in the *Wetzel* opinion did the Fifth Circuit provide a compelling basis to single out receipt of mail-in ballots for special treatment—or, for that matter, to reach a result different from the other courts that have considered this issue and found post-election ballot-receipt deadlines consistent with the federal election day statutes.

D. Plaintiffs' position is inconsistent with the purposes of federal law.

Plaintiffs' interpretation of the federal election day statutes cannot be squared with their purpose. In enacting them, "Congress was concerned . . . with the distortion of the voting process threatened when the results of an early federal election in one State can influence later voting in other states." *Foster*, 522 U.S. at 73; *see also Millsaps*, 259 F.3d at 541–42 ("By establishing a uniform date for holding federal elections, Congress sought 'to remedy more than one evil arising from the election of members of congress occurring at different times in the different states.'" (quoting *Ex parte Yarborough (The Ku Klux Cases)*, 110 U.S. 651, 661 (1884))); *Way*, 492 F. Supp. 3d at 368 ("[T]he primary concern when enacting the [federal election day statutes] appears to be the reporting of final election results in some states before other states had yet to open the polls.").

Nevada's ballot-receipt deadline does not "foster either of the primary evils identified by Congress as reasons for passing the federal statutes." *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 777 (5th Cir. 2000). It does not establish two (or more) election days, and every vote must be submitted as of the federal election day. (Plaintiffs' allegation that Nevada law "holds open" election day ignores how the deadline actually operates; only votes cast by election day are counted. *See* Nev. Rev. Stat. § 293.269921(1).) And ballots that arrive and are counted *after* election day cannot possibly distort the results in other states.

Ultimately, it is *Plaintiffs'* position, not Nevada's, that would undermine federal law. Declining to count ballots cast on or before but received after election day would potentially disenfranchise large numbers of Nevada voters—after all, once a voter puts their ballot in the mail, there is no guarantee that the U.S. Postal Service will deliver it to election officials on or before election day. As the Fifth Circuit explained in *Bomer*, "we cannot conceive that Congress intended the federal election day statutes to have the effect of impeding citizens in exercising their right to vote. The legislative history of the statutes reflects Congress's concern that citizens be able to exercise their right to vote." 199 F.3d at 777 (citing Cong. Globe, 42d Cong.,

2d Sess. 3407–08 (1872)). Plaintiffs' position is directly contrary to this recognized purpose and deprecates the very rights they claim to safeguard.

E. Plaintiffs' position contradicts historical practice.

"[T]he long history of congressional tolerance, despite the federal election day statute[s], of absentee balloting and express congressional approval of absentee balloting"—including when those ballots are received after election day—further requires rejecting Plaintiffs' theory. *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001). Courts should not "read the federal election day statutes in a manner that would prohibit . . . a universal, longstanding practice." *Bomer*, 199 F.3d at 776. Yet accepting Plaintiffs' theory in this case would do just that.

States have permitted absentee balloting for "[m]ore than a century." *Id.* (citing Edward B. Moreton, Jr., *Voting by Mail*, 58 S. Cal. L. Rev. 1261, 1261–62 (1985)); *cf.* George Frederick Miller, *Absentee Voters and Suffrage Laws* 179–97 (1948) (collecting laws, enacted as early as 1635, that address indirect voting). "Absentee voting began during the Civil War as a means of providing soldiers the ability to vote." *Keisling*, 259 F.3d at 1175. Several states allowed Civil War soldiers to "vote in the field" on the relevant state or federal election day and extended the "time for canvassing the votes" thereafter received. J.H. Benton, *Voting in the Field* 317–18 (1915). North

Carolina and Florida, for example, counted ballots twenty days after the election; in Maryland, it was "fifteen days after the election." *Id.* Many Northern states did not extend the time for counting ballots because there was already a sufficient period between "the day of the election, which was the day on which the soldiers were to vote in the field, and the counting of the votes." *Id.* at 318. These extensions for ballot receipt were necessary because of "the difficulty of getting the votes home to the various States in season to be counted with the other votes." *Id.* at 316. Notably, the Fifth Circuit's brief discussion of Civil War-era absentee voting in *Wetzel* omitted any mention of these post-election ballot-receipt deadlines. *See* 120 F.4th at 209–10.

Even fifty years after the Civil War, many states allowed soldiers to vote in the field on election day and have their votes counted in their home states at a later time. *See* P. Orman Ray, *Absent Voters*, 8 Am. Pol. Sci. Rev. 442, 468–69 (1914).

"Vermont became the first state to accord absentee voting privileges to civilians in 1896. States have continued to provide for and expand absentee voting since." *Keisling*, 259 F.3d at 1175. Indeed, all but four states had some form of absentee voting provisions by 1924. P. Orman Ray, *Absent-Voting Laws*, 18 Am. Pol. Sci. Rev. 321, 321 (1924).

Many states permitted votes submitted by election day to be received and counted at a later date. *See* Ray, *Absent Voters*, *supra*, at 442–43; Joseph P. Harris, *Election Administration in the United States* 287–88 (1934). In Kansas, for example, the absentee voter was required to appear at a polling place on election day, swear that they were a qualified voter (among other things), and complete a ballot. *See* Ray, *Absent Voters*, *supra*, at 442–43. The voter could mail their own ballot on election day, which would thereafter be received by an election official. *See id.* Then, the vote would be "sent by mail to the proper official" before "the result of the official canvass [wa]s declared." *Id.* Nebraska allowed voters to mail ballots on election day—necessarily meaning they would be received by election officials after election day. *See* Neb. Rev. Stat. § 32-838 (1943), https://bit.ly/45zCHmX. And Pennsylvania deferred the counting of absentee ballots until "the official canvas." Ray, *Absent-Voting Laws*, *supra*, at 322.

Some states even imposed explicit ballot-receipt deadlines:

- In Washington, a voter who was unable to vote in their home county could cast a ballot in another county, which would then be "sealed and returned to the voter's home county." P. Orman Ray, *Absent-Voting Laws*, 12 Am. Pol. Sci. Rev. 251, 253 (1917). "In order to be counted the ballot

must have been received by the [home] county auditor within six days from the date of the election or primary." *Id.* at 253–54.

- In California, a voter could appear before "any notary public" to complete their ballot, which was then "to be by him returned by registered mail" to election officials. Cal. Political Code § 1359(b)–(c) (James H. Derring ed. 1924), https://bit.ly/3VN7GJg. The completed ballot had to be received "within fourteen days after the date of the election." *Id.* § 1360.

- In Missouri, a voter had to complete an affidavit and ballot before "an officer authorized by law to administer oaths." Mo. Rev. Stat. § 11474 (1939), https://bit.ly/3VQsq2P. The ballot could then be "sent by mail" "by such voter." *Id.* Ballots had to be received by election officials "not later than 6 o'clock p. m. the day next succeeding the day of such election." *Id.*

- In Rhode Island, a voter could vote absentee "on . . . election day" before "some officer" authorized to administer oaths. R.I. Sess. Law ch. 1863 § 6 (1932), https://bit.ly/3RrDS1V. Then, the voter had to "mail" the completed ballot "on . . . election day" so that it could be received by "midnight of the Monday following said election." *Id.*

By the mid-1980s, "[t]welve [states] ha[d] extended the deadline for the receipt of voted ballots to a specific number of days after the election" for at least some voters. *Uniformed and Overseas Citizens Absentee Voting:*

Hearing on H.R. 4393 Before the Subcomm. on Elections of the H. Comm. on H. Admin., 99th Cong. 21 (1986) (statement of Henry Valentino, Director, Federal Voting Assistance Program).

Today, at least twenty-eight states and the District of Columbia permit mailed ballots to arrive after election day for all or some voters, including overseas and military voters. *See supra* pp. 24–25.[15] Of that majority, in addition to Nevada, fourteen states and the District of Columbia currently accept timely cast mail-in ballots received after election day from all absentee voters.[16] Many have done so for years.[17] The list of states with deadlines like

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[15] The Fifth Circuit's *Wetzel* opinion misunderstood this nuance, stating, "Even today, a substantial majority of States prohibit officials from counting ballots received after Election Day." 120 F.4th at 210–11. But a majority of states *allow* post-election ballot receipt for *at least some voters*, such as UOCAVA voters.

[16] *See* Alaska Stat. § 15.20.081(e) (requiring that voters mail their ballots on or before election day); Cal. Elec. Code § 3020(b)(1) (ballots are "timely cast" if received within seven days of election day and mailed on or before election day); D.C. Code § 1-1001.05(10A) (same); 10 Ill. Comp. Stat. 5/19-8(c) (ballots postmarked on or before election day received after polls close "shall be counted"); Kan. Stat. Ann. § 25-1132(b) (counting ballots received after polls close if they are "postmarked or are otherwise indicated by the United States postal service to have been mailed on or before the close of the polls on the date of the election").

[17] Although mail-in voting took on new importance at the onset of the COVID-19 pandemic in 2020, of the fifteen states that currently accept mail-in ballots after election day, eleven did so well before then. For example, West Virginia's law allowing receipt of ballots after election day has been in effect since 2007. *See* W. Va. Code § 3-3-5(g)(2). Virginia has allowed post-election receipt since 2010, Va. Code Ann. § 24.2-709(B); New York since 2011, N.Y. Elec. Law § 8-412(1); Maryland since 2013, Md. Code Ann., Elec.

the one Plaintiffs seek to invalidate here includes four of the nation's five most populous states—California, Texas, New York, and Pennsylvania. And yet, "[d]espite these ballot receipt deadline statutes being in place for many years in many states, Congress has never stepped in and altered the rules." *Bost*, 684 F. Supp. 3d at 736; *see also Bomer*, 199 F.3d at 776 ("Congress has taken no action to curb this established practice.").

Universally, and consistent with federal law, states that accept ballots received after election day require that voters cast them on or before election day. These states simply confirm that such ballots should be counted so long as they arrive within a specified period of time after election day.

It is true that some states—and, at times, the vast majority of states—require receipt of ballots by election day. *See Wetzel*, 120 F.4th at 210. But that proves the DNC's point. Federal law permits states to enact ballot-receipt deadlines of their choosing, consistent with the requirement that the voters' final choices be made no later than election day. Nothing in the snapshot historical accounts offered by the Fifth Circuit in *Wetzel* (or by Plaintiffs before the District Court here) suggests any kind of prohibition on post-election ballot-receipt deadlines. To the contrary, since the Civil War,

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Law § 9-505; California since 2015, Cal. Elec. Code § 3020(b)(1); and Texas since 2017, Tex. Elec. Code Ann. § 86.007(a)(2).

states have enacted various deadlines to fit their particular needs and preferences. And many states enacted deadlines that fell after election day.

Notably, though ballot-receipt deadlines like Nevada's have been in place in many states for years, Congress has never corrected the practice or clarified the rules. That matters: Congress knows how to amend federal election laws (and thus impose different requirements on states) when it wants to. It enacted, for instance, the Electoral Court Reform and Presidential Transition Improvement Act after the advent of post-election ballot-receipt deadlines in Nevada and elsewhere. *See* Pub. L. No. 117-328, 136 Stat. 4459 (2022). That Congress has not taken action to invalidate or otherwise correct multiple states' laws allowing for post-election receipt of mail-in ballots is strong evidence that the practice is consistent with Congress's understanding of federal law. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 599 (1983) (noting that "Congress can and often does correct . . . misconceptions" about meaning of statutes and finding "an unusually strong case of legislative acquiescence in and ratification by implication" where Congress is "constantly reminded" and aware of certain practices).[18]

[18] The Fifth Circuit's aberrant holding in *Wetzel* is not, on its own, adequate basis to disrupt otherwise-settled law or voters' expectations across multiple jurisdictions. Notably, the Fifth Circuit previously articulated this

F. Congress's enactment of UOCAVA confirms that Plaintiffs are wrong on the law.

Rather than prohibiting post-election ballot-receipt deadlines, Congress has passed legislation that recognizes and complements state-law choices about ballot deadlines. Congress enacted the Uniformed and Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA"), Pub. L. No. 99-410, 100 Stat. 924, to help uniformed servicemembers and citizens living abroad, *see The Uniformed and Overseas Citizens Absentee Voting Act: Overview & Issues*, Cong. Rsch. Serv., https://bit.ly/3EVvMLC (Oct. 26, 2016); *Bomer*, 199 F.3d at 777 (discussing purposes behind UOCAVA, including how it requires states to provide absentee ballots to certain voters). Congress's enactment of UOCAVA is especially relevant here for two reasons: First, the plain language of UOCAVA emphasizes the distinction between the date a ballot is cast and the date it is counted, and second, Congress has not invalidated laws in many states that allow counting of UOCAVA ballots cast on election day but received at a later date.

First, UOCAVA established procedures for the collection and delivery of absentee ballots to state election officials. *See* 52 U.S.C. § 20304. The law

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very principle, explaining, "We are unable to read the federal election day statutes in a manner that would prohibit such a universal, longstanding practice of which Congress was obviously well aware." *Bomer*, 199 F.3d at 776.

requires states to "process[] and accept[] . . . marked absentee ballots of absent overseas uniformed services voters" and to "facilitate the delivery" of such ballots "to the appropriate State election official" by "the date by which an absentee ballot must be received in order to be counted in the election" under state law. 52 U.S.C. §§ 20302(a)(10), 20304(b)(1).[19] These provisions recognize that the "election" itself occurs on a particular date and that the date by which a ballot must be received to be counted might be a different date. In other words, the act of *receiving* ballots is not part of the election; the election is the voter's choice of a candidate, and the process of receiving and counting ballots is a ministerial act aimed at identifying the results of the election.

Second, in passing (and amending) UOCAVA, Congress has repeatedly recognized and approved of states setting their own receipt deadlines for mail-in ballots, a substantial portion of which postdate election day. *See, e.g.*, *Bognet*, 980 F.3d at 354 ("[M]any States also accept absentee ballots mailed

[19] Here too, the Fifth Circuit in *Wetzel* misunderstood the nuance of UOCAVA's plain language by stating that "nothing [in UOCAVA] says that States are allowed to accept and count ballots received after Election Day." 120 F.4th at 211; *see also id.* at 213 (referring to UOCAVA as "congressional silence" on ballot-receipt deadlines). But if Congress objected to existing state practices of counting ballots received after election day, then it presumably would have required ballots to be received by election day to count. But Congress did not enact that requirement. Instead, it explicitly acquiesced to each state's own procedures for accepting absentee ballots.

by overseas uniformed servicemembers that are received after election day, in accordance with [UOCAVA]."). This reflects the entirely reasonable assumption that mailed ballots will take some time to arrive from overseas, and it serves as an important protection for the franchise of military voters stationed abroad.

Moreover, the U.S. Attorney General is authorized to enforce UOCAVA. 52 U.S.C. § 20307(a) (providing enforcement authority). Exercising that authority, the federal government has sued states on several occasions and secured orders that required states to extend their deadlines for receipt of mail-in ballots—sometimes several days after election day—to prevent disenfranchisement of military members serving overseas. *See Cases Raising Claims Under the Uniformed and Overseas Citizen Absentee Voting Act*, U.S. Dep't of Just., https://bit.ly/4hJqsK0 (last visited Feb. 20, 2025) (collecting cases). Jurisdictions in the Ninth Circuit sued on this basis include Arizona, New Mexico, and Guam.[20] These facts cannot be reconciled

[20] *See United States v. Arizona*, No. 2:18-cv-00505-DLR (D. Ariz. Feb. 15, 2018), ECF No. 8 (consent decree providing additional time for receipt of UOCAVA ballots to ensure eligible military and overseas voters have sufficient time to vote); *United States v. Guam*, No. 1–cv-00025 (D. Guam July 13, 2012), ECF No. 27 (consent decree requiring Guam extend deadline for receipt of absentee ballots from military and overseas voters until November 15, 2010); *United States v. New Mexico*, No. 1:10-cv-00968-MV-ACT (D.N.M. Aug. 1, 2011), ECF No. 12 (consent decree requiring state to extend deadline for accepting and counting UOCAVA ballots by four days).

with Plaintiffs' claim that the federal election day statutes require all ballots be received by election day.

G. Plaintiffs' position would lead to absurd results.

Plaintiffs' interpretation of federal law would lead to absurd results and have a profound and deleterious effect on voting in the United States. Statutes should be interpreted to reach "a sensible construction that avoids attributing to [Congress] either an unjust or an absurd conclusion." *United States v. Granderson*, 511 U.S. 39, 56 (1994) (cleaned up). Requiring all votes to be submitted and received as of election day would sow enormous chaos, regardless of the purported justification for that rule.

Significantly, Plaintiffs offered no meaningful basis for distinguishing between votes received *after* election day and votes received *before* election day. If counting a ballot received after election day "holds voting open after election day," ER-33, it would seem to follow that counting a ballot received before election day would likewise extend the "election" to a period before the congressionally prescribed day. That would, however, mean that only mail-in ballots submitted and received on election day itself would be valid, leading to an absurdly difficult (if not impossible) system for voting by mail. Worse still, Plaintiffs' theory that "the combined actions of voters and officials" must take place on a single election day would also invalidate early

voting across the United States. That would mean the forty-six states that currently offer some form of early voting, *see supra* note 10, are doing so in direct violation of federal law. Such a conclusion would require nothing short of a seismic change in the administration of elections, hung on the slender reed of a theory that only one court has ever credited.

In response to this dilemma, Plaintiffs might contend (atextually) that the "election" must be complete and final as of election day, but can *begin* before election day. But elections are never final as of election day. *See Millsaps*, 259 F.3d at 546 n.5 (recognizing and explaining in detail how "official action to confirm or verify the results of the election extends well beyond federal election day"). Extensive counting, canvassing, and certification efforts occur after election day, and Plaintiffs make no claim that those efforts improperly hold open the day for elections. Nor could they: Requiring election officials to tally millions of votes by midnight, mere hours after the polls close on election day, would be absurd.[21] It would also require

[21] This interpretation would also result in serious constitutional and statutory problems. For example, the inevitable inability to count all votes submitted on election day by midnight would create equal-protection problems—treating similarly situated voters differently by the pure happenstance of whether officials were able to count their votes in time. It would also be in tension with 52 U.S.C. § 10502(d), which requires states to provide absentee voting for presidential elections and to hold open the deadline for receipt of those votes at least until election day. If states were unable to count all votes received on election day, then Plaintiffs' theory

Plaintiffs to draw a meaningful distinction between *receipt* of votes and *counting* of votes, which they have not done. Instead, the only reasonable understanding of the "final selection" language in *Foster* is the plain meaning of the statutory language as articulated above: The relevant *choice* must conclude by election day. Surrounding ministerial efforts, whether before or after the election, are irrelevant.

III. Plaintiffs' constitutional claims also fail.

Dismissal of Plaintiffs' constitutional claims is also appropriate. They complained that Nevada violates their right to vote and right to stand for office by counting ballots received after election day. ER-33–34. But each claim expressly depended on Plaintiffs' misreading of the federal election day statutes. As a result, each of their constitutional claims fails for the same reasons as their main statutory claim.

Moreover, nothing about Nevada's ballot-receipt deadline burdens Plaintiffs' or their members' and supporters' right to vote or stand for office. Such claims are reviewed under the *Anderson-Burdick* test, *see Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081, 1085 (9th Cir. 2020), and Plaintiffs cannot succeed.

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would bar them from counting the rest after election day—in violation of federal law.

A. Nevada's ballot-receipt deadline does not burden the right to vote.

When assessing whether a statute impermissibly burdens the right to vote, a court must first determine whether the right to vote has been impacted at all. *Short v. Brown*, 893 F.3d 671, 676 (9th Cir. 2018). Statutes that do not make it harder to vote simply do not implicate the right to vote. *See id.* at 677. The same is true of laws that do not impede a candidate's ability to stand for office. *See Bates v. Jones*, 131 F.3d 843, 846–47 (9th Cir. 1997).

Nevada's ballot-receipt deadline does not make it more difficult to vote. If anything, it *facilitates* Nevadans' right to vote by ensuring that qualified voters' timely cast ballots are not rejected. Nor does the deadline "dilute" Nevadans' votes, as Plaintiffs contended in their complaint. ER-30. Dilution occurs "only when disproportionate weight is given to some votes over others." *Election Integrity Project Cal., Inc. v. Weber*, 113 F.4th 1072, 1087 (9th Cir. 2024). Even if votes received after election day were invalid—which they are not—the resulting increase in the total number of votes, on its own, is not legally cognizable "vote dilution."

Plainly, Plaintiffs failed to plead a right-to-vote claim under *Anderson-Burdick*. The claim is thus properly dismissed on the merits. *See Short*, 893 F.3d at 677 (affirming dismissal of challenge to law that "does not burden

anyone's right to vote" and instead "makes it easier for some voters to cast their ballots by mail").

B. Nevada's ballot-receipt deadline does not burden the right to stand for office.

Finally, Plaintiffs' claim that Nevada's ballot-receipt deadline unconstitutionally violates their right to stand for office fails for similar reasons. Their complaint did not include any allegations that the deadline bears on anyone's ability to run for office at all, let alone that it impairs such a right. This alone is sufficient reason to dismiss the claim. *See Bost*, 684 F. Supp. 3d at 739 (dismissing claim that "Ballot Receipt Deadline Statute impairs the right to stand for office" where law did not "prevent[] them from standing for office at all").

* * *

In sum, Nevada's ballot-receipt deadline neither burdens Plaintiffs' right to vote nor prevents them from running for office. By definition, then, the law does not unconstitutionally infringe on Plaintiffs' rights. Both claims are properly dismissed.

CONCLUSION

For the reasons stated above, the DNC respectfully requests that the Court affirm the District Court's dismissal of Plaintiffs' claims with prejudice.

Respectfully submitted this 20th day of February, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 20, 2025.

s/ Kevin J. Hamilton