

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2
3 NEVADA STATE DEMOCRATIC PARTY;)
4 AND ROSS MILLER, IN HIS CAPACITY AS)
5 SECRETARY OF STATE FOR THE STATE)
6 OF NEVADA,)

7 Appellants.

8 vs.

9 NEVADA REPUBLICAN PARTY, and
10 DAVID BUELL, an individual,

11 Respondents,

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Supreme Court No. 58404

District Court No. 11 OC 00147 1B

12 **JOINT APPENDIX**

13 **VOLUME 1**

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15 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
16
17 IN AND FOR CARSON CITY

18 NEVADA REPUBLICAN PARTY, and)
19 DAVID BUELL, an individual.)

20 Plaintiff,)

21 vs.)

22 STATE OF NEVADA, SECRETARY OF)
23 STATE ROSS MILLER)

24 Defendant.)

Case No. 1100 001471B
Dept No. I

25 VERIFIED COMPLAINT

26 COMES NOW, Plaintiff, the Nevada Republican Party,
27 ("Plaintiff" and/or "NRP") by and through its counsel, The O'Mara
28 Law Firm, P.C., through David C. O'Mara, Esq., and Parson, Behle &
29 Latimer, through Rew Goodenow, Esq, and alleges as follows:

30 GENERAL ALLEGATIONS

31 1. Plaintiff, Nevada Republican Party, is and at all times
32 relevant hereto, is a qualified major part pursuant to NRS 293.128.
33 At all times mentioned hereto, members of Plaintiff's organization

1 reside within each and ever County of the State of Nevada,
2 including within the Nevada's 2nd Congressional District.

3 2. Plaintiff, David Buell, individually, and as a properly
4 elected member of the Nevada Republican Party Central Committee, is
5 and at all times a resident of the County of Washoe, State of
6 Nevada.

7 3. Defendant, Secretary of State Ross Miller, ("Defendant"
8 and/or "SOS"), is, and at all times relevant hereto, was the duly
9 elected Secretary of State of Nevada. In his capacity as the State
10 of Nevada's chief elections officer, the Secretary of State must
11 obtain and maintain consistency in the application, operational and
12 interpretation of Nevada's election laws.

13 4. This action is brought pursuant to the Uniform
14 Declaratory Judgments Act, specifically NRS 30.040, for the purpose
15 of requesting the Court to construe a statute and the rules and
16 regulations set forth by the Secretary of State, as well as other
17 claims for relief. Jurisdiction and venue are proper in this Court
18 under NRS 30.030.

19 5. The true names and capacities, whether individual,
20 corporate, partnership, association, or otherwise of the Defendant
21 named herein as DOES I through X, inclusive, are unknown to
22 Plaintiff at this time, who therefore sues said Defendant by
23 fictitious name and will ask leave of the Court to amend this
24 Complaint when the same are ascertained; said Defendant is sued as
25 a principal, and all of the acts performed by them are within the
26 course and scope of their authority of employment; Plaintiff is
27 informed and believes, and thereupon alleges, that the said
28 Defendant is legally responsible in some manner for the events and

1 happenings referred to herein, and directly and proximately caused
2 the damages and injuries to the Plaintiff as hereinafter alleged.

3
4 **FACTS**

5 6. The political party has a fundamental interest, under the
6 first and fourteenth amendment to the United States Constitution in
7 ensuring that party members have an effective role in determining
8 who will appear on a special election ballot as their candidate.

9 7. On or about May 2, 2011, the SOS announced rules and
10 regulations regarding the method of placing a candidate on the
11 ballot for a special election for the 2nd Congressional District
12 seat that is believed to become vacant when now Congressman Dean
13 Heller resigns his seat and is appointed as Nevada's Senator.

14 8. The rules were not promulgated in accordance with the
15 Nevada Administrative Procedures Act, NRS Chapter 2338.

16 9. The election of Nevada's representative to the U.S. House
17 of Representative is a partisan election and as such, the election
18 is contested by candidates nominated by political parties and
19 independent candidates.

20 10. A fundamental principle of Nevada's electoral statutes is
21 that in a partisan election there shall be only one nominee from
22 each political party.

23 11. Nevada law recognizes the difference between partisan and
24 non-partisan nomination for elections and such a recognition is in
25 accord with the long-established party political system which has
26 existed throughout most the history of the United Sates. A
27 political party's selection of nominees for an election plays a
28 crucial role in the electoral process, in which the nomination of

1 candidates by the major parties has been called the most critical
2 state of the electoral process.

3 12. Nevada's Legislature has expressed a strong preference
4 for conducting elections by the narrowing of the field of
5 candidates placed on the ballot in which all qualified Nevadan's
6 are entitled to vote. A similar, but distinct legislative policy
7 favors the meaningful participation of the political party system
8 and recognizes the importance of preserving the participation of
9 the major and minor political parties in the election process.

10 13. NRS 304.250 instructs the Secretary of State to adopt
11 regulations to implement NRS Chapter 304, the Secretary of State
12 has never done so, until now, and cannot do so for the current
13 special election without violating the Administrative Procedure Act

14 14. Nevada law provides as follows:

15 (a) NRS 304.240 provides

16 NRS 304.240. Issuance by Governor of election
17 proclamation precludes holding of primary election;
18 nomination of candidates; placement of names of
19 candidates on ballot; conduct of election; application of
20 general election laws; exception.

21 (1) If the Governor issues and election proclamation
22 calling for a special election pursuant to NRS 304.230,
23 no primary election may be held. Except as otherwise
24 provided in this subsection, a candidate must be
25 nominated in the manner provided in chapter 293 of NRS
26 and must file a declaration or acceptance of candidacy
27 within the time prescribed by the Secretary of State

28 15. NRS Chapter 293 requires a party nomination for each
major or minor party pursuant to NRS 293.165. NRS 293.167, NRS
293.175, and NRS 293.260.

FIRST CLAIM FOR RELIEF
(Declaratory Relief)

16. Plaintiff reallege paragraphs 1 through 14 of the Complaint as if set out in haec verba.

17. There exists a justiciable controversy concerning whether the Secretary of State's interpretation of Nevada's election statutes and the rules and regulations asserted conflict with, and violate Nevada's election statutes.

18. The controversy concerning the effect of the Secretary of State's rules and regulation as the rules and regulations do not provide for the nomination process for a major and/or minor party candidate to be nominated through its respective central committee or executive committee.

19. Plaintiff NRP and Mr. Buell have a legally protectable interest in the controversy at issue in this case, because NRP is a major party and Mr. Buell is a Nevada resident within the 2nd Congressional District and a member of the Nevada Republican Party's central committee.

20. The controversy at issue is ripe for judicial determination, because the Secretary of State's rule and regulation allow for the acceptance of declarations and acceptance of candidacy from individuals who do not qualify for the ballot for the anticipated September 13, 2011, special election, and because at this time, there is no special election and the Secretary of State's actions are outside his authority.

21. Plaintiffs have been required to retain counsel and incur expenses and costs for legal services, filing fees and research,

1 all of which could have been avoided by the Secretary of State
2 comply with Nevada Law.

3 22. The Secretary of State should be required to compensate
4 Plaintiffs for its costs incurred in prosecuting this action.

5 23. The Court may award Plaintiffs its costs under the
6 authority given to grant supplemental relief in NRS 30.100.

7 SECOND CLAIM FOR RELIEF
8 (Injunctive Relief)

9 24. Plaintiffs reallege paragraphs 1 through 24 of the
10 Complaint as if set out in haec verba.

11 25. Plaintiffs will sustain irreparable harm if the Court
12 does not enjoin the Secretary of State from placing the names of
13 candidates that have not been nominated in accordance with NRS
14 Chapter 293, on the special election ballot.

15 26. Plaintiffs have no other plain speedy or ordinary remedy
16 to obtain the relief they seek.

17 WHEREFORE, Plaintiff prays for judgment against Defendant, as
18 follows:

19 1. For Declaratory Relief.

20 2. Preliminary and permanent injunction preventing the
21 Secretary of State from placing names of candidates not nominated
22 pursuant to NRS 293 on the special election ballot and to extend
23 the timeframe for major party candidates to file their necessary
24 declarations or acceptance of candidacy forms.

25 3. Further relief as may be just, and

26 4. Attorneys fees and costs as an item of special damages
27 pursuant to the Uniform Declaratory Judgment Act, NRS Chapter 30.

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19 Plaintiff,)

20 vs.)

21 STATE OF NEVADA, SECRETARY OF)
22 STATE ROSS MILLER)

23 Defendants.)

Case No. 11 OC 001471B

Dept No. I

24 APPLICATION FOR A PRELIMINARY AND PERMANENT INJUNCTION

25 COMES NOW, Plaintiffs, the Nevada Republican Party, ("NRP")
26 and Mr. David Buell ("Mr. Buell") (collectively "Plaintiffs"), by
27 and through their counsel, The O'Mara Law Firm, P.C., through David
28 C. O'Mara, Esq., and Parsons Behle & Latimer, through Rew R.
Goodenow, Esq., move this Court pursuant to NRCP 65(a) for a
preliminary and permanent injunction prohibiting the Secretary of
State from placing the names of major or minor party candidates on
the special election ballot, if the candidates were not duly
nominated by their respective major party's state central committee

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1 or the respective minor party's executive committee as required in
2 Chapter 293 of the NRS. Plaintiffs further seek a determination
3 that the Secretary of State failed to provide adequate time for the
4 major political parties to nominate their respective candidates in
5 a manner as provided in NRS 293.167 and their respective bylaws¹.
6 This application is made in good faith and for the reasons and on
7 the grounds that the Secretary of State must be enjoined from
8 violating Nevada's election laws and the constitutional freedom of
9 association and the right to vote. As such, the application is
10 based upon Nevada's election statutes, the United States
11 Constitution, all papers and pleadings, the Memorandum of Points
12 and Authorities and any evidence present at an evidentiary hearing
13 or oral argument.

14 MEMORANDUM OF POINTS AND AUTHORITIES

15 I. INTRODUCTION

16 There exists a substantial public interest in the sanctity of
17 our electoral process and that such a process is conducted in an
18 orderly voting process in compliance with Nevada law and the
19 Constitution of the United States. The Secretary of State's
20 interprets NRS 304.240(1) to permit a "free-for-all" or in his
21 words, "ballot royale," special election. This is a unique and new
22

23 ¹ The final date for filing of a nomination is clearly meant to
24 prejudice the Nevada Republican Party. As a major political party,
25 NRP must file with the Secretary of State a copy of its bylaws,
26 which has occurred. Under the NRP's bylaws and known to the
27 Secretary of State, notice of a State central committee must be
28 given 45 days in advance. Instead, the Secretary of State placed
an arbitrary and capricious filing date in order to preclude NRP
from seeking relief from this Court and still have enough time to
nominate their candidate. As such, the Court should extend the
time in which to file the proper nomination paperwork to 5:00 p.m.
on June 21, 2011.

1 misinterpretation of Nevada's election laws. Anyone who nominates
2 themselves can run.

3 The Secretary of State's interpretation of Chapter 304 of the
4 NRS infringes on every Nevadans' constitutionally protected freedom
5 to association and our right to vote. Indeed, contrary to the
6 Secretary of State's incorrect interpretation of Nevada's election
7 statutes, Plaintiffs' interpretation protects the public's interest
8 in the sanctity of the electoral process and the constitutional
9 mandate of each individual's right to association.

10 By enjoining the Secretary of State and precluding him from
11 placing improperly nominated persons who declare affiliation with a
12 major or minor party on the ballot, ie: the candidate has not been
13 nominated pursuant to Chapter 293, and specifically NRS 293.165 and
14 NRS 293.167, the public interest in the sanctity of the election
15 process will be protected and the process will be in compliance
16 with the constitutional mandate.

17 II. FACTUAL AND PROCEDURAL HISTORY

18 As Nevada's Secretary of State, Ross Miller is the chief
19 elections officer and is entrusted with conducting a fair election
20 pursuant to all Nevada election statutes.

21 On or about May 2, 2011, Secretary of State Ross Miller
22 issued, Secretary of State Interpretation, Number 112801, which
23 provided that, "[p]ursuant to the Secretary of State's authority
24 under NRS 293.247(4), the following interpretations provide for the
25 effective administration of the statutes and regulations governing
26 the conduct of a special election in Nevada conducted pursuant to
27 NRS 304.230. See Exhibit 1.

28

1 If the election proceeds as set forth by the Secretary of
2 State, in his interpretation, No. 112801, the lawful function of
3 the major and minor parties will not be allowed in the special
4 election.

5 Indeed, the election of Nevada's representative to the U.S.
6 House of Representatives is a partisan election, which in the case
7 of a special election will not include a primary election. See NRS
8 304.240, see also, NRS 293.175(5)(a) ("the provisions of NRS 293.175
9 to NRS 293.203², inclusive, do not apply to special elections.")

10 In the event of a vacancy, as in this case, the Governor will
11 set the time for a special election within 180 days. See NRS
12 304.230. Under NRS 304.240, a candidate must be nominated in the
13 manner provided in chapter 293 of the NRS and must file a
14 declaration or acceptance of candidacy within the time prescribed
15 by the Secretary of State pursuant to NRS 293.204..." Normally,
16 Chapter 293 provides a mechanism for a major party, minor party or
17 independent candidate. See NRS 293.175, NRS 293.171 to NRS
18 293.174, and NRS 293.200, respectively. However, the normal
19 procedures for nomination are not applicable in a special election,
20 and thus, a vacancy occurs which requires the nomination of the
21 major and minor candidates to be conducted pursuant to NRS 293.165.
22 See NRS 293.175(5)(1). This statute provides that the major party
23 candidate is nominated by the respective party's central committee
24 and the minor party candidate is nominated by the respective

25
26 ² Pursuant to NRS 293.203, a candidate for partisan office of a
27 major party must be nominated at the primary election, a minor
28 party candidate must be nominated in a manner prescribed pursuant
to NRS 293.171 to NRS 293.174, and independent candidates are
nominated pursuant to NRS 293.200.

1 party's executive committee. See NRS 293.165; NRS 293.167. There
2 is no method for nominating an independent candidate because the
3 normal method is specifically excluded pursuant to NRS 293.175.

4 Additionally, after the candidates for a major or minor party
5 are properly nominated pursuant to Chapter 293 of the NRS, a major
6 party candidate must file his documents within the timeframe
7 "prescribed by the Secretary of State pursuant to NRS 293.204," a
8 minor party candidate must file a list of its candidates³ with the
9 Secretary of State not more than 46 days before the special
10 election and not less than 32 days before the special election, and
11 finally, an independent candidate must file a petition of candidacy
12 with the appropriate filing officer not more than 46 days before
13 the special election and not less than 32 days before the special
14 election.⁴

15 Further, a special election must be conducted pursuant to the
16 provisions of chapter 293 of NRS and the general election laws of
17 this State unless a provision is otherwise provided in NRS 304.200
18 to 304.250. See NRS 304.240(2)(a)-(b).

19 Unfortunately, the Secretary of State has failed to interpret
20 Nevada's election statutes in harmony with each other and in

21
22 ³ A review of Nevada Statutes provides that when discussion minor
23 party candidates, the plural use of the word, "candidates" is
24 always used even though Nevada law clearly calls for only one
25 candidate from a specific minor party be nominated. Compare NRS
26 293.1715 ("the names of the candidates" and "list of its
27 candidates" and NRS 304.204, see also, NRS 293.1715(4) ("The name of
28 only one candidate of each minor political party for each partisan
office may appear on the ballot for a general election.")

⁴ The Secretary of State's interpretation claims that federal law
preempts the timeframes for minor party and independent candidates
to file the necessary paperwork, and thus the Secretary of State
will prescribe different filing dates.

1 effect, his incorrect interpretation negates the nomination and
2 election process in a manner that is inconsistent with Nevada law.
3 Secretary Miller's interpretation renders Nevada's entire election
4 statutes a nullity, based upon a broad and original reading of one
5 sentence contained in NRS 304.240.

6 As such, Plaintiffs seek a preliminary and permanent
7 injunction to enjoin the Secretary of State from preventing the
8 parties from nominating their candidates.

9 III. LEGAL DISCUSSION

10 Plaintiffs seek a preliminary and permanent injunction
11 pursuant to NRCP 65. A preliminary injunction is normally available
12 when the moving party can demonstrate that it has a reasonable
13 probability of success on the merits and that the nonmoving party's
14 conduct, if allowed to continue, will cause irreparable harm for
15 which compensatory relief is inadequate. See U. Sys. V. Nevadans
16 for Sound Govt., 120 Nev. 712, 721, 100 P.3d 179, 187 (2004);
17 Dangberg Holdings v. Douglas County, 115 Nev. 129, 142, 978 P.2d
18 311, 319 (1999). The question of whether to grant or deny a
19 preliminary injunction is addressed to the sound discretion of the
20 district court. See U. Sys., 120 Nev. at 721, 100 P.3d at 187. In
21 this case, the facts to support each element are present,
22 justifying the requested exercise of the Court's discretion.

23 Plaintiff seeks an injunction to prevent the Secretary of
24 State, and all other government agencies, from allowing more than
25 one candidate for each major or minor political party from being
26 placed on the special election ballot. Absent an injunction,
27 Plaintiff has no adequate remedy at law because the Secretary of
28 State will be allowed to violate Nevada's election laws and conduct

1 the 2nd Congressional District special election under rules and
2 regulations that do not comply with Nevada law and which violate
3 the Constitutional right to association and the right to vote. If
4 Plaintiffs are unsuccessful in this matter, they will have no
5 remedy if the special election is allowed to be conducted under the
6 Secretary of State's interpretation.

7 Under NRS 30.030, courts have the power to declare rights,
8 status, and other legal relations whether or not further relief is
9 or could be claimed. Here, Plaintiffs seek the Court's
10 determination that in a special election, the respective major
11 party candidate that is placed on the ballot must first be
12 nominated by the respective party's state central committee and the
13 minor party's candidate must be nominated by the respective party's
14 executive committee. A court may award declaratory relief if there
15 is a justiciable controversy between the parties, the parties'
16 interests are adverse, the proponent of declaratory relief has a
17 legal interest in the controversy, and the controversy is ripe for
18 judicial determination. See Kress v. Corey, 65 Nev. 1, 26, 189
19 P.2d 352, 264 (1948). There is a justiciable controversy between
20 Plaintiffs and the Secretary of State concerning the procedure for
21 the nomination and placing of a candidates' name of the election
22 ballot and whether the candidate must be nominated by the party's
23 central committee. The parties' interests are adverse and the
24 controversy is ripe for judicial determination, because the
25 Secretary of State has begun the election process as of May 4,
26 2011. Plaintiffs have a legally protectable interest in the
27 controversy because as a major political party (NRP) and a member
28 of the state central committee and a resident of the 2nd

1 Congressional District of Nevada (Buell), Plaintiffs have an
2 interest in the manner in which the Secretary of State interprets
3 and implements rules in regulations to conduct an election based
4 upon his interpretation. The Secretary of State's decision also
5 affects Plaintiff's constitutional rights of association.
6 Plaintiffs will be affected by any rules or regulations that are
7 implement under the Secretary or State's interpretation.

8 Based upon the forgoing, Plaintiffs submit that declaratory
9 relief is the appropriate means of obtaining judicial review and
10 relief from the Secretary of State's interpretation that sets forth
11 the rules and regulation of the special election to fill the
12 vacancy in the 2nd Congressional District.

13 1. Strong Likelihood of Success on the Merits

14 There is a strong likelihood that Plaintiff will prevail on
15 the merits of its declaratory relief action because the
16 Secretary of State has failed to interpret and construe Nevada's
17 election statutes in a manner that harmonizes all election
18 statutes or provisions to avoid unreasonable or absurd results.
19 See e.g. *We the People Nevada, Angle v. Miller*, 192 P.3d 1166,
20 1170 (2008).

21 Resolution of this case depends upon the interpretation of
22 NRS 304.240 and the relevant statutes included in Chapter 293 of
23 the Nevada Revised Statutes. In discerning the statute's
24 meaning, the Court should rely on well-established precepts of
25 statutory and constitutional construction. "Unless ambiguous, a
26 statute's language is applied in accordance with its plain
27 meaning." *Id.*, see also, *California Commercial v. Amedeo Vegas*
28 *I*, 119 Nev. 143, 145, 67 P.3d 329, 330 (2003). "When the

1 Legislature's intent is clear from the plain language, this
2 court will give effect to such intention and construe the
3 statute's language to effectuate rather than nullify its
4 manifest purpose." Id., see also, Sheriff v. Lugman, 101 Nev.
5 149, 155, 6976 P.2d 107, 111 (1985). As such, this court should
6 recognize that Nevada's election statutes should be "read as a
7 whole, so as to give effect to and harmonize each provision."
8 Id., see also Nevadans for Nevada v. Beers, 122 Nev. 930, 944,
9 142 P.3d 339, 348 (2006). Thus, "when possible, the
10 interpretation of a statute or constitutional provision will be
11 *harmonized with other statutes or provisions* to avoid
12 unreasonable or absurd results." Id., see also, Nevada Power
13 Co. v. Haggerty, 115 Nev. 353, 364, 989 P.2d 870, 877
14 (1999) (emphasis added). Conversely, if a statutory provision's
15 language is subject to more than one reasonable, although
16 inconsistent, interpretation, the court may look to the
17 provision's legislative history and the election scheme as a
18 whole to determine what the Nevada legislature intended. See,
19 e.g., McKay v. Bd. Of Supervisors, 102 Nev. 644, 650-51, 730
20 P.2d 438, 443, (1986); see also, Beazer Homes Nevada, Inc. v.
21 Dist. Ct. 120 Nev. 575, 582, 97 P.3d 1132, 1173 (2004).

22 Here, the Secretary of State has interpreted NRS 304.240 to
23 provide that,

24 2. Major political party candidates are nominated and
25 will appear on the special election ballot by filing a
26 declaration of candidacy or acceptance of candidacy
within the time and on the form prescribed by the
Secretary of State. See Exhibit 1.

27 Under this interpretation, the Secretary of State has given
28 the force and effect to a single sentence within NRS 304.240(1),

1 "[a] candidate of a major political party is nominated by filing a
2 declaration or acceptance of candidacy within the time prescribed
3 by the Secretary of State pursuant to NRS 293.250," and reads this
4 sentence into the entire subsection so that this single sentence
5 controls all applicable provisions of the special election law. As
6 such, the Secretary of State's interpretation and reading of the
7 statute gives no effect to the immediate preceding sentence of the
8 statute that clearly states, "[e]xcept as otherwise provided in
9 this subsection, a candidate *must* be nominated in the manner
10 provided in chapter 293 of NRS and must file a declaration or
11 acceptance of candidacy within the time prescribed by the Secretary
12 or State pursuant to NRS 293.204. The reference to the word
13 "except" refers to the timeframe in which a nominee must be
14 nominated in a manner provided in NRS 293, then file the necessary
15 declaration or acceptance form. The word does not negate the
16 nomination process of NRS 293 and such an interpretation fails to
17 recognize the statutes as a whole so as to give effect to and
18 harmonize each provision. See *We the People Nevada*, 192 P.2d at
19 1171. Indeed such an interpretation violates the well-established
20 precepts of statutory construction in that the interpretation fails
21 to harmonize the statutes with other statutes or provisions to avoid
22 unreasonable or absurd results. *Id.*

23 The Secretary of State has claimed that a major party
24 candidate will be placed on the ballot by simply filing a
25 declaration or acceptance. See Exhibit 1. Nowhere in NRS
26 304.240 is there language as to the process for the placement of
27 a major party candidate on the ballot. Thus, the Secretary of
28 State created rules for placement of candidates on the ballot

1 where no rule previously existed, in violation of Nevada's
2 Administrative Procedure Act, NRS Chapter 233B.

3 When construing a statute, the title of that statute may be
4 considered. See A Minor v. Clark Co. Juvenile Ct. Servs., 87
5 Nev. 544, 490 P.2d 1248 (1971). As such, NRS 304.240 title
6 states as follows:

7 Issuance by Governor of election proclamation precludes
8 holding of primary election; nomination of candidates;
9 placement of names of candidates on ballot; conduct of
election; application of general election laws;
exception.

10 As such, the statute clearly states that there is a two step
11 process in the nomination and the placement of a candidate on the
12 election ballot; (1) nomination of candidates and (2) placement of
13 names of candidates on ballot. Even utilizing the Secretary of
14 State's interpretation as to the nomination of a candidate, there
15 is no language regarding the placement of a candidate on the
16 ballot, and thus, it is improper for the Secretary of State to take
17 out of thin air the process for placing a major political party
18 candidate on the ballot. Indeed, NRS 304.240 specifically states,
19 (a) "the election must be conducted pursuant to the provisions of
20 chapter 293 of NRS and (b) "The general election laws of this State
21 apply to this election." See NRS 304.240(2)(a)-(b). As such, in
22 order to determine how to place a candidate on the ballot, we must
23 look to chapter 293 of the NRS, and specifically, NRS 293.260.⁵

24

25 _____
26 ⁵A fundamental principle of Nevada's electoral statutes is that in
27 a partisan election there shall be only one nominee from each
28 political party. See NRS 293.260; see also *State ex el. Cline v.*
Payne, 86 P.2d 32, 59 Nev. 127 (1939); NRS 293.175(4) ("The name of
only one candidate of each minor political party for each partisan
office may appear on the ballot for a general election.") Pursuant
to NRS 293.260. Additionally, NRS 293.1715 provides that, "[t]he

1 NRS 293.260 provides the manner in which a candidates name appears
2 on the general ballot. However, since a special election does not
3 allow for a primary, a vacancy occurs and the procedure for filling
4 a vacancy is pursuant to NRS 293.165.

5 Contrary to the Secretary of State's interpretation, when
6 interpreting NRS 304.240 in a manner that will be harmonized with
7 other statues or provisions to avoid unreasonable or absurd
8 results, only one candidate for a major political party can be
9 nominated and placed upon the special election ballot. Indeed, if
10 we simply break down the provisions of NRS 304.240 in a manner
11 consistent with the title, it is clear that a candidate must first
12 be nominated pursuant to NRS 304.240 and then file the proper
13 papers with the Secretary of State. A proper reading and
14 interpretation of the statue provides that the first sentence
15 relates to the Governor's proclamation and precluding of a primary;
16 the second sentence relates to the nomination process for all
17 candidates; the third, fourth and fifth sentences relate to the
18 timeframe in which the candidate must file its paperwork so that
19 the candidates' name can be placed on the ballot; subsection 2(a)
20 relates to the conduct of the election and subsection 2(b) relates
21 to the application of general election laws.

22 Under this analysis the nomination of a major political party
23 for a special election must be conducted pursuant to Chapter 293
24 and in accordance with the general election statutes of this State.
25 As such, the normal process for the nomination of a political party

26
27 name of only one candidate of each minor political party for each
28 partisan office may appear on the ballot for a general election.")

1 is through a primary election, pursuant to NRS 293.175. However,
2 pursuant to NRS 293.175 and NRS 304.240, a primary is not allowed.
3 Accordingly, since no primary is allowed, there is no major party
4 candidate and thus a vacancy occurs and may be filled pursuant to
5 NRS 293.165. See NRS 293.165, see also, Brown v. Georgetta, 70
6 Nev. 500, 275 P.2d 376 (1954). In fact, Nevada has already
7 implemented this process in the past.

8 Following the death of Senator McCarran, the Nevada Supreme
9 Court was asked to review the special election for Nevada's
10 representative to the United States Senate. Id. The appeal was to
11 review the granting a permanent injunction restraining the county
12 clerk from placing upon the ballot for the forthcoming general
13 election the names of Alan Bible, Democratic candidate and Senator
14 Ernest Brown, Republican candidate. Id. Alan Bible was named as
15 candidate by the *Democratic State Central Committee* and Senator
16 Brown was named as candidate by the *Republican State Central*
17 *Committee*. Id. (emphasis added).

18 At the time of his death on September 18, 1954, Senator
19 McCarran's term of office had not expired and he would not have
20 been up for re-election until 1956. There was no primary and thus,
21 a question as to whether a vacancy existed was before the court.

22 The Nevada Supreme Court, in finding that there was a vacancy
23 even though there was no primary, reversed the district court and
24 directed the court to enter judgment denying the petition for
25 permanent injunction and vacating the temporary injunction. As
26 such, the respective major parties' state central committees
27 nominated their respective candidates for the November 2, 1954,
28 special election.

1 Similarly, because there is no primary in the special
2 election, a vacancy has occurred and the respective major political
3 parties' state central committees may nominate a candidate to fill
4 this vacancy. The Secretary of State has overstepped his authority
5 by saying not only how, but who and when the special election will
6 take place. Nevada's Governor must say when and the major
7 political parties nominate who will run.

8 Additionally, the interpretation by the Secretary of State
9 regarding minor parties is deficient and unreasonable. The
10 Secretary of State has found,

11 3. A minor political party, which has ballot access
12 pursuant to NRS 293.1715(2), nominates its candidate(s)
13 by filing a list of its candidate(s) with the Secretary
14 of State within the time prescribed by the Secretary
15 of State. See Exhibit 1.

16 Again, the Secretary of State has interpreted the provisions
17 in NRS 304.240 by inserting his own language into the statutes.
18 Indeed, there is no specific language that states "a minor
19 party nominates its candidate(s) by filing a list of its
20 candidate(s)." In fact, that language is specifically contrary to
21 the actual language of NRS 304.240, which states, "a candidate must
22 be nominated in the manner provided in chapter 293." As such,
23 under a correct interpretation of the statute, the Court must look
24 to Chapter 293 to determine how the "candidate must be nominated."

25 In this case, we look to NRS 293.174, which provides that
26 "Candidates for partisan office of a minor political party must be
27 nominated in the manner prescribed pursuant to NRS 293.171 to
28 293.174." However, NRS 293.175 specifically states that, "the

1 provisions of NRS 293.175 to 293.203, inclusive, do not apply to:
2 (a) Special elections to fill vacancies."

3 Therefore, since the provision in which a minor party
4 nominates its candidates is not applicable to special elections, we
5 must look for the provision that allows for a nomination. As such,
6 NRS 293.165, which is not specifically excluded pursuant to NRS
7 293.175, provides that a minor party may nominate its candidate by
8 its executive committee.⁶

9 Therefore, Plaintiffs are likely to succeed on the merits when
10 an interpretation of Nevada's election statutes are conducted in a
11 manner that will be harmonized with other statutes and provisions
12 to avoid unreasonable or absurd results.⁷

13 2. Plaintiffs Will Suffer Damage From Denial of this
14 Motion

15 Here, Plaintiffs can show a high probability of injury absent
16 judicial intervention as Plaintiff will forever be deprived of the
17 opportunity and her right to recover.

18

19
20 ⁶ Again, when one interprets NRS 304.240 with NRS 293.165, it is
21 clear that the nomination of candidates is accomplished pursuant to
22 NRS 293.165. The exception, as provided for in NRS 304.240,
23 relates to the timeframe in which the nomination can be filled.
Indeed, it would be absurd to require the filling of a vacancy
pursuant NRS 393.165(4)-(5), and thus the reason for providing the
Secretary of State with the authority to set the time in which to
file the nomination papers.

24 ⁷ There is an equally deficient interpretation in regarding to
25 minor parties without ballot access and for independent candidates.
26 In fact, nowhere in NRS 304.240 does it require an independent
27 candidate to obtain 100 signatures and the normal manner for
28 nomination that does, is specifically precluded in a special
election. Secretary of State Miller's interpretation is clearly
improper and while this injunctive relief does not include
independent candidates, the declaratory relief by this Court
should.

1 In this case, Plaintiffs will suffer irreparable harm if
2 injunctive relief is not granted. Plaintiffs will forever be
3 foreclosed from fully remedying the Secretary of State's improper
4 and incorrect interpretation of Nevada's election statutes. As one
5 court has stated, it will be impossible to "unscramble the eggs."

6 Indeed, the damage caused by the Secretary of State's improper
7 interpretation not only violates Nevada law, it violates the
8 constitutional mandates of freedom of association and the right to
9 vote.

10 There can be no doubt that the freedom to associate with
11 others for the advancement of political beliefs and ideas are
12 protected activity under the first and fourteenth amendments to the
13 United States Constitution. See Cousins v. Wigoda, 419 U.S. 477,
14 487 95 S.Ct. 541, 547, 42 L.Ed.2d 595 (1975), quoting Kusper v.
15 Pontikes, 414 U.S. 51, 57, 94 S.Ct. 303, 307, 38 L.Ed.260
16 (1973) ("The right to associate with the political party of one's
17 choice is an integral part of this basic constitutional freedom.")
18 The United States Supreme Court has held that Kusper sets forth a
19 position, that the freedom to associate from common advancement of
20 political beliefs necessarily presumes the freedom to "identify the
21 people who constitute the association, and to limit the association
22 to those people only." See Democratic Party v. Wisconsin, ex rel.
23 La Follette, 450 U.S. 107, 122, 101 S.Ct. 1010, 1019, 67 L.Ed.2d 82
24 (1981). In fact, the political party has a fundamental interest in
25 ensuring that party members have an effective role in determining
26 who will appear on a general election ballot as their candidate.
27 See Langone v. Secretary of the Commonwealth, 388 Mass. 185, 446

28

1 N.E.2d 43 (1983). As one legal scholar has stated in Developments
2 in the Law - Elections, 88 Harv.L.Rev. 1111, 1151 (1975),

3 There can be no doubt that the political party has a
4 legitimate - indeed, a compelling - interest in ensuring
5 that its selection process accurately reflects the
6 collective voice of those who, in some meaningful sense,
7 are affiliated with it. Freedom of association would
8 prove an empty guarantee if associations could not limit
9 control over their decisions to those who share the
10 interests and persuasions that underlie the association's
11 being.

12 If the Secretary of State's interpretation is allowed to
13 stand, the regulations would dispense of a political party's
14 ability to nominate its candidate and such regulations would
15 obviously do more than simply impair the respective party's
16 critical function in nominating its candidates, it does away with
17 it entirely. Such a result would allow for the inclusion of
18 persons of adverse political principles to seriously distort the
19 collective decision-making of a political party and will strip any
20 voice a party might have whatsoever in determining who is to be its
21 candidate. Indeed, a rule that would allow persons having only
22 tenuous affiliations with the party to present themselves as its
23 candidate wholly undermines the party members' association rights
24 to identify those who best represent the party's principles and to
25 limit its candidates to those persons.

26 Additionally, by allowing any individual to choose to run for
27 the office of the House of Representatives to place their names on
28 the election ballot, the Secretary of State's interpretation could
29 create confusion among the electorate and almost surely guarantee
30 that the next Congressman/Congresswoman would be elected by an
31 insignificant plurality, thus seriously infringing on the
32 effectiveness of the right to vote to which all qualified voters in

1 the state are constitutionally entitled. Such a result is hostile
2 to our democratic system. In fact, the United States Supreme Court
3 has stated in Lubin v. Panish, 415 U.S. 709, 94 S.Ct.1315, 39
4 L.Ed.2d 702 (1974),

5 A procedure inviting or permitting every citizen to
6 present himself to the voters on the ballot without some
7 means of measuring the seriousness of the candidate's
8 desire and motivation would make rational voter choices
9 more difficult because of the size of the ballot and
10 hence would tend to impede the electoral process...

11 ... The means of testing the seriousness of a given
12 candidate may be open to debate; the fundamental
13 importance of ballots of reasonable size limited to
14 serious candidates with some prospects of public support
15 is not.

16 See Lubin, at 715, 94 S.Ct. at 1319, quoted in, Illinois Bd. Of
17 Elections v. Socialist Workers Party, supra, 440 U.S. at 185, 99 S.
18 Ct. at 990; see also Jenness v. Fortson, 403 U.S. 431, 442, 91
19 S.Ct. 1970, 1976, 29 L.Ed.2d 554 (1971).

20 As such, the effective denial of the right of a major
21 political party and its members to select, by nomination⁸ of the
22 central committee a single candidate for the office of the United
23 States House of Representatives, as provide in Nevada's election
24 statutes, and to advance the shared political beliefs and goals of
25 the respective party and its members seriously burdens the
26 constitutionally protected right of political association
27 guaranteed to the parties and their members. At the same time, the
28 denial would also significantly reduce the effectiveness of the

⁸ The nomination of the central committee is necessary and allowed because Nevada law specifically states that there is no primary. In the absence of a candidate in the general election, the central committee may nominate the party's candidate for office.

1 votes of all qualified voters in Nevada, regardless of their
2 political persuasion, thus infringing on all Nevadans'
3 constitutionally protected right to cast their votes effectively.

4 In light of the fact that the interference with the freedom of
5 a political party to exercise an effective role in the nomination
6 of its candidates is simultaneously an interference with the
7 fundamental, association rights of its adherents, infringement of
8 that freedom can only be justified by a compelling state purpose.
9 See Democratic Party, 450 U.S. at 122, 101 S.Ct. at 1019; see also
10 Sweezy v. New Hampshire, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d
11 1311 (1957); Cousins, 419 U.S. at 489, 95 S.Ct. at 548; Williams v.
12 Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968).

13 No such purpose appears in this case. Indeed, the compelling
14 state purpose is clear through the Nevada statutory framework that
15 the central committee is to nominate a candidate for a vacant
16 office, including a candidate for a special election in a
17 congressional (partisan) race. In fact, because the specific time
18 constraints (180 days) within the statute is short, it is
19 especially crucial that the candidate accurately reflects the views
20 and principles of the party in whose name they run, since party
21 affiliation may in such cases be a determinative factor in the
22 minds of the voting public.

23 By contrast, the Secretary of State, or any individual that
24 wants to nominate and place themselves on the special election
25 ballot will be harmed only minimally, if at all. In fact, these
26 individuals will have sufficient time to satisfy the necessary
27 requirements within the time provided should Plaintiffs be
28 unsuccessful.

1 3. Only a Nominal Bond is Required

2 While a bond may be required as a condition of issuance of a
3 preliminary injunction, the amount of the bond is within the
4 Court's discretion, based on damages which may actually be suffered
5 as a result of the injunction. NRCP 65(c). The enjoined party
6 must present admissible, competent, qualitative and quantitative
7 evidence of harm that an injunction would cause "by any party who
8 is found to have been wrongfully enjoined or restrained." *Id.*
9 Here, the bond amount should be a maximum of One Hundred Dollars
10 (\$100.00) as Defendants will not suffer any damages if by some
11 chance, they are successful.

12 IV. CONCLUSION

13 For the foregoing reasons, Plaintiff's motion for preliminary
14 and permanent injunction should be granted.

15 An Order should be entered as follows:

16 1. Construing NRS 304.240(1) to require full compliance
17 with NRS Chapter 293.

18 2. Preventing the Secretary of State from placing on the
19 special election ballot the names of candidates that have not
20 been nominated in full compliance with NRS Chapter 293 by the
21 political parties.

22 3. Extending the time for which the candidate has to file
23 their declaration or acceptance of candidacy.

AFFIRMATION
(Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceding document
filed in the above referenced matter does not contain the social
security number of any person.

DATED: May 4, 2011.

THE O'MARA LAW FIRM, P.C.


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EXHIBIT "1"

EXHIBIT "1"

STATE OF NEVADA



OFFICE OF SECRETARY OF STATE ROSS MILLER

May 2, 2011

SECRETARY OF STATE INTERPRETATION
NUMBER: 112801

Pursuant to the Secretary of State's authority under NRS 293.247(4), the following interpretations provide for the effective administration of the statutes and regulations governing the conduct of a special election in Nevada conducted pursuant to NRS 304.230.

1. The Secretary of State shall not require or collect any filing fee from candidates for a special election pursuant to NRS 304.230.
2. Major political party candidates are nominated and will appear on the special election ballot by filing a declaration of candidacy or acceptance of candidacy within the time and on the form prescribed by the Secretary of State.
3. A minor political party, which has ballot access pursuant to NRS 293.1715(2), nominates its candidate(s) by filing a list of its candidate(s) with the Secretary of State within the time prescribed by the Secretary of State. Each such candidate must also file a declaration of candidacy within the time prescribed by the Secretary of State.
4. A candidate from a minor political party, which does not have ballot access pursuant to NRS 293.1715(2), is nominated and will appear on the special election ballot if the minor political party:
 - (a) Files with the Secretary of State within the time prescribed by the Secretary of State its certificate of existence pursuant to NRS 293.171(1); and
 - (b) Files a list of its candidate(s) with the Secretary of State within the time prescribed by the Secretary of State.

For a candidate from a minor political party, which does not have ballot access pursuant to NRS 293.1715(2), to become nominated and appear on the special election ballot, he or she, in addition to the party requirements set forth above, must:

- (a) File with the applicable county clerk(s) within the time and on the form prescribed by the Secretary of State a petition on behalf of the candidate signed by 100 registered voters of the district that is the subject of the special election; and
- (b) File a declaration of candidacy or acceptance of candidacy within the time and on the form prescribed by the Secretary of State.

The applicable county clerk(s) shall verify the signatures on the petition of candidacy in the manner set forth in NRS 293.1276 through NRS 293.1279.

5. An independent candidate is nominated and will appear on the special election ballot if the independent candidate:

- (a) Files with the applicable county clerk(s) within the time and on the form prescribed by the Secretary of State a petition of candidacy signed by 100 registered voters of the district that is the subject of the special election; and
- (b) Files a declaration of candidacy or acceptance of candidacy within the time and form prescribed by the Secretary of State.

The petition of candidacy required for an independent candidate must comply with the requirements set forth in NRS 193.200(2), 193.200(3), 193.200(5), and 193.200(6). The applicable county clerk(s) shall verify the signatures on the petition of candidacy in the manner set forth in NRS 293.1276 through NRS 293.1279.

6. Following the Governor's issuance of an election proclamation calling for a special election and specifying the date of the special election pursuant to NRS 304.230, the Secretary of State shall prescribe the time during which all candidates must file a declaration of candidacy, acceptance of candidacy or petition of candidacy, as applicable, pursuant to NRS 293.204.

7. A withdrawal of candidacy for the office that is the subject of a special election pursuant to NRS 304.230 must be in writing and must be presented by the candidate in person to the Secretary of State's office no later than the last day for filing for candidacy as prescribed by the Secretary of State.

8. The Secretary of State will not accept or respond to challenges to a candidate's eligibility to appear on the ballot for a special election pursuant to NRS 304.230.

9. Voter registration for a special election pursuant to NRS 304.230 will close at 9:00 P.M. on the third Saturday preceding the special election. Beginning on the fifth Sunday preceding a special election pursuant to NRS 304.230, an elector may register to vote only by appearing in person at the office of the county clerk or registrar of voters, as applicable.

10. Early voting for a special election pursuant to NRS 304.230 shall begin the third Saturday preceding the special election and extend through the Friday before the special election day. The county clerks and registrars of voters shall establish the locations and times for the polling places pursuant to NRS 293.3568.

MAY 2, 2011

SECRETARY OF STATE INTERPRETATION

NUMBER: 112801

PAGE 3

11. The Uniformed and Overseas Citizens Absent Voting Act (UOCAVA), 42 USC Sec. 1973ff, requires that military and overseas voters be mailed absent ballots at least forty-five (45) days prior to an election applies to a special election pursuant to NRS 340.230. NRS 304.240(1) prescribes the deadlines for filing for minor political party and independent candidates to be "not more than 46 days before the special election." It is impossible to process the petitions and prepare the ballots in the space of one day, which would be necessary to comply with federal law. Therefore, these provisions of NRS 304.240(1) are preempted by federal law, and the Secretary of State shall prescribe the filing dates for these candidates.

Respectfully,



ROSS MILLER
Secretary of State

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9 Attorneys for Plaintiffs

10 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
11 IN AND FOR CARSON CITY

13 NEVADA REPUBLICAN PARTY, and)
14 DAVID BUELL, an INDIVIDUAL,)

15 Plaintiffs,)

16 vs.)

17 STATE OF NEVADA, SECRETARY OF)
STATE ROSS MILLER)

18 Defendants.)

Case No. 1102001471B

Dept No. I

19
20 **EX PARTE MOTION FOR AN ORDER SHORTENING**
TIME FOR DEFENDANTS TO RESPOND TO THE APPLICATION
21 **FOR A PRELIMINARY AND PERMANENT INJUNCTION**

22 Plaintiffs, the Nevada Republican Party and Mr. David Buell,
23 by and through their undersigned counsel, hereby move this Court
24 for an ex parte order shortening the time to respond to Plaintiff's
25 application of a preliminary and permanent injunction in connection
26 with Plaintiff's Complaint for declaratory judgment and injunctive
27 relief against the Defendant, The State of Nevada, Secretary of
28 State Ross Miller. This Motion is made in good faith and based

REC'D & FILED

2011 MAY -5 AM 8:48

ALAN GLOVER

BY _____ CLERK
DEPUTY

1 upon the Memorandum of Points and Authorities filed concurrently
2 herewith and all papers and pleadings filed herein.

3 This ex parte motion is necessary because if Defendants are
4 not required to respond to Plaintiff's application on an expedited
5 basis, then Plaintiffs, and the members that their organization
6 represents, will be seriously prejudiced.

7 The Secretary of State has moved quickly to implement his
8 incorrect interpretation of Nevada's election statutes so that
9 Plaintiffs are prevented from exercising their constitutionally and
10 statutorily protected rights to nominate a candidate through its
11 State's central committee.

12 Defendants publicly announced that the timeframe for filing
13 nomination documents is May 25, 2011, which is approximately 24
14 days before the Nevada Republican Party can nominate their
15 candidate pursuant to NRS 293.165, NRS 293.167, and their Bylaws.
16 Indeed, Secretary of State Miller is aware of these time
17 constraints that are placed on the Nevada Republican Party and in
18 an effort to preclude Plaintiff from obtaining relief from this
19 Court, Secretary Miller has set the deadline before Plaintiffs can
20 properly act. In fact, it is believed the date in which the Nevada
21 Republican Party will be nominating its candidate has been
22 published by the media (social media), and is set out in the bylaws
23 that are posted on the Secretary of State's website as required by
24 law.

25 Further, if this matter is not heard on expedited bases, the
26 damage to the Plaintiff will be irreparable.

27 Therefore, under the circumstances of this case, and the
28 shortened timeframe, if the Court is going to be presented with any

1 meaningful opportunity to weigh the application for a preliminary
2 and permanent injunction, the application must be heard on shorten
3 time.

4 Plaintiff's counsel will be available at any time this Co, urt
5 sets a hearing, after providing the required five (5) days notice,
6 on the pending application for preliminary and permanent
7 injunction, and providing due notice to Defendants. Thus, it is
8 requested that a hearing be scheduled at a time convenient to the
9 Court.

10 Based upon the foregoing, Plaintiff respectfully requests that
11 Defendants have until 5:00 p.m. on Thursday, May 12, 2010, within
12 which to respond to Plaintiff's application. Plaintiff shall have
13 until 5:00 p.m. on Monday, May 16, 2011, to file their reply, if
14 necessary.

15 Plaintiffs request that a hearing be conducted during the week
16 of May 16 through May 20, 2011.

17 **AFFIRMATION**
(Pursuant to NRS 239B.030)

18 The undersigned does hereby affirm that the preceding document
19 filed in the above-referenced case does not contain the social
20 security number of any person.

21 DATED: May 4, 2011.

THE O'MARA LAW FIRM, P.C.

22 
23
24 DAVID C. O'MARA, ESQ.

In the First Judicial District Court of the State of Nevada
In and For Carson City

* * * *

HEARING DATE MEMO

Case No.: 11 OC 00147 1B

Set In Department: I

NEVADA REPUBLICAN PARTY, and
DAVID BUELL, an individual,

DAVID O'MARA, Esq.
REW R. GOODENOW, Esq.
Attorneys for Plaintiffs

Plaintiffs,

v.

STATE OF NEVADA, SECRETARY OF
STATE ROSS MILLER,

KEVIN BENSON, Esq.
Attorney for Defendant

Defendant.

☐ TRIAL ☐ JURY ☐ NON-JURY

☒ HEARING ON Complaint for Declaratory Judgment and Injunctive Relief

TO COMMENCE on the 19th day of May, 20 11, at 1:30 o'clock, P.M.

TIME ALLOWED 1/2 Day NO. 1 Setting

☐ Yes ☒ No Court Reporter Requested By: ☐ Plaintiff ☐ Defendant

PHONE CONSENT
Attorney(s) for Plaintiff

DATED: May 9, 2011

PHONE CONSENT
Attorney(s) for Defendant

James T. Russell
JAMES T. RUSSELL
District Judge

CERTIFICATE OF SERVICE

The undersigned, an employee of the Carson City Clerk/District Judge, hereby certifies that on the 9th day of May, 2011, I served the foregoing TRIAL DATE MEMO by:

() Handing a copy thereof to the () Plaintiff's attorney () Defendant's attorney () DA () Pro per () Other _____

(x) Depositing a copy thereof in the U.S. Mail at Carson City, Nevada, postage paid, addressed as follows:

David C. O'Mara, Esq.
311 East Liberty Street
Reno NV 89501

Rew R. Goodenow, Esq.
50 West Liberty Street #750
Reno NV 89501

Kevin Benson, Esq.
Deputy Attorney General
100 N. Carson Street
Carson City NV 89701

SUBSCRIBED and SWORN to before me
this day of May, 2011
ALAN GLOVER, Clerk

BY: _____ Deputy

Christine Erven
CHRISTINE ERVEN, Judicial Assistant, Dept. I

1 CATHERINE CORTEZ MASTO
Attorney General
2 KEVIN BENSON
Deputy Attorney General
3 Nevada Bar No. 9970
Attorney General's Office
4 100 North Carson Street
Carson City, Nevada 89701-4717
5 (775) 684-1114
kbenson@ag.nv.gov
6 Attorney for Plaintiff

REC'D & FILED
2011 MAY 12 PM 3:32
ALAN GLOVER
BY RECEIVED CLERK
C. COOPER

7
8 IN THE FIRST JUDICIAL DISTRICT COURT OF NEVADA
9 IN AND FOR CARSON CITY

10
11 NEVADA REPUBLICAN PARTY, and
DAVID BUELL, an individual,

12 Plaintiff,

13 vs.

14 STATE OF NEVADA, SECRETARY OF
15 STATE ROSS MILLER,

16 Defendant.

CASE NO. 11 OC 00147 1B

DEPT. I

**DEFENDANT'S OPPOSITION TO
PLAINTIFFS' APPLICATION FOR
PRELIMINARY AND PERMANENT
INJUNCTION**

17 Defendant Ross Miller, Secretary of State, by and through counsel, Catherine Cortez
18 Masto, Attorney General, and Kevin Benson, Deputy Attorney General, hereby opposes
19 Plaintiffs' Application for Declaratory Relief and a Preliminary and Permanent Injunction.

20 I. **FACTS AND PROCEDURAL HISTORY**

21 On April 21, 2011, Senator John Ensign announced that he would resign, effective
22 May 3, 2011. On May 3, 2011, Governor Brian Sandoval appointed Representative Dean
23 Heller to serve the remainder of Ensign's unexpired term. Senator Heller was sworn into the
24 U.S. Senate by Vice President Biden on May 9, 2011.

25 Senator Heller's appointment has created a vacancy in his seat for House of
26 Representatives. Pursuant to NRS 304.230, Governor Sandoval issued a Proclamation
27 calling for a special election to fill the vacancy. The special election is set for Tuesday,
28 September 13, 2011. See Proclamation, a copy of which is attached hereto as "Exhibit 1."

1 On May 2, 2011, Secretary of State Ross Miller issued Interpretation No. 112801,
2 outlining the procedures for the special election. See Exhibit 1 to Plaintiffs' Application for
3 Preliminary and Permanent Injunction. Secretary Miller's Interpretation provides that major
4 party candidates are nominated by filing a timely a declaration of candidacy. *Id.* Secretary
5 Miller also published a calendar prescribing the dates for candidate filing, filing of petitions,
6 verification of signatures, and other important deadlines. See 2011 Special Election Calendar,
7 a copy of which is attached hereto as "Exhibit 2."

8 Plaintiffs initiated this action on May 5, 2011, by filing their Verified Complaint and
9 Application for a Preliminary and Permanent Injunction. Plaintiffs seek to enjoin operation of
10 Secretary Miller's Interpretation with regard to major party candidates. Instead, Plaintiffs
11 request the Court to declare that the major party central committees must each nominate one
12 candidate pursuant to NRS 293.165, and that only those candidates may appear on the ballot.

13 II. LEGAL STANDARD FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF.

14 A. Preliminary Injunction

15 "A preliminary injunction is available when the moving party can demonstrate that the
16 nonmoving party's conduct, if allowed to continue, will cause irreparable harm for which
17 compensatory relief is inadequate and that the moving party has a reasonable likelihood of
18 success on the merits." *Boulder Oaks Community Ass'n v. B & J Andrews Enterprises, LLC*,
19 215 P.3d 27, 31 (Nev. 2009); NRS 33.010. The court must also weigh the potential hardships
20 to the parties, as well as to the public interest. *Univ. and Comm. College System of Nevada*,
21 *v. Nevadans for Sound Government*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004).

22 In *Clark County School Dist. v. Buchanan*, 112 Nev. 1146, 1152-53, 924 P.2d 716, 720-
23 21 (1996), the court balanced the hardship to the school district as an employer with the
24 competing public policy of permitting access to trainers of helping dogs for the disabled. The
25 court concluded that the interests of the public in promoting training of helping dogs
26 outweighed the hardships to the school district in permitting a dog in the classroom. *Id.*

27 ///

28 ///

1 B. Permanent Injunction

2 To obtain a permanent injunction, a plaintiff need not show imminent irreparable harm.
3 NRS 33.010(1). But the plaintiff must show on the merits that it is entitled to the relief sought,
4 and not merely that it has a "reasonable likelihood" of success on the merits. *See id.*

5 As the U.S. Supreme Court explained, there are significant procedural differences
6 between a preliminary injunction and a trial on the merits, thus it is inappropriate to equate
7 "likelihood of success on the merits" with "success." *University of Texas v. Camenisch*, 451
8 U.S. 390, 394 (1981). Preliminary injunctions are issued for the limited purpose of preserving
9 the status quo during litigation, are usually issued under more hasty and less formal
10 procedures, and upon limited evidence. *Id.* A permanent injunction, by contrast, requires the
11 moving party to establish that it is entitled to relief on the merits. *Id.*

12 III. THE HEARING ON THE PRELIMINARY INJUNCTION SHOULD BE COMBINED
13 WITH THE HEARING ON THE MERITS

14 Pursuant to NRCP 65(a)(2), the Court may combine the hearing on the application for
15 the preliminary injunction with the hearing on the merits. Due to the short time frame required
16 to resolve these issues before the special election, a ruling on the merits, rather than on the
17 application for preliminary injunction, will promote prompt resolution. Furthermore, this case
18 involves primarily, if not solely, issues of law. Should the Court hold the hearing on the merits,
19 it should apply the standard for permanent injunctive relief and require the Plaintiffs to show
20 that they are entitled to relief, not just that they have a likelihood of success.

21 IV. THE SECRETARY OF STATE HAS AUTHORITY TO INTERPRET ELECTION
22 LAW PURSUANT TO NRS 293.247

23 An agency is afforded great deference in its interpretation of statutes it is charged with
24 administering. *Clark Co. Sch. Dist. v. Local Gov't*, 90 Nev. 442, 446, 530 P.2d 114, 117
25 (1974). This deference recognizes the special expertise of the agency, acquired through day-
26 to-day dealings in administering its laws. *See Malecon Tobacco, LLC v. State ex rel. Dept. of*
27 *Taxation*, 118 Nev. 837, 841, 59 P.3d 474, 477, n. 15 (2002).

28 ////

1 The Secretary of State is the Chief Elections Officer of the State, and is responsible for
2 the execution and enforcement of all state and federal election laws for Nevada's elections.
3 NRS 293.124. As such, the Secretary is vested with authority to not only promulgate
4 regulations, but also to provide interpretations of election laws. NRS 293.247(4) provides:
5 "The Secretary of State may provide interpretations and take other actions necessary for the
6 effective administration of the statutes and regulations governing the conduct of primary,
7 general, special and district elections in this State."

8 Therefore, the fact that the Secretary issued an interpretation in order to administer the
9 special election does not violate the Administrative Procedures Act, because the Secretary
10 has specific statutory authority to do so. Furthermore, the Secretary's interpretation should be
11 accorded deference due to his expertise in efficiently administering elections.

12 V. THE LAW DOES NOT PERMIT THE MAJOR PARTIES' CENTRAL COMMITTEES
13 TO CONTROL WHO CAN RUN IN THE SPECIAL ELECTION

14 The crux of this case is whether NRS 293.165 applies so that the only major party
15 candidates who can run in the special election are those selected by the major party central
16 committees, or whether NRS 304.240(1) allows ballot access to any qualified elector.

17 NRS 293.165 provides in pertinent part: "a vacancy occurring in a major or minor
18 political party nomination for a partisan office may be filled by a candidate designated by the
19 party central committee of the county or State, as the case may be, of the major political party
20 or by the executive committee of the minor political party..." NRS 293.165(1). By contrast,
21 NRS 304.240(1) provides: "A candidate of a major political party is nominated by filing a
22 declaration or acceptance of candidacy within the time prescribed by the Secretary of State
23 pursuant to NRS 293.204."

24 As discussed below, the Secretary interprets the plain language of NRS 304.240(1) to
25 control; therefore, a major party candidate must only file within the prescribed time, and the
26 central committees cannot limit the candidates to a single person of their choosing.

27 ////

28 ////

1 A. The plain language of NRS 304.240(1) provides that
2 major party candidates are nominated by filing a
3 declaration of candidacy.

4 "When this court interprets the plain language of a statute, the court 'presume[s] that
5 the Legislature intended to use words in their usual and natural meaning.'" *Wyman v. State*,
6 125 Nev. 46, ___, 217 P.3d 572, 583 (2009) (quoting *McGrath v. State, Dep't of Pub. Safety*,
7 123 Nev. 120, 123, 159 P.3d 239, 241 (2007)). "Where the language of a statute is plain and
8 unambiguous and its meaning clear and unmistakable, there is no room for construction, and
9 the courts are not permitted to search for its meaning beyond the statute itself." *Madera v.*
10 *S/IS*, 114 Nev. 253, 257, 956 P.2d 117, 120 (1998) (internal quotations omitted).

11 The Secretary's interpretation is based on the plain language of NRS 304.240(1). This
12 subsection, broken into five discrete clauses for ease of reading and discussion, provides:

13 If the Governor issues an election proclamation calling for a special
14 election pursuant to NRS 304.230, no primary election may be
15 held.

16 Except as otherwise provided in this subsection, a candidate must
17 be nominated in the manner provided in chapter 293 of NRS and
18 must file a declaration or acceptance of candidacy within the time
19 prescribed by the Secretary of State pursuant to NRS 293.204,
20 which must be established to allow a sufficient amount of time for
21 the mailing of election ballots.

22 A candidate of a major political party is nominated by filing a
23 declaration or acceptance of candidacy within the time prescribed
24 by the Secretary of State pursuant to NRS 293.204.

25 A minor political party that wishes to place its candidates on the
26 ballot must file a list of its candidates with the Secretary of State
27 not more than 46 days before the special election and not less
28 than 32 days before the special election.

 To have his or her name appear on the ballot, an independent
candidate must file a petition of candidacy with the appropriate
filing officer not more than 46 days before the special election and
not less than 32 days before the special election.

NRS 304.240(1).

 The first clause of NRS 304.240(1) prohibits holding a primary election when the
Governor has issued a proclamation for a special election to fill a vacancy in the office of
Representative in Congress.

1 The second clause states: "*Except as otherwise provided in this subsection, a*
2 candidate must be nominated in the manner provided in chapter 293 of NRS..." *Id.* (emphasis
3 added). It also requires that all candidates "must file a declaration or acceptance of candidacy
4 within the time prescribed by the Secretary of State pursuant to NRS 293.204, which must be
5 established to allow a sufficient amount of time for the mailing of election ballots." *Id.*

6 The third, fourth, and fifth clauses of the statute specify how each of the three types of
7 candidates – major party, minor party, and independent, respectively - are nominated for the
8 special election. *Id.* Since the second clause states that candidates are nominated pursuant
9 to chapter 293, "*[e]xcept as otherwise provided in this subsection,*" the nomination procedures
10 in 293 only apply to the extent they are not inconsistent with NRS 304.240(1).

11 For major party candidates, the statute states: "A candidate of a major political party is
12 *nominated* by filing a declaration or acceptance of candidacy within the time prescribed by the
13 Secretary of State pursuant to NRS 293.204." NRS 304.240(1) (emphasis added). This
14 sentence is plain and unambiguous: a major party candidate is deemed to be nominated if he
15 or she files within the time prescribed.

16 This is consistent with the second clause of the statute, which states that candidates
17 are nominated pursuant to chapter 293, "except as otherwise provided in this subsection."
18 NRS 304.240(1). Ordinarily, under chapter 293, major party candidates are nominated by
19 primary election, which NRS 304.240(1) prohibits for this type of special election. Instead,
20 NRS 304.240(1) itself provides how major party candidates are nominated.

21 Contrary to Plaintiffs' arguments, the "except as otherwise provided" language in
22 NRS 304.240(1) does not relate solely to timing issues. The second clause of
23 NRS 304.240(1) states that all candidates for the special election must file a timely declaration
24 of candidacy. The third clause, specific to major party candidates, states that they are
25 nominated if they file a timely declaration of candidacy. If the "except as otherwise provided"
26 language was intended to only apply to timing issues, the third clause would be rendered
27 entirely meaningless because it would be merely redundant of the second clause, which
28 already requires *all* candidates to file a timely declaration of candidacy. A court should

1 construe statutes in such a way that no part is rendered nugatory or mere surplusage. *Albios*
2 *v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006).

3 The Secretary's interpretation is also consistent with the remaining clauses of
4 NRS 304.240(1). The fourth clause states that minor parties must file their lists of candidates,
5 and the fifth clause requires independent candidates to file their petitions of candidacy during
6 a certain time frame.¹ NRS 304.240(1) does not distinguish between minor parties with ballot
7 access and those without, nor does it describe the form, content, or number of signatures
8 required for an independent candidate's petition of candidacy. Chapter 293 fills in the gaps for
9 these technical details.

10 For example, NRS 293.1725 governs lists of minor party candidates, and requires the
11 Secretary to strike from the list any candidates who are not entitled to appear on the ballot,
12 either because the party is not qualified, or because the candidate has not gathered sufficient
13 signatures. NRS 293.1725(1). Additionally, NRS 293.200 specifies the format of the petition
14 and the required number of signatures for independent candidates. Therefore under the
15 Secretary's Interpretation, such candidates are "nominated *in the manner* provided in chapter
16 293," and all parts of the statute are given meaning and effect.

17 Plaintiffs argue that the provisions for minor parties and independent candidates do not
18 apply in special elections because NRS 293.175(5)(a) provides that NRS 293.175 through
19 293.203, inclusive do not apply to special elections to fill vacancies. See Application, pp. 14-
20 15, ll. 24-12, nn. 6, 7. NRS 293.175(3) states: "Candidates for partisan office of a minor
21 political party must be nominated in the manner prescribed pursuant to NRS 293.171 to
22 293.174, inclusive." But according to NRS 293.175(5)(a), this section does not apply.
23 Likewise, NRS 293.200 is within the range of statutes that NRS 293.175(5)(a) says do not
24 apply to special elections to fill vacancies.

25
26
27 ¹ The Uniformed and Overseas Citizens Absent Voting Act (UOCAVA), 42 USC Sec. 1973ff, which requires that
28 military and overseas voters be mailed absent ballots at least forty-five (45) days prior to an election, applies to a
special election pursuant to NRS 340.230. NRS 304.240(1) prescribes the deadlines for filing for minor party and
independent candidates to be "not more than 46 days before the special election." It is impossible to process the
petitions and prepare the ballots in the space of one day, which would be necessary to comply with federal law.
Therefore these timelines in NRS 304.240(1) are preempted by federal law.

1 However, NRS 304.240(1) specifically requires minor parties to file a list of candidates
2 (as opposed to a "designation" of a nominee, cf. NRS 293.165), and for independent
3 candidates to file a petition of candidacy. Although multiple statutes should be read in
4 harmony whenever possible, "when a specific statute is in conflict with a general one, the
5 specific statute will take precedence." *Andersen Family Associates v. Hugh Ricci, P.E.*, 179
6 P.3d 1201, 1204 (Nev. 2008).

7 Here, NRS 304.240 is the more specific statute because it deals with the particular
8 issue of special elections to fill vacancies in the office of Representative in Congress.
9 Accordingly, this Court should give effect to those parts of NRS Chapter 293 that govern lists
10 of candidates of minor parties and petitions of candidacy for independent candidates because
11 NRS 304.240(1) explicitly requires them, but does not provide details as to form.

12 Plaintiffs argue that the Secretary's interpretation is improper because nothing in
13 NRS 304.240 specifies the number of required signatures for minor parties without ballot
14 access and independent candidates, and the provisions of chapter 293 that do so specify are
15 suspended by NRS 293.175. See Application, p. 15, fn. 7. Taken to its logical conclusion,
16 Plaintiffs' argument would mean that independent candidates and candidates of minor parties
17 without ballot access could not be on the ballot, because there would be no statutory method
18 allowing them to qualify.

19 This result would be both absurd and unconstitutional. See *Williams v. Rhodes*, 393
20 U.S. 23, 34 (1968) (striking down Ohio laws that severely limited ballot access for minor
21 parties as in violation of equal protection); *Storer v. Brown*, 415 U.S. 724, 746 (1974) (citing
22 *Rhodes* and remanding to determine whether laws prevented independent candidates from
23 gaining ballot access). By contrast, the Secretary's interpretation gives meaning and effect to
24 all of NRS 304.240, as well as the provisions of Chapter 293 that are necessary to permit
25 minor party candidates and independents to appear on the ballot. This is consistent with the
26 plain language of the statute: candidates are nominated in the manner provided by chapter
27 293 except as otherwise provided in NRS 304.240(1).

28 ////

1 Next, Plaintiffs argue that NRS 304.240 contemplates a "two step process in the
2 nomination and the placement of a candidate on the election ballot: (1) nomination of
3 candidates and (2) placement of names of candidates on ballot." See Application, p. 11, ll.
4 10-13. Plaintiffs are attempting to construct a two-step process where none exists. To the
5 contrary, the statute's title² merely recognizes that there are different processes for different
6 types of candidates. Independent candidates are not "nominated" in the sense that partisan
7 candidates are nominated, because by definition such candidates do not purport to represent
8 the interests or values of any particular party or group. Instead, their names are simply
9 "placed on" the ballot. See NRS 293.200(7). Therefore the title of the statute does not
10 support Plaintiffs' argument.

11 Finally, there is no "fundamental principle" in Nevada, let alone an affirmative legal
12 requirement, that only one candidate from each party may appear on the ballot, particularly in
13 a special election. NRS 293.260 permits two candidates from the same major party to appear
14 on the general election ballot in certain circumstances. In a recall election under Chapter 306,
15 all candidates who qualify are placed on the ballot to succeed the recalled officer, regardless
16 of party affiliation, and without any primary election to pick a party's nominees. Thus there is
17 no merit in Plaintiffs' contention that Nevada law or tradition requires only one candidate from
18 each party to appear on the ballot.

19 In sum, if the Legislature had intended major party candidates to be selected by the
20 party central committees according to NRS 293.165, it could have very easily said so.
21 Instead, it stated that a major party candidate "is nominated" by filing a timely declaration of
22 candidacy. NRS 304.240(1). Where the statute is plain and unambiguous, there is no room
23 for construction. *Madera*, 114 Nev. at 257, 956 P.2d at 120. The Court should give effect to
24 the clear language of NRS 304.240(1) and uphold the Secretary's interpretation.

25 ////

26 ////

27
28 ² It should also be noted that the "title" to which *A Minor v. Clark Co. Juvenile Ct.*, 87 Nev. 544, 490 P.2d 1248 (1971) refers is the title of the law as it appears in the Statutes of Nevada, not the revised title that is used in the NRS.

1 B. NRS 293.165 does not apply because there is no vacancy
2 in a nomination.

3 By its own terms, NRS 293.165 only applies when there is "a vacancy occurring in a
4 major or minor political party nomination for a partisan office." But a vacancy *in a nomination*
5 is not the same thing as a vacancy in *an office*.

6 Plaintiffs rely on *Brown v. Georgetta*, 70 Nev. 500, 275 P.2d 376 (1954), which involved
7 a vacancy in a U.S. Senate seat, for the proposition that the vacancy in the office of
8 Representative in Congress also creates a vacancy in the nomination. However, this case is
9 inapplicable because there is no vacancy in any nomination and the Legislature has since
10 enacted a wholly different mode of filling a vacancy in Congress: a special election.

11 In *Brown*, Senator McCarran passed away on September 28, 1954, after the primary
12 election and shortly before the general election. 70 Nev. at 501, 275 P.2d at 376. The
13 relevant law at the time was § 25 of the Primary Election Law, which provided in pertinent
14 part: "Vacancies occurring after the holding of any primary election shall be filled by the party
15 committee of the county, district or state, as the case may be. Such action shall be taken not
16 less than thirty days prior to the November election." *Id.*, 70 Nev. at 508, 275 P.2d at 380.

17 Since Senator McCarran's term would not expire until after the 1956 election, his seat
18 did not appear on the ballot for the primary election held in 1954. *Id.* The court recognized
19 that a vacancy in a nomination is distinct from a vacancy in the office. *Id.* Nevertheless, the
20 court held that under those particular circumstances the vacancy in his office also created a
21 vacancy in the nomination, reasoning:

22 [W]here, by reason of death, as in this case, a vacancy in an office
23 occurs *shortly* before a general election at which some one to fill
24 the office for the unexpired term should be chosen, *and no one has*
 been nominated to said office (as in this case), there is a vacancy
 in the nominations within the meaning of the election law.

25 *Id.* (internal quotations omitted) (emphasis added).

26 In short, it is the exception, rather than the rule, that a vacancy in the office also creates
27 a vacancy in the nomination. This exception only applies in situations like that in *Brown*:
28 where the officeholder died after the primary election, and very shortly before a *general*

1 election at which a replacement must be elected and where there is no other specific statutory
2 procedure to fill the vacancy. *Id.*, 70 Nev. at 501, 275 P.2d at 376.

3 This case, by contrast, involves a special election for which the Legislature
4 promulgated specific statutes to deal with vacancies. NRS 304.040 provides that: "*Except as*
5 *otherwise provided in NRS 304.200 to 304.250, inclusive, party candidates for Representative*
6 *in Congress shall be nominated in the same manner as state officers are nominated.*"
7 (Emphasis added.) Thus the specific provisions of NRS 304.240 control how candidates are
8 nominated for the special election.

9 *Brown* does not apply, because there is no vacancy occurring after a primary and
10 shortly before a general election; instead, NRS 304.240(1) provides for a special election
11 without a primary. NRS 304.240(1) also prescribes that a major party candidate "is
12 nominated" by filing a timely declaration of candidacy. Giving these words their ordinary and
13 plain meaning, anyone who timely files "is nominated," therefore there is no vacancy in the
14 nomination.

15 Additionally, *Brown* was decided long before NRS 304.240 was enacted by AB 344 in
16 2003. The original purpose of the bill was to provide for filling a vacancy as a result of a
17 catastrophe, but then the sponsor realized that Nevada did not have *any* laws governing filling
18 of vacancies in a congressional seat, and that a vacancy had never occurred in the State's
19 history. Minutes of the Assembly Comm. on Elections, Procedures, and Ethics (March 27,
20 2003). Therefore the bill was amended to also provide procedures to fill an "ordinary" vacancy
21 caused by death, resignation, or otherwise. *Id.*

22 The sponsor testified that pursuant to Art. 1, § 2 of the U.S. Constitution,
23 Representatives must be elected by the people, thus the Governor could not appoint a
24 replacement and would have to issue a writ of election. *Id.* Since there were no laws on the
25 procedure for such an election, they would have to be formulated from scratch. *Id.* This
26 reactionary method would take additional time, or even require the seat be left vacant until the
27 next regular election, which would unnecessarily leave some citizens without representation in
28 the House for a long duration. *Id.* Therefore the purpose of AB 344 was to proactively create

1 the procedures for holding a special election to fill the vacancy. *Id.*

2 No such special election was required in *Brown*. In that case, the vacancy would be
3 temporarily filled by appointment, and then filled for the remainder of unexpired term at the
4 next general election. The race would be just one of many on the ballot. Here, by contrast,
5 NRS 304.200 through 304.250 provide for a special election with just one race on the ballot –
6 to fill the vacancy in Congress. This is a wholly different procedure than those governing the
7 vacancy at issue in *Brown*, and was later enacted by the Legislature because the U.S.
8 Constitution does not permit appointments of Representatives.

9 NRS 293.165 only applies if there is a vacancy in a *nomination*, not when there is a
10 vacancy in office. Only in certain, unusual circumstances will a vacancy in the office also
11 create a vacancy in the nomination. NRS 304.240 provides a special nomination process for
12 the election, through which a vacancy in a nomination is very unlikely. Accordingly, *Brown* is
13 inapplicable to this case.

14 C. Plaintiffs' request to extend the candidate filing period
15 should be denied.

16 Plaintiffs argue that under the NRP's bylaws, notice of a State central committee
17 meeting must be given 45 days in advance. See Application, p. 2, n. 1. Pursuant to
18 NRS 304.240(1) and NRS 293.204, the Secretary's Interpretation sets the period for
19 candidate filing as May 23 through May 25. Plaintiffs argue that this interferes with their ability
20 to nominate a candidate because of the 45-day notice requirement in their bylaws, and
21 therefore the period to file should be extended to June 21, 2011.

22 First, this filing period does not interfere with their ability to nominate a candidate
23 through the central committee,³ because the party is free to nominate anyone it wishes after
24 the filing period, but that person simply must be sure to file during the May 23 – 25 period.

25 Second, the purpose of NRS 304.200 – 304.250 is clearly to hold a special election “as
26 soon as practicable” to fill a vacancy. See NRS 304.230(1)(a). In the event of a catastrophe,

27
28 ³ The party may nominate someone through its central committee, but that nomination will not prevent other
candidates of the same party affiliation from appearing on the ballot. Nor will the party's nominee be
denominated as such on the ballot. Nevertheless, the party is free to endorse a candidate and to campaign on
behalf of that candidate, etc.

1 the election must be held within 90 days after the Governor's proclamation.
2 NRS 304.230(1)(c). Because of the federal requirement to mail ballots to overseas and
3 military voters at least 45 days before the election, according to Plaintiffs' argument, it would
4 be impossible to hold an election in the event of a catastrophe because the parties would
5 need 45 days to select a nominee, which in a 90-day election period would correspond with
6 the mailing deadline. In that instance, there would be literally no time to prepare the ballots,
7 and the State would be in violation of federal law.

8 The party's bylaws cannot jeopardize the entire election in this manner. If the party has
9 failed to adopt procedures for expedited selection of a nominee, that is an internal party
10 matter. In this case, the May 23-25 filing period is designed to give adequate time for the
11 clerks to verify petitions, prepare the ballots, and to conclude legal challenges. As explained
12 above, it does not prejudice the ability of a party to hold a central committee meeting.
13 Accordingly, the Plaintiffs will not suffer any harm as a result of the filing deadlines and their
14 request to extend the deadline should be denied.

15 **VI. AN OPEN-ACCESS SPECIAL ELECTION DOES NOT VIOLATE PLAINTIFFS'**
16 **FREEDOM OF ASSOCIATION OR RIGHT TO VOTE**

17 Plaintiffs argue that if the Secretary's interpretation stands, they will suffer injury to their
18 constitutional rights of freedom of association and to vote. See Application, pp. 15-19. It is
19 certainly true that the freedom to associate with others to advance political ideas is protected
20 under the First and Fourteenth Amendment. *Democratic Party of U. S. v. Wisconsin ex rel. La*
21 *Follette*, 450 U.S. 107, 121 (1981). Additionally, the freedom to associate necessarily implies
22 the freedom to exclude those who do not share the party's ideals and beliefs. *California*
23 *Democratic Party v. Jones*, 530 U.S. 567, 574 (2000).

24 But an examination of the relevant case law shows that an open access ballot does not
25 impinge on the parties' freedom of association, nor does it affect individuals' right to vote. In
26 fact, it serves compelling government interests in allowing voters, not party leadership to
27 choose candidates, and also enhances, not undermines, the right to vote.

28 ////

1 A. Members of the party, not party leadership, have a right to pick the
2 the party's nominees.

3 Even in a regular election, major parties do not control who becomes the party's
4 nominee. Any member of the party can run in the primary by simply filing a declaration of
5 candidacy. NRS 293.177. At the primary election, the voters of that party, not the party
6 leadership, pick the nominee. NRS 293.175(2); NRS 293.260(2).

7 It is well-settled that the State may require major party candidates to be nominated by
8 voters of the party through a direct primary election, and this does not violate the associational
9 rights of the party. *American Party of Texas v. White*, 415 U.S. 767, 781 (1974); *Lightfoot v.*
10 *Eu*, 964 F.2d 865, 873 (9th Cir. 1992). In fact, the very purpose of a direct primary is to
11 remove the nomination of candidates from the "smoke-filled rooms" under the sole control of
12 party bosses, and to give that power to the voters instead. *Lightfoot*, 964 F.2d at 872.

13 The Ninth Circuit in *Lightfoot* directly addressed the Libertarian Party's objection to
14 California law requiring that it nominate its candidates by primary election, because, it argued,
15 the law usurped the party's power to decide for itself how to nominate its candidates. *Id.* at
16 868. In upholding the direct primary requirement, the court held that the primary reduces the
17 power of party leadership and special interests, in the hope of producing a cleaner, more
18 efficient government. *Id.* at 872. Noting that it could not imagine a more compelling
19 government interest, the court concluded: "We therefore hold that the State's interest in
20 enhancing the democratic character of the election process overrides whatever interest the
21 Party has in designing its own rules for nominating candidates." *Id.* at 872-73.

22 In short, it is the *members* of the party whose rights of association are at stake, not the
23 rights of the party's central committee to pick their preferred candidate. As the Ninth Circuit
24 discussed in *Lightfoot*, even assuming this burdens associational rights of the party
25 leadership, that burden is easily justified by compelling governmental interests in producing
26 more a democratic and more efficient government that is less beholden to special interests.
27 *Id.* The court more recently reaffirmed this holding in *Alaskan Independence Party v. Alaska*,
28 545 F.3d 1173, 1179-80 (9th Cir. 2008), where it held that compelling state interests supported

1 Alaska's law that allowed anyone to appear on the primary ballot against the parties'
2 arguments that they had a constitutional right to limit candidates to those pre-approved by
3 party leadership.

4 The Plaintiffs' arguments that the parties are being deprived of the power to pick their
5 nominee ring hollow because in a regular election, the voters, not the party leadership, pick
6 the major party's nominee. Sometimes this will result in a nominee who is distasteful to the
7 party leadership, but that does not infringe on any rights of the party. Rather, it reflects the will
8 of the voters of the party – the people who, after all, compose its actual membership.

9 Likewise, in a special election without a primary, the voters – the members of the
10 party – will vote for a person to represent them in Congress. Were the candidates for the
11 special election limited to just one candidate hand-picked by each major party central
12 committee, this would completely undermine the same interests that justify direct primaries: it
13 would place the power to pick candidates solely with party leadership and deprive the
14 members of the party of any meaningful input into the process.

15 In this case, since there is no primary election, the Secretary's interpretation furthers
16 the State's compelling interests in promoting clean government, gives power to the voters to
17 choose their representative, and enhances, rather than diminishes, their freedom to associate
18 with the candidate of their choice. As held in *Lightfoot* and *Alaskan Independence Party*, if
19 this infringes on any associational rights of the party leadership, the burden is easily justified
20 by the State's compelling interests in a more open, democratic election that shifts the power to
21 the members of the party rather than the few in leadership. 964 F.2d at 872.

22 B. The special election does not implicate the parties' freedom of association by
23 forcing it to associate with candidates it finds repugnant.

24 Members of political parties do have a constitutional right to choose their "standard
25 bearer." Accordingly, the U.S. Supreme Court in *California Democratic Party v. Jones*, struck
26 down California's "blanket primary"⁴ system in which *non*-members were permitted to select a

27
28 ⁴ The Court explained: "An open primary differs from a blanket primary in that, although as in the blanket primary
any person, regardless of party affiliation, may vote for a party's nominee, his choice is limited to that party's
nominees *for all offices*. He may not, for example, support a Republican nominee for Governor and a Democratic
nominee for attorney general." *Id.* at 576, n. 6.

1 party's nominee. 530 U.S. 567, 577 (2000). As the Court explained:

2 Proposition 198 forces political parties to associate with-to have
3 their nominees, and hence their positions, determined by-those
4 who, at best, have refused to affiliate with the party, and, at worst,
5 have expressly affiliated with a rival. In this respect, it is
6 qualitatively different from a closed primary. Under that system,
7 even when it is made quite easy for a voter to change his party
8 affiliation the day of the primary, and thus, in some sense, to "cross
9 over," at least he must formally *become a member of the party*;
10 and once he does so, he is limited to voting for candidates of that
11 party.

12 *Id.* (emphasis in original).

13 In contrast, the Supreme Court upheld Washington's "top two" blanket primary system
14 in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008).

15 Under Washington's system, any person could file a declaration of candidacy for the primary
16 election which stated his or her party preference, and no party could prevent anyone from
17 naming it as their preferred party. *Id.* at 447. At the primary election, a voter may select any
18 candidate, regardless of party affiliation of either the voter or the candidate. *Id.* Then the top
19 two candidates (those receiving the most and second-to most votes) advance to the general
20 election, regardless of party affiliation. *Id.* at 447-48.

21 It was argued that the Washington system was indistinguishable from the blanket
22 primary struck down in *Jones* because "candidates who progress to the general election under
23 I-872 will become the *de facto* nominees of the parties they prefer, thereby violating the
24 parties' right to choose their own standard-bearers and altering their messages." *Id.* at 452-53
25 (internal citations omitted). However, the Court rejected this argument because the
26 Washington system primarily served to winnow the number of candidates down to two, not to
27 chose nominees of the respective parties. *Id.* at 453. It noted that it was quite possible that
28 the general election would pit two candidates of the same party against each other. *Id.*

Next, the Court turned to the parties' argument that the system violated the parties'
associational rights because voters would be confused by having a candidate with a party
designation on the ballot, since they would likely believe the party designation to mean that
the candidate was endorsed or chosen by the party. *Id.* at 454. But the Court rejected this

1 argument because it was essentially based on speculation⁵: "There is simply no basis to
2 presume that a well-informed electorate will interpret a candidate's party-preference
3 designation to mean that the candidate is the party's chosen nominee or representative or that
4 the party associates with or approves of the candidate." *Id.* The Court noted: "Our cases
5 reflect a greater faith in the ability of individual voters to inform themselves about campaign
6 issues." *Id.* (quoting *Tashjian*, 479 U.S. at 220).

7 Additionally, the Court recognized that "The First Amendment does not give political
8 parties a right to have their nominees designated as such on the ballot." *Id.* at 448, n. 7
9 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362-363 (1997) ("We are
10 unpersuaded, however, by the party's contention that it has a right to use the ballot itself to
11 send a particularized message, to its candidate and to the voters, about the nature of its
12 support for the candidate"))).

13 Similarly, the special election called for under NRS 304.240 does not serve to pick
14 nominees of the parties; it serves to allow the voters to elect a replacement to the House of
15 Representatives. Therefore the fact that multiple Republicans and multiple Democrats may
16 appear on the ballot does not force these parties to affiliate with any of those candidates. Like
17 in *Washington State Grange*, the fact that anyone can run by filing a declaration of candidacy,
18 and given the amount of publicity already generated by this case, it is quite doubtful that
19 voters will assume that a party designation after a candidate's name necessarily indicates that
20 the party endorses that candidate.

21 Plaintiffs argue that, given the requirement that the election must be held within 180
22 days, "it is especially crucial that the candidate accurately reflects the views and principles of
23 the party in whose name they run, since party affiliation may in such cases be a determinative
24 factor in the minds of the voting public." See Application, p. 19, ll. 17-22. As the Supreme
25 Court stated, "Our cases reflect a greater faith in the ability of individual voters to inform
26 themselves about campaign issues." *Tashjian*, 479 U.S. at 220. In this case, the election is
27 scheduled to be held September 13th, which is four months away. Several candidates have

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⁵ *Washington State Grange* came to the U.S. Supreme Court on a facial challenge. *Id.* at 444. It was upheld as-
applied by the district court. Slip Copy, 2011 WL 92032, W.D.Wash. No. C05-0927-JCC (Jan. 11, 2011).

1 already announced that they are running. There will be ample opportunity for voters to
2 become familiar with the candidates, and there is no need for voters to use party affiliation as
3 a "short hand" for who they should support. The members of the party, the voters, can decide
4 for themselves which candidate best reflects the views and principles of the party.

5 C. The special election promotes the right to vote.

6 Next, Plaintiffs argue that allowing multiple candidates to run will infringe on the
7 effectiveness of the right to vote because it would create confusion and "almost surely
8 guarantee" that the next Representative of CD 2 "would be elected by an insignificant
9 plurality." See Application, p. 17, ll. 22-28. However, neither the case law, nor the experience
10 of other states, supports this position.

11 First, the cases Plaintiffs cite all involved challenges to a state's *restrictions* on ballot
12 access, which were weighed against important government interests in managing the size of
13 ballots, deterring frivolous candidacies, and minimizing voter confusion. However,
14 undersigned counsel is unaware of, and Plaintiffs have not cited, any case holding that laws
15 restricting access to further these interests are *constitutionally mandated*. To the contrary,
16 these interests are typically invoked to justify restrictions in the face of constitutional attack.

17 For example, Plaintiff quotes *Lubin v. Panish*, which involved a suit by an indigent who
18 was denied nomination papers because he could not pay the filing fee. 415 U.S. 709, 712
19 (1974). The Court recognized the states' interests in limiting the size of its ballots and
20 weeding out frivolous candidates, but also noted that these interests are in direct conflict with
21 the interests of voters and candidates in increased political participation through increasing
22 ballot access. *Id.* at 713. The Court also realized that the rights of voters are impaired when
23 ballot access is unduly restricted:

24 The interests involved are not merely those of parties or individual
25 candidates; the voters can assert their preferences only through
26 candidates or parties or both and it is this broad interest that must
27 be weighed in the balance. The right of a party or an individual to
28 a place on a ballot is entitled to protection and is intertwined with
the rights of voters.

1 "[T]he right to vote is heavily burdened if that vote may be cast only
2 for one of two parties at a time when other parties are clamoring
3 for a place on the ballot." *Williams v. Rhodes*, 393 U.S. 23, 31
4 (1968).

5 *This must also mean that the right to vote is "heavily burdened" if*
6 *that vote may be cast only for one of two candidates in a primary*
7 *election at a time when other candidates are clamoring for a place*
8 *on the ballot.*

9 *Id.* at 716 (emphasis added).

10 Ultimately, the Court held that it is unconstitutional to deny access to the ballot solely
11 because the candidate cannot afford the filing fee; some reasonable alternative must be
12 permitted. *Id.* at 718.

13 *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) involved
14 restrictions on ballot access in a special election to fill a vacancy in the office of mayor of
15 Chicago. *Id.* at 177. New political parties and an independent candidate challenged the
16 requirement that, in order to appear on the ballot, they each had to obtain at least 35,947
17 signatures in slightly less than three months, whereas candidates for statewide office had to
18 obtain only 25,000 signatures. *Id.* at 177-78. The Court struck down this requirement,
19 reasoning that there was no rational reason to place a greater burden on candidates for a city
20 election than on those for a statewide election, where the latter had a much greater pool of
21 voters from which to gather signatures. *Id.* at 184. In so holding, the Court emphasized the
22 rights of voters are impaired when candidates' access to the ballot is limited:

23 Restrictions on access to the ballot burden two distinct and
24 fundamental rights, "the right of individuals to associate for the
25 advancement of political beliefs, and the right of qualified voters,
26 regardless of their political persuasion, to cast their votes
27 effectively." *Rhodes*, 393 U.S. at 30.

28 ...

By limiting the choices available to voters, the State impairs the
voters' ability to express their political preferences. And for reasons
too self-evident to warrant amplification here, we have often
reiterated that voting is of the most fundamental significance under
our constitutional structure.

Id. (emphasis added).

Finally, in *Jenness v. Fortson*, 403 U.S. 431, 432 (1971), the Court upheld Georgia's

1 requirement that an independent candidate attain 5% of the number of registered voters at the
2 last general election for the office in question. The Court held that this requirement did not
3 violate candidates' and voters' First Amendment rights because it was a reasonable restriction
4 and that the state has an important interest in requiring candidates to show that they had a
5 modicum of support before placing them on the ballot. *Id.* at 439-40.

6 Each of these cases stand for the proposition that the state *may* impose reasonable
7 restrictions on ballot access to prevent voter confusion, prevent ballot flooding, and deter
8 frivolous candidacies. None of them support Plaintiffs' proposition that the state is
9 constitutionally *required* to implement such procedures. In fact, each of these cases
10 recognize that ballot restrictions are subject to balancing the interests of the state against the
11 First Amendment rights of candidates and voters to participate in the electoral process, and
12 that restrictions that are severely burden those rights can only be justified by compelling
13 government interests.

14 Furthermore, the specters of voter confusion, that the winner might be chosen by a
15 small plurality, and or that the "effectiveness" of a vote might be lost has not been borne out
16 by other states' experiences. California and Hawaii have recently held open access special
17 elections to fill vacancies. In 2003, Arnold Schwarzenegger was elected Governor of
18 California, following the recall of Gray Davis.

19 In a case similar to this one, the Secretary of State of California issued an interpretation
20 that anyone could run to replace the recalled governor by filing a petition of candidacy with
21 only 65 signatures. *Burton v. Shelley*, 2003 WL 21962000, Slip Op. No. S117834 (Cal. Aug.
22 7, 2003). There was no primary election, and the ballot consisted of 135 candidates. But
23 despite the fact that 135 candidates appeared on the ballot, Schwarzenegger prevailed with a
24 substantial 48.6% of the vote. See Official Declaration of Results,⁶ available at:
25 http://www.sos.ca.gov/elections/sov/2003_special/sum.pdf, a copy of which is attached hereto
26 as "Exhibit 3."

27 On May 22, 2010, Hawaii held a special election to fill a vacancy in the House of

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⁶ The Court may take judicial notice of the official election results of California and Hawaii pursuant to
NRS 47.130.

Representatives caused by the resignation of Neil Abercrombie. The special election was an open access election with no primary, in which 14 candidates ran. Republican Charles Djou prevailed with just under 40% of the vote. See Summary Report, available at: <http://hawaii.gov/elections/results/2010/files/special2010.pdf> attached hereto as "Exhibit 4."

While each of these is less than a majority, they are both substantial pluralities. Thus the experience of other states does not bear out the fear that the winning candidate will garner only a small fraction of the vote. The California election results in particular show that voters are not confused by a long list of candidates: they know who is who, and are able to effectively use their votes, even when faced with a large slate of candidates.

Furthermore, in special elections such as the one in this case, there is typically only one race on the ballot. This alone significantly reduces the possibility of an unwieldy ballot. It also narrows voters' attention and minimizes confusion. Thus there is no appreciable risk that voter confusion or a lengthy ballot will impair the effectiveness of the right to vote. To the contrary, the U.S. Supreme Court has recognized that the right to vote is "heavily burdened" if that vote may only be cast for one of two candidates "when other candidates are clamoring for a place on the ballot." *Lubin*, 415 U.S. at 716.

D. The public interest in choosing among various candidates greatly outweighs any harm to Plaintiffs.

As discussed above, the right to vote is implicated when ballot access is limited only to a few candidates. The harm that Plaintiffs allege they will suffer is minimal in comparison to the harm that would befall the voters by depriving them of their choice among various candidates seeking a place on the ballot. This is not an election to choose party nominees; it is an election to choose a Representative for the people. Therefore it is the people, not the parties, who would suffer most if they did not have a meaningful opportunity to associate with the candidate of their choice – even if that candidate is not preferred by party leadership.

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1 CONCLUSION

2 For the foregoing reasons, the Secretary of State respectfully requests that this Court
3 DENY Plaintiffs' Application for injunctive and declaratory relief and instead grant judgment in
4 favor of the Secretary.

5 DATED this 12th day of May 2011.

6 CATHERINE CORTEZ MASTO
7 Attorney General

8 By: 

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15 kbenson@ag.nv.gov
16 Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 12th day of May, 2011, I served a copy of the foregoing Defendant's Opposition to Plaintiffs' Application for Preliminary and Permanent Injunction, by mailing a true copy to the following:

William M. O'Mara, Esq.
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Reno, Nevada 89501

Rew R. Goodenow, Esq.
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I further certify that I served a copy of the foregoing document via email to the addresses listed above.

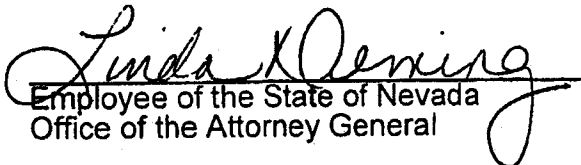

Employee of the State of Nevada
Office of the Attorney General

EXHIBIT LIST

- 1
- 2
- 3 Exhibit 1 Proclamation by the Governor dated May 9, 2011
- 4 Exhibit 2 Special Election Calendar
- 5 Exhibit 3 Official Declaration of the Result of the Statewide Special Election
held on Tuesday, October 7, 2003
- 6 Exhibit 4 U.S. Rep District I Special Vacancy Election - State of Hawaii
- 7
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EXHIBIT 1



A Proclamation by the Governor

To the County Clerks and Registrars of **ALL COUNTIES** in the State of Nevada and to **ALL OTHER ELECTION AUTHORITIES** in the State of Nevada:

WHEREAS, on May 9, 2011, the Honorable Dean Heller resigned from the Office of Member of the United States House of Representatives, leaving a vacancy in Nevada's Second Congressional District;

WHEREAS, federal and state law require that such vacancy be filled by the people at a special election; and

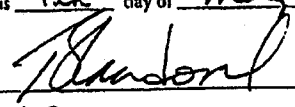
WHEREAS, state law requires that such election be called within seven days of the vacancy.

NOW, THEREFORE, by the authority vested in me as Governor by the Constitution of the United States and the Constitution and laws of the State of Nevada, it is hereby ordered as follows:

1. A special election shall be held in the Second Congressional District to fill the unexpired term of the Honorable Dean Heller on Tuesday, September 13, 2011; and
2. Said election shall conform with all applicable federal and state laws as interpreted by the Secretary of State, the State's chief elections officer.



In Witness Whereof, I have hereunto set my hand and caused the Great Seal of the State of Nevada to be affixed at the State Capitol in Carson City, this 9th day of May 2011.


By the Governor: _____ Governor


Secretary of State

By _____ Deputy

EXHIBIT 2

STATE OF NEVADA



OFFICE OF SECRETARY OF STATE ROSS MILLER

Special Election Calendar
2nd Congressional District

Special Election: Tuesday, September 13, 2011

May 4	Independent Candidates and Candidates of Minor Political Parties without ballot access may begin circulating Petition of Candidacy on form prescribed by the Secretary of State
May 4-18	Independent Candidates and Candidates of Minor Political Parties without ballot access may file Petition of Candidacy on form prescribed by the Secretary of State
May 18	Last Day to submit Petition of Candidacy (Independent & Minor Political Parties without Ballot access)
May 23-25	Candidate Filing Period: All Candidates, including Candidates who have filed a Petition of Candidacy, must file Declaration of Candidacy during this time period even if petition not yet deemed qualified
May 24	Last Day for County Clerk/Voter Registrar to complete raw count on Petitions of Candidacy
May 25	Last Day for any Minor Political Party to submit to Secretary of State its list of candidates
May 25	Last Day for Candidate Withdrawal
June 7	Last Day for County Clerk/Voter Registrar to complete signature verification on Petitions of Candidacy
June 8	Last Day for Secretary of State to release certified list of candidates for Special Election for the U.S. House of Representatives, CD-2
July 30	Last Day to mail ballots to Military & Overseas Voters as dictated by UOCAVA & MOVE Act 45 day requirement
August 13	Last Day to Register to Vote by Mail (<i>must be postmarked by August 13</i>)
August 13	Last Day to Register to Vote Online (<i>applies only to Clark County</i>)
August 27	Last Day to Register to Vote In-Person at office of County Clerk/Voter Registrar (<i>registration closes at 9pm</i>)
Aug 27-Sept 9	Early Voting by Personal Appearance
September 6	Last Day to Request in writing Absentee Ballot
September 13	Special Election Day (<i>includes return of absentee ballots</i>)
September 14-21	County Commissions Canvass of Votes
October 4	Supreme Court Canvass of Votes

EXHIBIT 3

**Official Declaration of the Result of the Statewide Special Election
held on Tuesday, October 7, 2003, throughout the State of California
on Statewide Measures Submitted to a Vote of Electors**

The following laws were defeated by vote of voters:

**Number
on Ballot**

Ballot Title

- | | |
|----|--|
| 53 | Funds Dedicated for State and Local Infrastructure. Legislative Constitutional Amendment (Assembly Constitutional Amendment 11, Resolution Chapter 185, Statutes of 2002). |
| 54 | Classification by Race, Ethnicity, Color, or National Origin. Initiative Constitutional Amendment. |

**Votes For and Against October 7, 2003, Statewide Ballot Measures
and Constitutional Amendments**

Ballot Number	For		Against	
	Votes	Percent	Votes	Percent
53	3,020,577	36.2	5,318,065	63.8
54	3,144,145	36.1	5,541,314	63.9

EFFECTIVE DATE

“An initiative...approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise.... If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail.”

See Cal. Const., Art. II, Sec. 10.

“A proposed [legislative] amendment or revision shall be submitted to the electors and if approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise. If a provision of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail.”

See Cal. Const., Art. XVIII, Sec. 4.

Bond Proposals submitted to the electors by the Legislature also become effective the day following approval by a majority of votes thereon.

See Cal. Const., Art. XVI, Sec. 1.

STATEMENT OF VOTE, Summary Pages

Recall Governor	Votes	Percent
Yes	4,976,274	55.4%
No	4,007,783	44.6%
Votes Not Cast	429,431	4.6%

Governor	Votes	Percent
Arnold Schwarzenegger, REP	4,206,284	48.6%
Cruz M. Bustamante, DEM	2,724,874	31.5%
Tom McClintock, REP	1,161,287	13.5%
Peter Miguel Camejo, GRN	242,247	2.8%
Arianna Huffington, IND	47,505	0.6%
Peter V. Ueberroth, REP	25,134	0.3%
Larry Flynt, DEM	17,458	0.3%
Gary Coleman, IND	14,242	0.2%
George B. Schwartzman, IND	12,382	0.2%
Mary "Mary Carey" Cook, IND	11,179	0.2%
Bruce Margolin, DEM	9,188	0.2%
Bill Simon, REP	8,913	0.2%
Van Vo, REP	7,226	0.0%
John Christopher Burton, IND	6,748	0.0%
David Laughing Horse Robinson, DEM	6,496	0.0%
Leo Gallagher, IND	5,466	0.0%
Cheryl Bly-Chester, REP	5,297	0.0%
Lawrence Steven Strauss, DEM	5,245	0.0%
Ronald Jason Palmieri, DEM	4,221	0.0%
Calvin Y. Louie, DEM	3,906	0.0%
Badi Badiozamani, IND	3,404	0.0%
Audie Bock, DEM	3,358	0.0%
Ralph A. Hernandez, DEM	3,199	0.0%
Edward "Ed" Kennedy, DEM	3,007	0.0%
Dan Feinstein, DEM	2,927	0.0%
Bob McClain, IND	2,857	0.0%
James H. Green, DEM	2,848	0.0%
Garrett Gruener, DEM	2,562	0.0%
Angelyne, IND	2,536	0.0%
Paul Mariano, DEM	2,455	0.0%
Ivan A. Hall, GRN	2,346	0.0%
Jim Weir, DEM	2,328	0.0%
Jerry Kunzman, IND	2,317	0.0%
Ned Roscoe, LIB	2,250	0.0%
Georgy Russell, DEM	2,216	0.0%
Jonathan Miller, DEM	2,214	0.0%
Jack Loyd Grisham, IND	2,200	0.0%
Christopher Sproul, DEM	2,039	0.0%
Daniel Watts, GRN	2,021	0.0%
Ken Hamidi, LIB	1,948	0.0%
Marc Valdez, DEM	1,840	0.0%
Frank A. Macaluso, Jr., DEM	1,801	0.0%
Daniel C. "Danny" Ramirez, DEM	1,778	0.0%
Randall D. Sprague, REP	1,771	0.0%
Brooke Adams, IND	1,713	0.0%
Mohammad Arif, IND	1,709	0.0%
Nathan Whitecloud Walton, IND	1,697	0.0%
John J. "Jack" Hickey, LIB	1,689	0.0%

Governor (cont.)	Votes	Percent
Mike Schmier, DEM	1,652	0.0%
C.T. Weber, PF	1,626	0.0%
Diana Foss, DEM	1,577	0.0%
Michael J. Wozniak, DEM	1,562	0.0%
B.E. Smith, IND	1,545	0.0%
Lingel H. Winters, DEM	1,466	0.0%
Richard J. Simmons, IND	1,422	0.0%
Joe Guzzardi, DEM	1,419	0.0%
Mike P. McCarthy, IND	1,351	0.0%
Art Brown, DEM	1,344	0.0%
Leonard Padilla, IND	1,343	0.0%
Iris Adam, NL	1,297	0.0%
Maurice Walker, GRN	1,236	0.0%
Trek Thunder Kelly, IND	1,210	0.0%
Vik S. Bajwa, DEM	1,168	0.0%
David Ronald Sams, REP	1,166	0.0%
Darin Price, NL	1,152	0.0%
Charles "Chuck" Pineda Jr., AI	1,104	0.0%
John "Jack" Mortensen, DEM	1,078	0.0%
Sara Ann Hanlon, IND	1,077	0.0%
Diane Beall Templin, AI	1,067	0.0%
Dick Lane, DEM	1,065	0.0%
Jim Hoffmann, REP	1,046	0.0%
Bill Vaughn, DEM	1,028	0.0%
C. Stephen Henderson, IND	989	0.0%
Robert C. Newman II, REP	987	0.0%
Jamie Rosemary Safford, REP	943	0.0%
Robert C. Mannheim, DEM	914	0.0%
Dorene Musilli, REP	907	0.0%
Scott A. Mednick, DEM	903	0.0%
A. Lavar Taylor, DEM	851	0.0%
Brian Tracy, IND	842	0.0%
Kurt E. "Tachikaze" Rightmyer, IND	837	0.0%
Christopher Ranken, DEM	823	0.0%
Sharon Rushford, IND	821	0.0%
Darrin H. Scheidle, DEM	814	0.0%
Patricia G. Tilley, IND	792	0.0%
Darryl L. Mobley, IND	778	0.0%
Alex-St. James, REP	771	0.0%
Bob Lynn Edwards, DEM	758	0.0%
Douglas Anderson, REP	754	0.0%
Joel Britton, IND	751	0.0%
Michael Jackson, REP	746	0.0%
Ed Beyer, REP	727	0.0%
Paul "Chip" Mailander, DEM	715	0.0%
John W. Beard, REP	699	0.0%
Paul Nave, DEM	679	0.0%
Robert Cullenbine, DEM	632	0.0%
Warren Farrell, DEM	626	0.0%
Chuck Walker, REP	623	0.0%
William "Bill" S. Chambers, REP	610	0.0%
Vip Bhola, REP	607	0.0%
Gerold Lee Gorman, DEM	598	0.0%
Dennis Duggan McMahon, REP	591	0.0%

STATEMENT OF VOTE, Summary Pages

Governor (cont.)	Votes	Percent
James M. Vandeventer, Jr., REP	588	0.0%
Eric Korevaar, DEM	586	0.0%
Kelly P. Kimball, DEM	582	0.0%
Mike McNeilly, REP	581	0.0%
S. Issa, REP	554	0.0%
Gino Martorana, REP	532	0.0%
Rich Gosse, REP	497	0.0%
Tim Sylvester, DEM	489	0.0%
Bill Prady, DEM	474	0.0%
Bryan Quinn, REP	474	0.0%
Jeffrey L. Mock, REP	455	0.0%
Paul W. Vann, REP	452	0.0%
Michael Cheli, IND	451	0.0%
Heather Peters, REP	444	0.0%
Jeff Rainforth, IND	425	0.0%
Ronald J. Friedman, IND	419	0.0%
Todd Carson, REP	386	0.0%
Scott Davis, IND	384	0.0%
Daniel W. Richards, REP	383	0.0%
Carl A. Mehr, REP	376	0.0%
Lorraine (Abner Zurd) Fontanes, DEM	365	0.0%
Gary Leonard, DEM	359	0.0%
Gregory J. Pawlik, REP	349	0.0%
Jon W. Zellhoefer, REP	346	0.0%
Reva Renee Renz, REP	333	0.0%
Kevin Richter, REP	305	0.0%
Stephen L. Knapp, REP	298	0.0%
William Tsangares, REP	281	0.0%
D. (Logan Darrow) Clements, REP	274	0.0%
Robert "Butch" Dole, REP	273	0.0%
D.E. Kessinger, DEM	261	0.0%
Gene Forte, REP	235	0.0%
Todd Richard Lewis, IND	192	0.0%
Mathilda Karel Spak, IND (w/i)	16	0.0%
Jason Alan Gastrich, REP (w/i)	11	0.0%
Monty Manibog, DEM (w/i)	11	0.0%
Thomas "Tom" Benigno, IND (w/i)	7	0.0%
R. Charlie Chadwick, IND (w/i)	7	0.0%
Shirley Coly, IND (w/i)	5	0.0%
Jane H. Dawson, DEM (w/i)	5	0.0%
Pauline Cooper, DEM (w/i)	4	0.0%
Paul Walton, IND (w/i)	4	0.0%
Jim "Poorman" Trenton, REP (w/i)	3	0.0%
Wignes K. Warren, DEM (w/i)	3	0.0%
Christy Cassel, IND (w/i)	2	0.0%
Jacques Andre Istel, REP (w/i)	2	0.0%
Christian F. Meister, DEM (w/i)	2	0.0%
Vincent Pallaver, IND (w/i)	2	0.0%
Lincoln Pickard, DEM (w/i)	2	0.0%
Lynda L. Toth, DEM (w/i)	2	0.0%
Donald P. Wang, REP (w/i)	2	0.0%
Robert D. Gibb, DEM (w/i)	1	0.0%
Ronald W. Spangler, IND (w/i)	1	0.0%
Bill Thill, DEM (w/i)	1	0.0%

Governor (cont.)	Votes	Percent
Jurlene Jeanne Kokoa White, DEM (w/i)	1	0.0%
Joel Wirth, REP (w/i)	1	0.0%
Donnie Adlen, DEM (w/i)	0	0.0%
Harry William Braun, DEM (w/i)	0	0.0%
Yancey Hawkins, IND (w/i)	0	0.0%
Charles J. Hennegan, REP (w/i)	0	0.0%
Ruth Anson Sowby, REP (w/i)	0	0.0%
Votes Not Cast	755,575	8.0%

Proposition No. 53	Votes	Percent
Infrastructure: Finance.		
Yes	3,020,577	36.2%
No	5,318,065	63.8%
Votes Not Cast	1,074,837	11.4%

Proposition No. 54	Votes	Percent
Classification by Race, ... Color or Origin.		
Yes	3,144,145	36.1%
No	5,541,314	63.9%
Votes Not Cast	728,022	7.7%

EXHIBIT 4

Congressional District 1		
	98 of 98	
(R) DJOU, Charles	67,810	38.4%
(D) HANABUSA, Colleen	52,802	30.8%
(D) CASE, Ed	47,391	27.6%
(D) DEL CASTILLO, Rafael (Del)	664	0.4%
(N) STRODE, Kalaeloa	491	0.3%
(N) BREWER, Jim	273	0.2%
(D) LEE, Philmund (Phi)	254	0.1%
(R) COLLINS, Charles (Google)	194	0.1%
(R) AMSTERDAM, C. Kasi Jochanan	170	0.1%
(D) BROWNE, Vinny	150	0.1%
(N) TATAI, Steve	125	0.1%
(R) CRUM, Douglas	107	0.1%
(R) GIUFFRE, John (Raghu)	82	0.0%
(N) MOSELEY, Karl F.	80	0.0%
Blank Votes:	135	0.1%
Over Votes:	889	0.5%
REGISTRATION AND TURNOUT		
SPECIAL		
TOTAL REGISTRATION	317,337	
TOTAL TURNOUT	171,417	54.0%
PRECINCT TURNOUT	169,104	53.3%
ABSENTEE TURNOUT	2,313	0.7%
OVERSEAS BALLOTS CAST		
OVERSEAS TURNOUT	296	0.0%
1ST CONGRESSIONAL	296	
2ND CONGRESSIONAL	0	