IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA STATE DEMOCRATIC PARTY; AND ROSS MILLER, IN HIS CAPACITY AS SECRETARY OF STATE FOR THE STATE OF NEVADA, Appellants, vs. NEVADA REPUBLICAN PARTY; AND DAVID BUELL, Respondents.	Supreme Court Docket No. 58404 Appeal from the FIRST JUDICIAL DISTRICT COURT, CARSON CITY, NEVADA THE HONORABLE JAMES TODD RUSSELL. District Judge District Court Case No. 11-OC-00147 1B

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Was it correct—or, at the very least, reasonable—for the Secretary of State to interpret N.R.S. 304.240(1) in accordance with its plain language, to allow a candidate of a major political party to be nominated by filing a declaration or acceptance of candidacy?

II.

STATEMENT OF THE CASE

This is an appeal from an Order of the First Judicial District, Carson City, Nevada, the Honorable James Todd Russell, granting Respondents' Application for Injunctive and Declaratory Relief.

On May 5, 2011, Respondents filed a Complaint and Application for a Preliminary and Permanent Injunction with the district court, seeking to enjoin the Secretary of State from "allowing more than one candidate for each major or minor political party from being placed on the special election ballot" and seeking a declaratory judgment that "in a special election, the respective major party candidate that is placed on the ballot must first be nominated by the respective party's state central committee and the minor party's candidate must be nominated by the respective party's executive committee." Application for a Preliminary and Permanent Injunction, Record on Appeal ("R"), 14-15. Respondents also requested that the filing deadline for major party nominees be moved from May 25, 2011 to June 21, 2011, in order to accommodate a provision of the Nevada Republican Party's ("NRP") bylaws. R, 10.

On May 12, 2011, the Nevada State Democratic Party ("NSDP") filed a Motion to Intervene, an Answer in Intervention, and a Response to Respondents' Application. R, 74 - 114. The same day, the Nevada Attorney General filed its Opposition to Respondents' Application on behalf of Defendant the Secretary of State of Nevada. R, 39 - 73. Respondents did not oppose the NSDP's Motion to Intervene. On May 16, 2001, Respondents filed their Reply in Support of their Application. R, 117-147.

A hearing was held before the Hon. Judge James Todd Russell, First Judicial District, Carson City, Nevada, on May 19, 2011. *See* Transcript of Hearing Proceedings, R, 148-260.

The district court entered its Order granting Appellant's Application for Declaratory and Injunctive Relief on May 23, 2011 (hereinafter, "District Court Order"). R, 261-273.

Appellants timely filed Notice of Appeal on May 23, 2011, and now appeal. This Court has jurisdiction over this appeal pursuant to Nev.R.App.P. 3a(b)(1) and (3).

III.

STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW

Prior to 2003, Nevada did not have procedures to fill a vacancy in the office of U.S. House of Representatives. Nevada also lacked procedures to place candidates on the ballot for a special election to fill such a vacancy. In 2003, the state legislature passed Assembly Bill 344, which rectified both problems. A.B. 344 also provided basic rules governing the special election itself, and established expedited procedures for candidates to appear on the special election ballot.

Until several weeks ago, Nevada had never employed these special election procedures. But after a series of events resulting in former U.S. Representative Dean Heller being appointed to fill the U.S. Senate seat vacated by John Ensign, Governor Brian Sandoval timely issued an election proclamation pursuant to N.R.S. 304.230, setting the special election for September 13, 2011 to fill the vacant Second Congressional District seat. *See* Proclamation by the Governor (May 9, 2011), R, 64. The Proclamation stated that that the "election shall conform with all applicable federal and state laws as interpreted by the Secretary of State, the State's chief elections officer."

On May 2, 2011, drawing on the plain language of the statute, the Governor's delegation of authority in the proclamation, and his broad statutory authority "to provide interpretations and take other actions necessary for the effective administration of the statutes and regulations governing the conduct of primary, general, special and district elections in this State," Secretary of State Ross Miller issued Interpretation No. 112801 (hereinafter, the "Secretary's Interpretation"). R, 32-34. The Secretary's Interpretation prescribed that candidates are nominated and qualify for the special election ballot as follows:

- ¶ 2 of the Secretary's Interpretation provides that major political

party candidates are nominated and 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 of the Secretary's Interpretation provides that a minor political party with ballot access under N.R.S. 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 of the Secretary's Interpretation provides that, in order to be nominated and placed on the ballot, a candidate from a minor political party without ballot access under N.R.S. 293.1715(2) 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 or acceptance of candidacy within the time and on the form prescribed by the Secretary of State. Minor parties without ballot access must also file their certificate of existence and list of candidate(s) within the time prescribed by the Secretary.

- ¶ 5 of the Secretary's Interpretation provides that an independent candidate is nominated and will appear on the special election ballot if the 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.

Id.

IV.

STANDARD OF REVIEW

Review of a district court's decision to grant injunctive and declaratory relief, in the absence of any factual dispute, is *de novo*. *See Heller v. Give Nev. a Raise, Inc.*, 120 Nev. 481, 486, 96 P.3d 732, 734 n. 8 (Nev. 2004). Further, this Court reviews questions of statutory construction, including the meaning and scope of a statute, *de novo*. *See Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 122 Nev. 894, 901, 141 P.3d 1235, 1240 (Nev. 2006). When an interpretation of a statute by an administrative agency is "reasonably consistent with the language of the statute, it is entitled to deference in the courts." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court of Nev.*, 122 Nev. 132, 157, 127 P.3d 1088, 1106 (Nev. 2006).

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V.

SUMMARY OF ARGUMENT

This Court should reverse the judgment of the district court for two reasons. First, the plain language of N.R.S. 304.240 compels the Secretary's Interpretation. The statutory language does not support alternative constructions. Second, even if the statutory text supports multiple readings of the statute and is therefore ambiguous, the Secretary's Interpretation is reasonable and should be afforded deference by this Court.

N.R.S. 304.240(1) provides that "[a] candidate of a major political party is nominated by filing a declaration or acceptance of candidacy within the time prescribed by the Secretary of State pursuant to N.R.S. 293.204." N.R.S. 304.240(1). The Secretary and Respondents agree—and the district court found—that N.R.S. 304.240 is the vehicle by which major party candidates are "nominated" and placed on the special election ballot.

The only disagreement is with respect to the conditions that a major party candidate must fulfill to be nominated. Giving effect to the plain language of N.R.S. 304.240(1), the Secretary's Interpretation concludes that it is sufficient for the major party candidate to file a declaration or acceptance of candidacy within the prescribed time. Diverging from the plain language of N.R.S. 304.240(1), Respondents would have this Court read into N.R.S. 304.240(1) a separate condition from a different statute, requiring a major party candidate to be designated by her or his major party central committee pursuant to N.R.S. 293.165 before filing the declaration or acceptance of candidacy.

Nothing in the plain language of N.R.S. 304.240(1) or its legislative history supports Respondents' interpretation. As this Court consistently has stated for nearly one hundred years, imposing an additional statutory condition where none exists is strongly disfavored. *See Merritt v. Merritt*, 40 Nev. 385, 160 P. 22, 23 (Nev. 1916). No argument offered by Respondents or the district court justifies the departure from these cardinal rules of statutory interpretation. On these grounds alone, this Court should reverse the judgment of the district court and uphold the Secretary's Interpretation.

But even if the statute could support multiple readings, and is therefore ambiguous, the Secretary's Interpretation is reasonable and should be afforded deference by this Court. This Court traditionally affords great deference to interpretations promulgated by the agency authorized to administer the statute. That deference is even greater where, as here, the legislature has specifically given a constitutional officer the power to interpret and enforce Nevada's election laws.

Moreover, the Secretary's Interpretation is clearly reasonable and leads to a sensible and commonplace outcome that is consistent with traditional electoral processes. It interprets N.R.S. 304.240(1) in a manner consistent with N.R.S. Chapter 293. It reasonably concludes that N.R.S. 293.165 does not apply to special elections to fill U.S. House seats, because no "vacancy occurring in a major or minor political party nomination" has occurred and because N.R.S. 293.165 cannot be harmonized with N.R.S. 304.240(1). It also properly distinguishes the situation here, where there is a specific statute prescribing how major party candidates are nominated for elections to fill congressional vacancies, from the circumstances confronting this Court in *Brown v. Georgetta*, 70 Nev. 500, 275 P.2d 376 (1954), where no such statute existed and where this Court felt compelled to fill a statutory gap.

Finally, Nevada's special election statute is consistent with the First Amendment. Respondents allege that N.R.S. 304.240(1) will result in voter confusion. Respondents, however, did not present any evidence tending to show that the statute will result in widespread voter confusion among a well-informed electorate. Respondents' other First Amendment argument is equally without merit. By claiming that the First Amendment affords political parties the unfettered right to place their candidate of choice on the ballot and exclude all others bearing their party's name, Respondents ask this Court to endorse an argument that the U.S. Supreme Court and Ninth Circuit have repeatedly dismissed. As a result, there is no First Amendment violation.

For these reasons, this Court should reverse the judgment of the district court, lift the district court's injunction, authorize the Secretary of State to reinstate his Interpretation to the extent possible, and dismiss Respondents' lawsuit.

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VI.

ARGUMENT

A. The Plain Language Of N.R.S. 304.240(1) Compels The Secretary's Interpretation

The plain language of N.R.S. 304.240 compels the Secretary's Interpretation. It does not support alternative constructions of the statute. When "a statute uses words that have a definite and plain meaning, the words will retain that meaning unless it clearly appears that the Legislature did not intend such a meaning." *City of Reno v. Bldg. & Constr. Trades Council of N. Nev.*, -- P.3d --, 2011 WL 1205272 (Nev. March 31, 2011). Courts are "not empowered to go beyond the face of an unambiguous statute to lend it construction contrary to its plain meaning and not apparent from the legislative history." *State Indus. Ins. Sys. v. Miller*, 112 Nev. 1112, 1120, 923 P.2d 577, 582 (Nev. 1996). As the district court acknowledges, there is nothing in the legislative history that in any way calls into question the statute's plain language. *See* District Court Order, R, 267 ("The Court has reviewed the scant legislative history and finds that it does not assist the Court in resolving the particular matter.").

Therefore, this Court should look to the language of the statute itself to determine how major party candidates are nominated. This provision contains five clauses, the first three of which apply to major party candidates:[1]

> Clause 1: If the Governor issues an election proclamation calling for a special election pursuant to N.R.S. 304.230, no primary election may be held.

Clause 1 clearly provides that no primary election may be held to nominate major

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[1] Clauses 4 and 5, which set forth the procedure for placing minor party candidates and independent candidates on the ballot, read as follows:

> Clause 4: A minor political party that wishes to place its candidates on the ballot must file a list of its candidates with the Secretary of State not more than 46 days before the special election and not less than 32 days before the special election.
>
> Clause 5: 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.

party candidates.

> Clause 2: Except as otherwise provided in this subsection, a candidate must be nominated in the manner provided in chapter 293 of N.R.S. and must file a declaration or acceptance of candidacy within the time prescribed by the Secretary of State pursuant to N.R.S. 293.204, which must be established to allow a sufficient amount of time for the mailing of election ballots.

The first part of Clause 2 confirms that where N.R.S. 304.240 and other provisions of N.R.S. Chapter 293 are inconsistent, the procedures set forth in N.R.S. 304.240 trump the procedures set forth in N.R.S. Chapter 293. *See* N.R.S. 304.240(1) (emphasis added) ("*[e]xcept as otherwise provided in this subsection*, a candidate must be nominated in the manner provided in chapter 293 of N.R.S.."). This sentence establishes a clear interpretive rule: Where N.R.S. 304.240 specifies procedures to nominate candidates, those procedures govern; where N.R.S. 304.240 is silent, applicable procedures set forth in N.R.S. Chapter 293 apply.[2] The second part of Clause 2 clarifies that a candidate, regardless of party status, must file a declaration or an acceptance of candidacy as a necessary condition of being nominated and placed on the ballot. *See id.* (stating that a candidate "must file a declaration or acceptance of candidacy within the time prescribed by the Secretary of State pursuant to N.R.S. 293.204 . . . .").

> Clause 3: A candidate of a major political party is nominated by filing a declaration or acceptance of candidacy within the time prescribed by the Secretary of State pursuant to N.R.S. 293.204.

As to how a major party candidate is nominated, Clause 3 of N.R.S. 304.240(1) could not be clearer: "A candidate of a major political party is nominated by filing a declaration or acceptance of candidacy within the time prescribed by the Secretary of State pursuant to N.R.S. 293.204." Id.[3] This language is plain and unambiguous. It refers to a clear subject ("a candidate of a major political party"); it sets forth a single condition that the subject must satisfy ("filing a declaration or

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[2] A separate provision, N.R.S. 293.175(5), renders certain provisions of N.R.S. Chapter 293 inapplicable to special elections. More specifically, it states that "[t]he provisions of N.R.S. 293.175 to 293.203, inclusive, do not apply to . . . (a) Special elections to fill vacancies." N.R.S. 293.175(5) does not affect any other provisions of N.R.S. Chapter 293.

[3] The cross-referenced provision in turn states that "[i]f a special election is held pursuant to the provisions of this title, the Secretary of State shall prescribe the time during which a candidate must file a declaration or acceptance of candidacy." N.R.S. 293.204.

acceptance of candidacy within the time prescribed by the Secretary of State pursuant to N.R.S. 293.204"); and it mandates a specific result when the subject satisfies the prescribed condition (the candidate "is nominated").

In ¶ 2 of his Interpretation, the Secretary construes Clause 3 to mean that "[m]ajor 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." R, 32. This interpretation tracks the language of Clause 3 nearly word for word. The only difference is that ¶ 2 clarifies that a major party candidate who is "nominated" pursuant to N.R.S. 304.240(1) also qualifies for the special election ballot. That clarification is beyond dispute. *See* District Court Order, R, 270 (finding that to "give effect to [Clause 3] regarding major party candidates," the Clause must be read to "provide[] the method for placing a major party candidate on the ballot.").

The Secretary and Respondents disagree on only one thing: the conditions that the major party candidate must satisfy to be nominated and placed on the ballot. Giving effect to the plain language of Clause 3, the Secretary's Interpretation requires the major party candidate to satisfy the one condition identified in the statute: to file a declaration or acceptance of candidacy within the prescribed time. *See* N.R.S. 304.240(1) (emphasis added) ("A candidate of a major political party *is nominated* by filing a declaration or acceptance of candidacy within the time prescribed by the Secretary of State pursuant to N.R.S. 293.204."). Diverging from the plain language of the statute, the district court imports into N.R.S. 304.240(1) a separate condition from a different statute: that, before filing a declaration or acceptance of candidacy, the major party candidate must first be "designated" by her or his party's central committee in accordance with N.R.S. 293.165.

Nothing in the plain language of N.R.S. 304.240(1) supports this interpretation. On its face, N.R.S. 304.240(1) does not incorporate the procedures set forth N.R.S. 293.165. In fact, it does not even refer to N.R.S. 293.165 at all. Nor is there any language in N.R.S. 304.240(1) suggesting that a major party candidate must satisfy a second condition before being nominated and placed on the ballot. Imposing an additional statutory condition where none exists is strongly disfavored. As this

Court confirmed nearly one hundred years ago, "[t]he courts have neither the power nor the right to read into the statute anything not there found, nor to strike therefrom that which is there presented." *Merritt v. Merritt*, 40 Nev. 385, 160 P. 22 (Nev. 1916). Time and again, this Court has found that courts should not read into statutes additional requirements or conditions that the Legislature did not specifically include in the statute itself. *See Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 95, 16 P.3d 1074, 1078, n. 7 (Nev. 2001) ("At the time the legislature could have added language limiting the application of the statute to bona fide purchasers, but it did not. From this, we conclude that the legislature did not intend for the statute to be so limited."); *Binegar v. Eight Judicial Dist. Court of Nev.*, 112 Nev. 544, 549, 915 P. 2d 889, 893 (Nev. 1996) ("The legislature could have put such limiting language in N.R.S. 174.089(1) but chose not to do so."); *Ramacciotti v. Ramacciotti*, 106 Nev. 529, 531, 795 P.2d 988, 989 (Nev. 1990) ("If the legislature intended to require that a motion to modify could only be made before the child reaches 18, the legislature could have expressly included a requirement in the statute."). The judicial imposition of an additional requirement should be particularly disfavored where, as here, it restricts candidate access to the ballot.

Despite these clear admonitions, the district court held that N.R.S. 304.240's use of two phrases—"candidate of a major party" and "nominated"—compelled it to look beyond N.R.S. 304.240's plain language. This was incorrect. The district court first concluded that the phrase "candidate of a major party" was significant because it implied that "[t]here must be a process to designate a candidate, namely N.R.S. 293.165." District Court Order, R, 270. But the use of the word "candidate" here does not signify what the district court understood it to mean. Under Nevada law, a "candidate" is merely someone who files a declaration or acceptance of candidacy; this act does not require a designation by a major political party. *See* N.R.S. 293.177, 294A.005. When Nevada holds regularly scheduled elections pursuant to N.R.S. Chapter 293, a "candidate" becomes a "candidate of a major party" upon signing a declaration or acceptance of candidacy bearing that major party's name. *See* N.R.S. 293.177. This occurs well before the major party's voters have the chance to "designate" their preferred candidate in a primary election. *See, e.g.*, N.R.S. 293.176 (providing that "no person may be a candidate of a major political party for partisan office in any

election if the person has changed" her or his party affiliation within a certain period of time before the election, thereby confirming that if the party member has not switched party affiliation, she may be a "candidate of a major political party" without any action by the party itself); N.R.S. 293.260 (making clear that, by the time of the primary, major political parties "ha[ve] candidates").

The district court likewise concluded that the term "nominated" in Clause 3 necessarily implies that the candidate must first be "proposed," "named," or "designated." District Court Order, R, 270 (citing Black's Law Dictionary). Even under this definition, however, there is nothing to require that the act of nomination be undertaken by a third party as opposed to the individual seeking the nomination. It is commonplace for individuals to nominate themselves for positions, awards, or other recognition. Likewise, N.R.S. Chapter 293 is replete with examples of candidates being "nominated" in different ways. When multiple parties have candidates, a major party candidate is "nominated" by filing a declaration or acceptance of candidacy and winning the most votes at the primary election. *See* N.R.S. 293.177, N.R.S. 293.260(2). But when only one party has candidates for a single-seat race, and only two candidates file, a major party candidate is "nominated" simply by filing the declaration or acceptance of candidacy, which is exactly how major party candidates are "nominated" in special elections. *See* N.R.S. 293.177, N.R.S. 293.260(4)(b) (emphasis added) ("If there are no more than twice the number of candidates to be elected to the office, the candidates must, without a primary election, be declared the nominees for the office."). In short, the statute's use of the words "candidate" and "nominated" does not in any way undermine or otherwise call into question N.R.S. 304.240(1)'s plain language.

For these reasons, the plain language of the statute clearly compels the Secretary's Interpretation. Clause 3 of N.R.S. 304.240(1) provides that a major party candidate "is nominated" by filing a declaration or acceptance of candidacy within the prescribed time. These words plainly mean what the Secretary interpreted them to mean: that a major party candidate is nominated and placed on the ballot by filing a declaration or acceptance of candidacy within the prescribed time. As this Court has said on many occasions, "when a statute is facially clear, we will generally not go beyond its language in determining the Legislature's intent." *Las Vegas Taxpayer Accountability*

Comm. v. City Council of the City of Las Vegas, 125 Nev. 17, 208 P.3d 429, 437 (Nev. 2009). That is especially true, where, as here, the parties agree that there is nothing in the legislative history that calls into question the statute's plain language. On these grounds alone, this Court should reverse the judgment of the district court and uphold the Secretary's Interpretation.

B. Even If The Plain Language Of The Special Election Statute Could Support Multiple Interpretations, The Secretary's Interpretation Is Reasonable And Should Be Afforded Deference.

Even if the plain language could support multiple interpretations, the Secretary's Interpretation is reasonable and should be afforded deference. When "a statute is ambiguous, the intent of the legislature is the controlling factor in statutory interpretation." *State v. Granite Construction Co.*, 118 Nev. 83, 87, 40 P.3d 423, 426 (Nev. 2002).[4] But here, as the district court concluded, "the scant legislative history . . . does not assist the Court in resolving the particular matter." District Court Order, R, 267.

When legislative history cannot resolve disputes among multiple reasonable interpretations, this Court has consistently deferred to the agency's interpretation, provided that it is reasonable. *See Int'l Game Tech., Inc. v. Second Judicial Dist. Court of Nev.*, 122 Nev. 132, 157, 127 P.3d 1088, 1106 (Nev. 2006). "Where a doubt may exist as to the proper construction to be placed on a constitutional or statutory provision, courts will give weight to the construction placed thereon by other coordinate branches of government and by officers whose duty it is to execute its provisions." *Beenstock v. Villa Borega Mobile Home Parks*, 107 Nev. 979, 982, 823 P.2d 270, 272 (Nev. 1991). *See also Thomas v. City of N. Las Vegas*, 122 Nev. 82, 101, 127 P.3d 1057, 1070 (Nev. 2006) ("We give deference to administrative interpretations," citing *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). Because the Secretary's Interpretation follows the plain language of N.R.S. 304.240(1), it is clearly reasonable and this Court should defer to it here.

1. This Court should defer to the Secretary's reasonable interpretations.

While "[q]uestions of statutory construction are subject to de novo review by this court ... an

[4] The district court order found that "N.R.S. 304.240 is ambiguous." District Court Order, R, 267.

administrative agency charged with the duty of administering an act is impliedly clothed with the power to construe the relevant laws . . . and the construction placed on a statute by the agency charged with duty of administering it is entitled to deference." *Elliot v. Resnick*, 114 Nev. 25, 32, 952 P.2d 961, 966, n. 1 (Nev. 1998). Consequently, this Court "will not readily disturb an administrative interpretation of statutory language." *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 900, 59 P.3d 1212, 1219 (Nev. 2002). As "long as that interpretation is reasonably consistent with the language of the statute, it is entitled to deference in the courts." *Int'l Game Tech.*, 122 Nev. at 157, 127 P.3d at 1106. *See also State Indus. Ins. Sys. v. Miller*, 112 Nev. 1112, 1118, 923 P.2d 577, 581 (Nev. 1996), quoting *State. Indus. Ins. Sys. v. Snyder*, 109 Nev. 1223, 1228, 865 P.2d 1168, 1171 (Nev. 1993) ("[T]he administrative agency ... charged with the duty of administering the statute ... is entitled to receive deference from this court to its interpretations of the laws it administers so long as such interpretations are 'reasonable' and 'consistent with the legislative intent.'"). Even Respondents, at oral argument below, conceded that agency interpretations are afforded deference so long as they are "reasonable." Transcript of Hearing Proceedings, R 169-70.

Deference is particularly appropriate in this case. As this Court has held, deference should be even greater where, as here, the statute specifically grants to the agency the authority to interpret the statute. *See Clark County Sch. Dist. v. Local Gov't Employee Mgmt. Relations Bd.*, 90 Nev. 442, 446, 530 P.2d 114, 117 (Nev. 1974) ("[G]reat deference should be given to the agency's interpretation when it is within the language of the statute."). Nevada law specifically authorizes the Secretary of State to interpret the State's election statutes.[5] As Nevada's Chief Officer of Elections, "the Secretary of State is responsible for the execution and enforcement of the provisions of title 24 of the N.R.S. and all other provisions of state and federal law relating to elections in this State." *See* N.R.S. 293.124(1). In fact, Nevada law explicitly recognizes that the Secretary's broad interpretive authority is *essential* to ensure the "effective administration" of Nevada's elections. *See* N.R.S.

[5] Though neither Secretary of State Miller, nor his predecessor Secretary of State Dean Heller, enacted regulations pursuant to NRS 304.250, the failure to promulgate regulations does not affect the Secretary's broad power to interpret existing statutes pursuant to NRS 293.247(4).

293.247(4) (granting Secretary authority "to provide interpretations and take other actions necessary for the effective administration of the statutes and regulations governing the conduct of primary, general, special and district elections in this State.").[6]

The exigent nature of special elections argues even more strongly for deference. A special election for a U.S. House seat is a logistically difficult enterprise involving a significant commitment of government resources. Complying with the 180-day deadline set forth in the special election statute—which is shortened to 90 days in case of a catastrophe—requires the Secretary to interpret the law and fill in gaps where necessary. Nevada law acknowledges this by delegating to the Secretary the power to set the filing deadline for special elections, which is normally set in the statute itself. *See* N.R.S. 293.204 ("If a special election is held pursuant to the provisions of this title, the Secretary of State shall prescribe the time during which a candidate must the file a declaration or acceptance of candidacy."); N.R.S. 304.240(1) (incorporating, by reference, the Secretary's authority in N.R.S. 293.204). Furthermore, in his proclamation setting the date for a special election, the Governor specifically acknowledged the Secretary's broad power to interpret the special election statute in order to ensure the effective administration of the election. *See* Proclamation by the Governor (May 9, 2011), R, 64 (the special "election shall conform with all applicable federal and state laws *as interpreted by the Secretary of State, the State's chief elections officer.*") (emphasis added).

Nevada courts are not alone in recognizing that the agency responsible for administering elections should receive a substantial amount of deference in its interpretation of state election laws. For example, the U.S. Supreme Court has described the Federal Election Commission, as "precisely the type of agency to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37, 102 S.Ct. 38, 45, 70 L.Ed.2d 23 (1981). *See also*

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[6] As Senator Heller, a former Secretary of State, observed upon the promulgation of Secretary Miller's Interpretation, "[w]hen the [S]ecretary of [S]tate makes a ruling, he's got a lot of latitude, and the courts pretty much have backed him up … The constitution of Nevada gives him a tremendous amount of authority, and I think the [G]overnor recognizes that and the courts recognize that too … he could have gone either way, and either way can be justified." *See* Steve Tetreault, "Heller in transition: One foot in House, one foot in Senate," Mobile Nevada Review-Journal (May 3, 2011), *available at* http://www.lvrj.com/news/heller-in-transition-one-foot-in-house-one-foot-in-senate-121223624.html?mobile=y.

Californians for Political Reform Found. v. Fair Political Practices Comm'n, 61 Cal.App.4th 472, 484, 71 Cal.Rptr.2d 606 (Cal. App. 3 Dist. 1998) (citing *Democratic Senatorial Campaign Committee* for proposition that courts should defer more to election agencies to avoid becoming entangled in the "political thicket."). Courts in two of Nevada's neighboring states have held that the decisions of election officials are due substantial deference. *See Colo. for Family Values v. Meyer*, 936 P.2d 631, 633, 21 Colo. J. 401 (Col. App. 1997) (finding that "although the appropriate construction of a statute is a question of law, and appellate courts engage in de novo review, the Secretary of State's construction of the Act is entitled to great deference because her office is charged with enforcement of the law."); *Burton v. Shelley*, No. S117834, 2003 WL 21962000, at *1 (Cal. Aug. 7, 2003) ("The Secretary of State is the constitutional officer charged with administering California's election laws and his interpretations of those laws are entitled to substantial judicial deference.").

Given all of these circumstances, this Court should defer to the Secretary's Interpretation so long as it is reasonable.

2. The Secretary's Interpretation is reasonable.

At the very least, the Secretary's Interpretation is clearly reasonable. It interprets N.R.S. 304.240(1) in a manner consistent with N.R.S. Chapter 293, it concludes reasonably that N.R.S. 293.165 does not apply to special elections to fill U.S. House seats, and it distinguishes properly the situation here (where there is a specific statute prescribing how major party candidates are nominated for elections to fill congressional vacancies) from the circumstances confronting this Court in *Brown v. Georgetta*, 70 Nev. 500, 275 P.2d 376 (1954), where no such statute existed and where this Court felt compelled to fill a statutory gap. Finally, it leads to a commonplace and sensible result that is consistent with Nevada practices and those employed by other states.

a. The Secretary interpreted N.R.S. 304.240(1) in a manner consistent with N.R.S. Chapter 293.

Clause 2 directs that "[e]xcept as otherwise provided in this subsection, a candidate must be nominated in the manner provided in chapter 293 of N.R.S.." N.R.S. 304.240(1). To this end, the

Secretary's Interpretation fully incorporates the procedures set forth by N.R.S. 304.240(1) and, to the extent that N.R.S. Chapter 293 sets forth additional procedures not inconsistent with N.R.S. 304.240(1), the Secretary's Interpretation properly integrates these as well. In so doing, the Secretary was not "picking and choosing" among the provisions in N.R.S. Chapter 293; rather, he was faithfully following Clause 2's directive.[7]

Under N.R.S. Chapter 293, major party candidates are not nominated by party central committees; they are nominated by voters. This system provides a "neutral mechanism ... that reduces the role of party leadership and gives ultimate authority to party voters." *Alaskan Independence Party v. Alaska*, 545 F.3d 1173, 1177 (9th Cir. 2008). It "advances the state's interest in limiting opportunities for fraud and corruption by preventing party leadership from controlling nominating decisions, while promoting democratic decisionmaking." *Id.* The nomination process proceeds in two steps. First, the candidate must file a declaration or acceptance of candidacy by the deadline set forth at N.R.S. 293.177(1)(b). *See* N.R.S. 293.177. With one exception, a candidate who fails to file a timely declaration or acceptance of candidacy is ineligible to be nominated. Second, assuming that more than one party "has candidates" for a particular office, "the persons who receive the highest number of voters at the primary elections must be declared the nominees of those parties for the office." N.R.S. 293.260(2).[8] Once the candidate is "nominated," neither the candidate

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[7] Respondents allege, and the district court concurred, that the procedures adopted by the Secretary to nominate minor party candidates were also unreasonable. The NSDP notes, in the first instance, that this issue is not before the Court. Respondents did not challenge the procedures for minor party candidates; indeed, they did not so much as allege that they even would be disadvantaged if minor parties were permitted to nominate candidates in accordance with the Secretary's Interpretation. Even more importantly, No minor party has sought to intervene in this case. Nor did any minor party file its own lawsuit challenging the Secretary's Interpretation. Basic principles of standing, therefore, should have precluded the district court from even addressing the status of minor parties in its ruling. *See generally Buzz Stew, LLC v. City of North Las Vegas*, 181 P.3d 670, 674, n. 19 (Nev. 2008).

Even if this Court were to consider this issue on the merits, it should conclude that the Secretary's Interpretation was reasonable. The procedures for placing minor party candidates on the ballot are found at N.R.S. 293.171, N.R.S. 293.1715, N.R.S. 293.172, N.R.S. 293.1725, and 293.174. These provisions are not within the set of provisions deemed inapplicable to special elections by N.R.S. 293.175(5)(a). Therefore, it was reasonable for the Secretary to apply these provisions to this special election, consistent with the deadlines prescribed by N.R.S. 293.204 and 304.240(1).

[8] If only one party "has candidates" for a particular office, different rules apply. *See* N.R.S. 293.260(4).

nor the political party is required to take any additional steps to place the candidate on the ballot. Instead, the law mandates that "[b]allots for a general election must contain the names of candidates who were nominated at the primary election ...." N.R.S. 293.267.

The Secretary reasonably concluded that, for special elections to fill U.S. House vacancies, N.R.S. 304.240(1) replaces N.R.S. Chapter 293's two-step process with a one-step procedure that allows major party candidates to be nominated and placed on the special election ballot by filing a declaration or acceptance of candidacy. The Secretary's Interpretation is both mandated by N.R.S. 304.240(1), as discussed above, and consistent with N.R.S. Chapter 293. The elimination of the second step of N.R.S. Chapter 293's two-step process is necessitated by Clause 1 of N.R.S. 304.240(1), which precludes the holding of any primary election. *See* N.R.S. 304.240(1). This provision reflects a concession to the compressed 90 or 180 day timeframe prescribed by N.R.S. 304.230(1)(c). Clause 3 of N.R.S. 304.240(1), meanwhile, clarifies that compliance with N.R.S. Chapter 293's first step—the filing of a declaration or acceptance of candidacy—is sufficient to be "nominated" to appear on the special election ballot. This process, consistent with the regular nomination process set forth by Chapter 293, gives ultimate decision-making authority to voters, rather than the party central committees.

b. It was reasonable for the Secretary to conclude that N.R.S. 293.165 does not apply to this special election.

The Secretary's Interpretation reasonably concludes that N.R.S. 293.165 does not apply to this special election. Neither the text nor the legislative history of N.R.S. 304.240 refers to N.R.S. 293.165 even though the latter was enacted many years previously, nor is there any mandate that N.R.S. 293.165's procedures displace N.R.S. 304.240's plain language. Furthermore, as the discussion below explains, there are several reasons—some found in the language of N.R.S. 293.165 itself—why the Secretary concluded that N.R.S. 293.165 does not apply here. This Court's decision in *Brown* does not compel an alternative interpretation.

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(i) N.R.S. 293.165 applies only in limited circumstances, which are not present here

N.R.S. 293.165 is not the primary procedure by which major party candidates are nominated under N.R.S. Chapter 293. By its very terms, N.R.S. 293.165 applies only where there is a "vacancy occurring in a major or minor political party nomination." Thus, N.R.S. 293.165 is a fallback mechanism that applies only where the standard nomination procedure set forth by the statute does not lead to the selection of a nominee or the placement of that nominee on the ballot. Where such a vacancy exists, it "may be filled by a candidate designated by the party central committee . . . of the major political party or by the executive committee of the minor political party subject to the provisions of subsections 4 and 5." N.R.S. 293.165(1). Subsections 4 and 5 further limit the applicability of N.R.S. 293.165. Subsection 4 provides that "[n]o change may be made on the ballot for the general election after 5 p.m. on the first Tuesday after the primary election," while subsection 5 states that "[a]ll designations provided for in this section must be filed on or before 5 p.m. on the first Tuesday after the primary election." N.R.S. 293.165(4), (5). For these reasons, N.R.S. 293.165 does not come into play in all, or most, nomination processes; it only applies where these above conditions exist.

None of those requisite conditions are present here. *First*, the special election statute, N.R.S. 304.240(1), clearly sets forth a procedure to nominate major candidates and place them on the ballot. Under this provision, major party candidates are nominated and placed on the ballot by filing a declaration or acceptance of candidacy within the time prescribed by the Secretary. As a result, by its very terms, N.R.S. 293.165 would apply only if the procedure set forth by N.R.S. 304.240(1) failed to produce major party nominees by the deadline that the Secretary had prescribed (May 25, 2011). Consequently, it was reasonable for the Secretary to conclude that N.R.S. 293.165 had no role to play here unless no major party candidates had been nominated pursuant to N.R.S. 304.240(1) by May 25, 2011. *Second*, N.R.S. 293.165 specifically requires that "[a]ll designations provided for in this section must be filed on or before 5 p.m. on the first Tuesday after the primary election," while Clause 1 of N.R.S. 304.240(1) precludes the holding of any primary. *See* N.R.S.

293.165(5). In the absence of any statutory directive or legislative history to the contrary, it was reasonable for the Secretary to conclude that no designations could be made for the special election in accordance with the strict deadlines prescribed by N.R.S. 293.165(5).

(ii) N.R.S. 293.165 cannot be harmonized with N.R.S. 304.240(1) and therefore must yield to it.

While courts should strive, where possible, to harmonize statutory provisions, it is not possible to harmonize N.R.S. 293.165 with N.R.S. 304.240(1). Therefore, it was reasonable for the Secretary to conclude that the former must yield and that the latter applies.

N.R.S. 293.165 sets forth a procedure to nominate major party candidates and place them on a ballot. Under that procedure, once a vacancy in nomination has been established, a major party candidate is nominated when the major party central committee designates the candidate and the candidate accepts the designation.[9] *See* N.R.S. 293.165(1), (5). N.R.S. 304.240(1) also sets forth a procedure to nominate major party candidates and place them on a ballot. Under that procedure, a candidate is nominated simply by filing a declaration or acceptance of candidacy. *See* N.R.S. 304.240(1).

The two provisions are in direct conflict with one another. Clause 2 of N.R.S. 304.240(1) states that, in order to be "nominated," it is necessary for any candidate, regardless of party, to file a declaration or acceptance of candidacy within the prescribed time. *See* N.R.S. 304.240(1). Clause 2's directive leaves Clause 3 of N.R.S. 304.240(1) with but one job in the statutory scheme: to prescribe that the act deemed *necessary* for nomination by Clause 2 is also *sufficient* to nominate a major party candidate. Of course, by insisting that major party candidates must be designated by their party's central committee, Respondents would construe N.R.S. 304.240(1) to mean that the

[9] It is notable that such candidates are *not* required to file a "declaration or acceptance of candidacy." *See* N.R.S. 293.177(1) (emphasis added) ("*Except as otherwise provided in N.R.S. 293.165*, a name may not be printed on a ballot to be used at a primary election unless the person named has filed a declaration or an acceptance of candidacy ...."). Instead, they are merely required to file "an acceptance of the designation ...." N.R.S. 293.165(5). Given the prominent role that the designation or acceptance of candidacy plays in N.R.S. 304.240(1), its absence in N.R.S. 293.165 provides further evidence that the legislature did not intend for N.R.S. 293.165 to apply.

filing of a declaration or acceptance of candidacy is *not* sufficient for a major party candidate to be nominated. Respondents' interpretation, therefore, "leaves [Clause 3] with no job at all, which [this Court's] rules do not allow." *Strickland v. Waymire*, 235 P.3d 605, 610 (Nev. 2010). As a result, any interpretation—including Respondent's—that incorporates N.R.S. 293.165's nomination procedure into N.R.S. 304.240(1) presents a direct conflict with Clause 3 of N.R.S. 304.240(1).

Given this conflict, it was reasonable for the Secretary to conclude that N.R.S. 293.165 does not apply. *See Haney v. State*, 185 P.3d 350, 353 (Nev. 2008) ("When interpreting a statute, this court will give the statute its plain meaning and will examine the statute as a whole without rendering words or phrases superfluous or rendering a provision nugatory.") As discussed above, Clause 2 of N.R.S. 304.240(1) makes clear that, where a conflict exists, the procedures set forth in N.R.S. 304.240 trump the procedures set forth in N.R.S. Chapter 293. *See* N.R.S. 304.240(1) (emphasis added) ("*[e]xcept as otherwise provided in this subsection*, a candidate must be nominated in the manner provided in chapter 293 of N.R.S.."). If that were not enough, Clause 3 would also trump N.R.S. 293.165 because, as the statute designed specifically to nominate candidates for special elections to fill U.S. House vacancies, it is the more specific of the two provisions. *See State Indus. Ins. Sys. v. Surman*, 103 Nev. 366, 368, 741 P.2d 1357, 1359 (Nev. 1987) (noting that "a specific statute takes precedence over a general statute.").

(iii) *Brown v. Georgetta* does not require the Secretary to apply N.R.S. 293.165 to this election

As discussed above, N.R.S. 293.165 is inapplicable to the upcoming special election for multiple, independent reasons. In an effort to resist this inescapable conclusion, Respondents in the proceedings below relied on a case that addressed a fundamentally different issue: the procedures that might apply when an election is imminent and the statutes lack any mechanism by which to nominate candidates. *See Brown v. Georgetta*, 70 Nev. 500, 508-509, 275 P.2d 376, 380 (1954). In such a scenario, there may be a "vacancy in nomination," *id.* at 508-509, and, under current law, it is possible that N.R.S. 293.165 could apply. But this is not the case before this Court.

Brown simply has no relevance in the instant litigation. At the very outset, the upcoming election *does* have a mechanism by which to nominate candidates. Candidates can and will be nominated pursuant to N.R.S. 304.240(1); therefore, no "vacancy in nomination" exists and neither *Brown* nor N.R.S. 293.165 applies. Respondents apparently read *Brown* to mean that a vacancy in office always results in a vacancy in nomination. But such an interpretation cannot possibly be true. When Senator John Ensign resigned from office, for example, his resignation created a vacancy in office but did *not* create a vacancy in nomination. The reason for this is straightforward: the general election to fill Senator Ensign's office is scheduled to be held at the 2012 general election and, prior to that election, there is a statutory procedure—the 2012 primary elections—to select the nominees who will appear on the November general election ballot. Furthermore, Respondents' interpretation also ignores the limiting language of the Court's holding:

> "[W]here, by reason of death, as in this case, a vacancy in an office occurs shortly before a general election at which some one to fill 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."

Id. at 380 (emphasis added), quoting *State ex rel. Penrose v. Greathouse*, 48 Nev. 419, 233 P. 527, 529 (Nev. 1925). *See also State ex. rel. Crow v. Hostetter*, 137 Mo. 636, 39 S.W. 270, 271 (Mo. 1897). This language makes clear that *Brown* does not stand for the broad proposition that Respondents claim.

When considered in context, the inapplicability of *Brown* becomes even starker. There, this Court was considering whether to enjoin a state official from placing certain names on a ballot, a judicial intrusion that effectively would have shut down the election and mooted the primary holding of the case regarding the meaning of the phrase "next general election."[10] The Court refused, siding with the State's official position (as articulated by the Nevada Attorney General in AGO 1954-350) that a nomination-related statute was "broad enough to permit the qualified electors of a judicial district to make a nomination by petition authenticated in the mode pointed out by the statute." *Brown*, 70 Nev. at 509, 275 P.2d at 380. In the instant case, this Court again is

[10] There is no indication that any other major party candidates sought to appear or were prevented from appearing on the 1954 general election ballot as a result of the parties' actions.

considering whether to enjoin a state official from placing certain names on a ballot, and, again, the State's official position is that a nomination-related statute, N.R.S. 304.240(1), is "broad enough" to govern the nomination process. Respondents, ironically, now cite *Brown* in an attempt to convince this Court to side *against* the State. Yet, considered in context, *Brown* runs contrary to Respondents' position, as it confirms that this Court will not override statutorily imposed nomination procedures so as to *limit* the field of candidates able to participate in an election, and it will not interfere with reasonable determinations made by state officials charged with administering the State's election laws.[11]

In any event, Respondents' interpretation of *Brown*, which predates the enactment of N.R.S. 304.240(1), does not lead to the conclusion they desire. Even if *Brown* were to stand for the proposition that Respondents suggest, N.R.S. 304.240(1) still governs the nomination process. Because it conflicts with N.R.S. 293.165, it still trumps. In short, *Brown* is inapposite.

c. The Secretary's Interpretation leads to a commonplace and sensible result.

Because it is compelled by the plain meaning of the statute, the Secretary's Interpretation should stand regardless of the result to which it leads. *See Nelson v. Heer*, 123 Nev. 217, 224, 163 P.3d 420, 425 (Nev. 2007), citing *State Div. of Insurance v. State Farm*, 116 Nev. 290, 293, 995 P.2d 482, 485 (Nev. 2000) (where "the language of statute is plain and unambiguous and its

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[11] A recent case from Illinois provides further support for these important distinctions. In *Judge v. Quinn*, 612 F.3d 537 (7th Cir. 2010), the 7th Circuit held that the 17th Amendment required the State of Illinois to hold a special election to fill the remaining months of President Obama's Senate term. By the time that the court had rendered its decision, the primaries had passed and there was no provision in state law setting forth a procedure to select nominees for such an election. On remand, in *Judge v. Quinn*, Case 1:09-cv-01231 (N.D. Ill. Aug. 2, 2010), the district court found that, in the absence of any clear statutory guidance, the court could order that the nominees appearing on the general election ballot should also appear on the special election ballot being held the same day. *See id.*, at ¶ 9 ("Accordingly, this court may formulate, as necessary, mechanisms for the conduct of a special election on November 2, 2010 to fill the U.S. Senate seat vacancy in order to comply with the Seventeenth Amendment consistent with the Court of Appeals' ruling in this case.").

Both *Brown* and *Quinn* suggest that, where a statutory vacuum exists, courts are authorized to formulate reasonable procedures to provide for the nomination of candidates. This power clearly does not extend to situations, such as the one here, where the legislature has already enacted a statute prescribing a mechanism to nominate candidates in the exact situation that the court confronts and, moreover, where the election officials charged with interpreting and administering those laws have already done so in a reasonable manner.

meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself."). But, in fact, rather than leading to an "absurd result," the Secretary's Interpretation actually leads to a commonplace and sensible one. It is neither unusual nor problematic for more than one candidate from the same party to appear on a general or special election ballot. For example, Nevada law requires that two nominees from the same political party appear on the ballot where "only one major political party has candidates for a particular office and no minor political party has nominated a candidate for the office and no independent candidate has filed for the office." N.R.S. 293.260(4)(a), (b).[12] Likewise, Nevada's recall law contemplates that more than one nominee from the same party can appear on the recall ballot, provided that they present the necessary number of petition signatures. *See* N.R.S. 306.110.

Other states also allow multiple candidates from the same party to appear on general or special election ballots. In 2010, for example, Hawaii employed an identical system to that proposed by Secretary Miller to fill a U.S. House vacancy, in which a Republican candidate prevailed with 39.4 percent of the vote. *See* Haw. Rev. Stats. §§ 11-1, 12-3(a)(7), 12-5(d), 17-2; U.S. Rep. District I Special Vacancy Election Report (May 22, 2010), *available at* http://tinyurl.com/24wp522. Likewise, just this year, Louisiana's legislature passed legislation to bring back an election format whereby candidates from all parties appear on the general election ballot and the top two finishers advance to a runoff election (unless one candidate receives 50 percent or more of the vote). *See* 2010 La. Acts 570. This past February, pursuant to its authority under the Federal Voting Rights Act, the U.S. Department of Justice "pre-cleared" this new legislation. *See* La. Dept. of State Media Advisory, Department of Justice Preclears Open Primary System for Congressional Elections (Feb. 8, 2011). In short, the possibility that more than one candidate from the same party may appear on the ballot simply reflects a common and sensible approach taken by the Nevada legislature.

Likewise, the fact that the special election statute results in different treatment of major

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[12] In the 2010 general election, two Republican nominees appeared on the general election ballot for the 32nd Assembly District, with Republican Ira Hansen defeating Republican Jodi Stephens. *See* Secretary of State Election Results 2010, *available at* http://tinyurl.com/3crj9jt.

party, minor party, and independent candidates is not unusual at all. In fact, it is the *rule*—not the exception—that these candidates are treated differently.[13] In regularly-scheduled elections held pursuant to N.R.S. Chapter 293, major party candidates must qualify for the general election via the primary election, *see* N.R.S. 293.175(2), 293.260(2), while minor parties are permitted to handpick their candidates of choice and submit them on a list to the Secretary of State. *See* N.R.S. 293.1725(c). To further illustrate the "disparate treatment" that Nevada law affirmatively adopts, the statute explicitly prohibits minor party candidates from appearing on a ballot for a primary election. N.R.S. 293.1715(1). Tellingly, even the system preferred by Respondents results in different treatment of candidates: it would create a system whereby major and minor party candidates select their nominees via a centralized process, but independent candidates have to petition their way onto the ballot by obtaining signatures.

Nevada is not alone in treating major and minor party candidates differently. Many states, for example, prohibit minor parties from nominating their candidate of choice if that candidate has been nominated by a major party. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S.Ct. 1364 (1997) (upholding Minnesota law banning fusion voting). In other states, major parties are given preferential placement on the ballot. *See, e.g.* Laura Miller, Election by Lottery: Ballot Order, Equal Protection, and the Irrational Voter, 13 N.Y.U. J. Legis. & Pub. Pol'y 373, 380 (2010) (listing states that give major parties preferential treatment). State laws also typically make it significantly easier for major parties to gain ballot access than minor parties or independent candidates. *See, e.g.* Black, 82 Cornell L. Rev. at 167-72 (describing signature requirements and early filing deadlines as common barriers to ballot access). Some states, such as North Carolina, have laws that make it significantly harder for minor parties to grow their support among the

[13] Although Respondents did not raise this argument below, the district court expressed concern that minor parties were being treated unfairly. It is worth noting that the United States U.S. Supreme Court has, on several occasions, recognized that states treat major party candidates, minor party candidates, and independent candidates in different ways, and has upheld these statutes. *See, e.g. Buckley v. Valeo*, 424 U.S. 1, 97 (1976) (upholding different treatment of candidates for campaign finance purposes); *Jenness v. Fortson*, 403 U.S. 431, 441-42 (1976) (upholding different treatment of candidates for ballot access purposes). *See also* Benjamin D. Black, Developments in the State Regulation of Major and Minor Political Parties, 82 Cornell L. Rev. 109, 165-66, n. 406-17 (1996) (citing cases upholding such laws in states).

electorate. *See, e.g.* N.C.G.S.A. §§ 163-96(a)(1), 163-97 (requiring political party to poll at least 2 percent of the votes cast in preceding gubernatorial election to maintain status as "political party"); 163-97.1 (authorizing State Board of Elections to change the registration affiliation of all voters who are affiliated with a political party which has lost its legal status); 163-99 (allowing qualified "political parties" to use public buildings for meetings, but not making some allowance for non-qualified political parties).

This is true at the federal level as well. Federal Election Commission regulations impose different regulations upon major party candidates and minor party candidates who seek money from the Presidential Election Campaign Fund. Any eligible major party candidate may receive payments from the Fund. *See* 26 C.F.R. § 9004.1. In contrast, an eligible candidate of a minor party may receive pre-election payments only if he or she received a certain percentage of the popular vote as the candidate of a minor party in the preceding election, or if the minor party received a percentage of the popular vote in the preceding election. *See id.* §§ 9004.2(a)(1), (b). Furthermore, the minor party candidate is entitled to only a percentage of the amount that major party candidates are entitled to receive. *Id.* In addition, a participating major party candidate is permitted to accept contributions to a legal and accounting compliance fund, but no similar provision exists that allows minor party candidates to do the same. *See id.* § 9003.3.

In short, there is nothing unusual about major party candidates, minor party candidates, and independent candidates being treated differently under the law.

C. The Secretary's Interpretation Of The Special Election Statute Is Consistent With The First Amendment.

In a tacit acknowledgement that their statutory analysis lacks merit, Respondents have suggested that the courts should simply disregard Nevada's laws and find an alleged constitutional violation. Yet their constitutional claim also lacks merit. Respondents contend that the special election statute violates the First Amendment because it would lead voters to believe that the NRP has endorsed each candidate identifying with the Republican Party on the special election ballot. But Respondents have not presented, as they are required to do under U.S. Supreme Court

precedent, any evidence tending to show that the statute will result in widespread voter confusion among a well-informed electorate. Respondents' other First Amendment argument is equally without merit. By claiming that the First Amendment affords political parties the unfettered right to place their candidate of choice on the ballot and exclude all others bearing their party's name, Respondents ask this Court to endorse an argument that the U.S. Supreme Court and Ninth Circuit have dismissed repeatedly. As a result, there is no First Amendment violation.

1. Respondents have failed to show the possibility of widespread voter confusion.

Respondents contend that the special election statute violates the First Amendment because it would lead voters to believe that the NRP has endorsed each candidate identifying with the Republican Party on the special election ballot. But as the U.S. Supreme Court has made clear, a party bringing a voter-confusion claim must marshal evidence showing the possibility of widespread voter confusion among a well-informed electorate. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S.Ct. 1184 (2008) (hereinafter "*Grange I*"). Because Respondents have failed even to attempt such a showing, their claim necessarily fails.

To make out a cognizable voter confusion claim, Respondents must show "the possibility of widespread voter confusion" among "a reasonable, well-informed electorate." *Washington State Republican Party v. Washington State Grange*, No. CO5-0927-JCC 2011 WL 92032, at *6 (W.D. Wa. Jan. 11, 2011) (hereinafter, "*Grange II*"), citing *Grange I*, 552 U.S. at 456. Respondents have not presented *any* evidence that the special election statute would result in widespread voter confusion. Indeed, because the statute has never been employed this Court lacks even the most basic background knowledge, such as how party preferences will be displayed on the special election ballot.

This was precisely the situation in which the U.S. Supreme Court rejected a similar voter-confusion claim before. *See Grange I*, 552 U.S. at 455 ("[W]e do not even have ballots indicating how party preference will be displayed."); *id.* (It "stands to reason that whether voters will be confused . . . will depend in significant part on the form of the ballot."). Even if this Court were concerned that the candidate's self-designation might imply endorsement, approval, or affiliation by

the party, it need not nullify Nevada's election laws; rather, it could, for example, require that the Secretary include a disclaimer on the ballot clarifying that the party label does not imply endorsement, approval, or affiliation, and provide similar explanatory materials in the voter guides it distributes to the public and posts on its website. *Grange II*, 2011 WL 92032 at *5-6 (approving of these measures that Washington State took to alleviate any potential confusion).[14] This would be the sensible and judicially appropriate way to alleviate any speculative possibility of voter confusion.

There are other reasons why this Court should not "presume that a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." *Grange I*, 552 U.S. at 454-55. Significantly, the special election statute does not interfere with the party's *internal* processes for nomination or endorsement. *Compare Democratic Party v. LaFollette*, 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1980) (holding that State of Wisconsin could not compel the national Democratic Party to alter its *internal procedures* for nominating a presidential candidate); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) (striking down law barring state parties from endorsing preferred candidates in a primary). The NRP, for example, is free to endorse its preferred candidate at the next state central committee meeting and to broadcast that endorsement far and wide via e-mail, mail, telephone, canvassing, television, radio, or any other means at its disposal. Likewise, Nevada's law does not restrict the ability of the NRP to criticize or oppose the candidates that it disfavors. *See Grange I*, 552 U.S. at 453 (parties may express preference by nominating candidates outside of the primary process); *Alaskan Independence Party v. Alaska*, 545 F.3d 1173, 1180 (9th Cir. 2008) (parties "do not contend that they are prohibited by state law from endorsing their preferred candidate and disavowing undesired candidates."). The NRP's bylaws, in fact, recognize that political parties can effectively disavow undesired candidates through various means. *See* Bylaws of

[14] At oral argument, Respondents suggested that the language in N.R.S. 304.240(1) providing for the "nomination" of major party candidates was constitutionally dispositive. It is not. The central issue is whether the candidate's self-designation "impl[ies] one way or another whether the political parties endorse, approve, or affiliate with that candidate." *See Grange II*, 2011 WL 92032, at *6. Respondents cannot satisfy this evidentiary burden simply by pointing to language on the face of the statute.

the Nevada Republican Central Committee, Art. 16, § 1, *available at* http://www.nevadagop.org/about-the-gop/by-laws/ ("The Nevada Republican Party shall neither recognize nor support any candidate for public office who has been convicted of a felony or, while serving in a public office was impeached and convicted or removed from office for any reason . . . .").

2. Parties do not enjoy a constitutional right to place their candidate of choice on the ballot to the exclusion of all other candidates bearing the party label.

In addition to their claims of voter confusion, Respondents ask this Court to endorse a proposition that the U.S. Supreme Court and Ninth Circuit have rejected repeatedly: that political parties have an unfettered right to place their preferred candidate on the ballot and exclude from the ballot any candidate with whom they do not want to be associated. *See Lightfoot v. Eu*, 964 F.2d 865, 871 (9th Cir. 1992) ("[P]olitical parties' rights to nominate whomever they want, however they want, is not sacred."). In *Grange I*, the U.S. Supreme Court rejected the argument now advanced by Respondents. Deeming it "unexceptionable" that "parties may no longer indicate their nominees on the ballot," the Court concluded that the "First Amendment does not give political parties a right to have their nominees designated as such on the ballot." *Grange I*, 552 U.S. at 453 n. 7. Furthermore, "[p]arties do not gain such a right simply because the State affords candidates the opportunity to indicate their party preference on the ballot." *Id.* Citing its earlier decision in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997), the Court reaffirmed that "[b]allots serve primarily to elect candidates, not as forums for political expression." *Grange I*, 552 U.S. at 453 n. 7.

In another case, the Alaskan Independence Party and the Alaska Libertarian Party challenged a state law requiring political parties to nominate candidates in a primary in which any registered member of the political party could seek the party's nomination. The parties contended that the law forced them to associate with candidates who were not members of the party or were not ideologically compatible with the party. *See Alaskan Independence Party*, 545 F.3d at 1174-75. Echoing the arguments made by Respondents, the parties contended that Alaska's laws "run afoul of

the First Amendment because they force parties to associate with undesired candidates who appear on the primary ballot and seek their parties' nomination" and "impermissibly burden[] their associational rights because Alaska does not allow the party to exclude from the ballot those candidates the party finds objectionable." *Id.* at 1175, 1178 (emphasis in original). Following the lead of the U.S. Supreme Court in *Grange I*, the Ninth Circuit rejected these arguments.

In *Alaskan Independence Party*, the Ninth Circuit distinguished between the unexceptional situation where, as here, the state "does not allow the party to exclude from the ballot those [undesired] *candidates* the party finds objectionable" and the constitutionally problematic situation where the state forces parties to "associate with unaffiliated or undesired *voters*." *Id.* The latter problem, which the U.S. Supreme Court found unconstitutional in *California Democratic Party v. Jones*, 530 U.S. 567, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000), is not present here.[15] Nevada's special election statute does not compel any association between the NRP and non-Republicans. For the special election, major party candidates will be "nominated by filing a declaration or acceptance of candidacy within the time prescribed by the Secretary of State pursuant to N.R.S. 293.204." N.R.S. 304.240(1). Because the declaration of candidacy form requires the candidate to swear that she is a registered member of the party with which she will be listed on the ballot, the Republican candidates on the special election ballot will have been "nominated" solely by registered members of the Republican Party (*e.g.* themselves). *See* State of Nevada Declaration of Candidacy for the Office of U.S. House of Representatives, District 2, *available at* http://www.nvsos.gov/Modules/ShowDocument.aspx?documentid=1985.

In addition, whereas the statute struck down in *Jones* impeded parties from placing their candidates of choice on the general election ballot by allowing voters from the opposite party to

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[15] Under the law at issue in *Jones*, voters could vote for any candidate regardless of the voter's or candidate's party affiliation, with the top vote-getter from each party being declared the party's *only* nominee and qualifying for a place on the general election ballot. Under this law, for example, Democratic voters could band together to prevent the Republican Party's favored candidate from winning the Republican nomination and appearing on the general election ballot. The Court found the law unconstitutional because it effectively compelled political parties to associate with *voters* who were affiliated with rival parties. *See id.*,at 577 (holding that the law "forces political parties ... to have their nominees ... determined by ... [voters] who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival.").

band together and defeat this candidate in the primary, here the NRP faces no such impediment. The NRP is free to recruit the candidates that it favors, assist those candidates in filing a declaration of candidacy, and endorse the candidates publicly.[16] There is nothing that any competing political party can do to stand in its way. Furthermore, as in every election, the NRP can spend money promoting that candidate to its members and to the general public. The NRP can also lend its organizational support apparatus to this favored candidate, find surrogates, plan events, and turn out the party faithful via get-out-the-vote drives. Simply put, unlike in *Jones*, there is nothing in Nevada law that would prevent the NRP from engaging in all of the activities it normally conducts on behalf of preferred candidates.[17]

VII.

CONCLUSION

Based upon the foregoing, Appellant requests this Court to reverse the judgment of the

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[16] Any references to self-imposed restrictions in the NRP's bylaws are not the State's concern. *See Timmons*, 520 U.S. at 367 (finding that there is no state interest in "protect[ing] political parties from the consequences of their own internal disagreements.").

[17] For the same reasons, the U.S. Supreme Court's opinion in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986), also does not apply. In *Tashjian*, the U.S. Supreme Court struck down a law barring independent voters from participating in party primaries even where the parties had elected to open its primary to such voters. *See id.* The Court was particularly concerned that such a provision could allow the majority party in the state to restrict coalition-building efforts between the minority party and unaffiliated voters. *See id.* at 224 ("Under these circumstances, the views of the State, which to some extent represent the views of the one political party transiently enjoying majority power, as to the optimum methods for preserving party integrity lose much of their force.").

district court, lift the district court's injunction, authorize the Secretary of State to reinstate his Interpretation to the extent possible, and dismiss Respondents' lawsuit.

DATED this 31st day of May, 2011.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, and in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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