**IN THE SUPREME COURT OF THE STATE OF NEVADA**

NEVADA STATE DEMOCRATIC PARTY; and ROSS MILER, IN HIS CAPACITY AS SECRETARY OF STATE FOR THE STATE OF NEVADA

Appellants,

vs.

NEVADA REPUBLICAN PARTY, and DAVID BUELL, an individual,

Respondents.

Supreme Court No. 58404



APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT,
CARSON CITY, NEVADA
THE HONORABLE JAMES TODD RUSSELL
District Court Case No. 11-OC-00147 1B

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# RESPONDENTS' ANSWERING BRIEF

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Respondents, Nevada Republican Party ("NRP") and Mr. David Buell ("Mr. Buell")(collectively "Respondents"), by and through their counsel, David C. O'Mara, Esq., of The O'Mara Law Firm, P.C., and Rew R. Goodenow, of Parsons, Behle & Latimer, herein submit their Answering Brief to Appellants', Nevada State Democratic Party ("NSDP") and Ross Miller, in his capacity as Secretary of State for the State of Nevada ("State" or "Secretary") (collectively "Appellants"), Opening Briefs.

## I. STATEMENT OF JURISDICTION

The Nevada Supreme Court has jurisdiction over this case, pursuant to NRAP 3A(b)(1) and 3A(b)(3). The Honorable James Russell's Order was entered on May 23, 2011, and Appellants timely filed a Notice of Appeal on the same day. Appellants are appealing from the District Court's final order granting Respondent's (Plaintiffs) request for declaratory and injunctive relief. The parties agreed to consolidate the preliminary injunction hearing with a hearing on the merits. The District Court's Order was, therefore, a final hearing.

## II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the District court erred in finding that NRS 304.240 requires compliance with the nominating requirements and general election statutes in NRS Chapter 293?

## III. STATEMENT OF THE CASE

This case involves an action brought by Respondents, on May 5, 2011, seeking declaratory and injunctive relief in order to require the Secretary of State to administer NRS 304.240(1) in a manner that gives effect to all the applicable provisions of the language of NRS 304.240 and NRS Chapter 293. The action further sought to prevent the Secretary from placing on the special election ballot the names of individuals that have not been designated by their respective major or minor political party as the specific party's candidate for the special election pursuant to NRS 293.165.[1] 1 Joint Appendix

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[1] Even though the general election laws of this State apply to special elections, the term "general election" is used to describe the normal election process, while the term "special

("JA"), 1-34.

The Secretary opposed the application for declaratory and injunctive relief. 1 JA 39-73. NSDP intervened, without objection, and also opposed Respondents' application. 2 JA 74-114. A hearing was conducted by the Honorable James Russell on May 19, 2011, and all parties agreed that the hearing should be final and on the merits pursuant to NRCP 65(a)(2). 1 JA 38 and 3 JA 87. The district court announced its oral decision in favor of NRP on May 19, 2011, and a written order was filed on May 23, 2011. 3 JA 261-273.

## IV. STATEMENT OF FACTS

On May 3, 2011, Governor Brian Sandoval appointed Representative Dean Heller to serve as Nevada's Senator until the pending term expires. Senator Heller thereafter resigned his position as Nevada's Representative to the United States House of Representatives in Congressional District 2 ("CD2"), leaving a vacancy in the seat of United States Representative in CD2. The special election is to fill the vacancy thus created in CD2.

Previously, and before any vacancy existed, Secretary Miller issued Interpretation No. 112801 which purported to set forth the procedures that would be required to fill the vacancy in the nomination and office of CD2. In reaching his Interpretation, the Secretary claimed that it was necessary to "fill in the gaps," or as the district court stated, "picking and choosing" various statutory provisions in NRS Chapter 293. Compare 3 JA 197 and 3 JA 215, with 3 JA 268. The Secretary's Interpretation created a "free-for-all" or in his words, a "ballot royale" in which candidates could nominate themselves as the major political parties' nominee. 1 JA 10.

On May 9, 2011, Governor Sandoval issued a proclamation calling for a special election to be held on Tuesday, September 13, 2011. 1 JA 64. The Court may take

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election" is used to describe a special election process, including the pending election, unless otherwise stated.

judicial notice of the fact that more than one person from each major party has filed a declaration of candidacy.[2] The Secretary of State has accepted these forms. Id.

Nevada's Legislature enacted NRS 304.240, in 2003, specifically providing that "a candidate must be nominated in the manner provided in chapter 293 of NRS" unless otherwise provided in NRS 304.240.[3] The legislative impetus derived from fear surrounding the tragic events of September 11, 2001, that a government could be hamstrung if a large number of members of congress were killed in a catastrophic event. The changes to NRS Chapter 304 were designed to rapidly replace vacancies created by such a catastrophe. Nominations by the major parties of their candidates, needed to be more expeditious than the normal primary. So, for the nomination of major party candidates, the language in the third sentence of NRS 304.240(1) refers the reader back to NRS 293.204 for the Secretary's authority to adjust the time frames in a special election, nothing more, nothing less.

The Nevada Legislature never intended to abandon its historical mechanism for nominations to fill a vacancy in favor of a free-for-all election. Nevada voters never voted for this change, nor does the legislative history support it, nor does the United States Constitution allow it.

## V. SUMMARY OF THE ARGUMENT

The district court, the Honorable James Russell correctly interpreted Nevada's election laws when he held that each major political party is entitled to designate its specific nominee for the vacancy in CD2, pursuant to NRS 293.165, and only that

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[2] See www.nvsos.gov/index.aspz?page=880 (filed candidates list). NRS 47.130. See also Jory v. Bennight, 91 Nev. 763, 766, 542 P.2d 1400, 1403 (1975) (appellate court took notice of records of the Secretary of State).

[3] Before 2003, the United States Constitution and Nevada statutes provided the procedures to fill a vacancy in the office of United States House of Representatives.[3] Article 1, § 2, clause 4; see also, NRS 293.165; NRS 293.175, and NRS 293.260. This process was followed in 1954, and is still applicable today. Brown v. Georgetta, 70 Nev. 500, 507, 275 P.2d 376, 380 (1954).

candidate becomes the nominee for the specific political party.

Judge Russell's decision comports with the rules of statutory construction, the intent of the Nevada Legislature and the United States Constitution.

The Secretary's Interpretation not only improperly relies on statutes that are specifically inapplicable in special elections, such as this, the Interpretation conflicts with clear statutory provisions that are applicable and necessary to conduct this special election pursuant to NRS 304.240(2)(a)&(b). The Secretary's Interpretation would produce an unfair result, since it would free the major party nominees from all qualification conditions normally required of them, but still enforce the requirements pertaining to minor party and independent candidates. Finally, it would infringe the First Amendment right of association. As such, the Secretary's Interpretation is not entitled to deference.

## VI. STANDARD OF REVIEW

Questions of law receive *de novo* review. Heller v. Give Nev. A Raise, Inc., 120 Nev. 481, 486 n.8, 96 P. 3d 732, 734 n.8 (2004). The Nevada Supreme Court is being asked to review the district court's decision to grant declaratory and injunctive relief. The District Court found that the Secretary improperly interpreted the pertinent statutes. Statutory interpretation is a question of law.

The Nevada Supreme Court "is free to decide purely legal questions, however, without deference to the agency's decision." Jones v. Rosner, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986). Accordingly, this Court "may undertake independent review of the construction of a statute." Nevada Emp. Sec. Dep't v. Capri Resorts, 104 Nev. 527, 528, 763 P.2d 50, 51 (1988).

## VII. SUMMARY OF ARGUMENT

The Nevada Supreme Court should affirm the Honorable James Russell's decision to preclude the Secretary from placing any individual on the election ballot, unless said individual is the designated candidate of the major political party pursuant to NRS 293.165.

Indeed, the decision by Judge Russell to require a major party candidate to be designated by his or her respective party before being placed on the ballot comports with Nevada's general election laws and adheres to the constitutional protection afforded Nevadans under the First Amendment to the United States Constitution.

The Secretary's Interpretation is, at a minimum, purely results oriented, or, at worst, lacking in understanding of Nevada's election statutes. Nevada has a primary nominating system for partisan office. NRS 293.175. For filling vacancies, the major political parties nominate, rather than conducting a primary election. NRS 293.165. The Secretary picks and chooses various statutes which are specifically precluded from a special election pursuant to NRS 293.175 to justify his interpretation, yet the Secretary intentionally ignores other statutes that govern placing a candidate on the ballot for a special election.

Additionally, as applied under the Secretary's Interpretation, NRS 304.240 violates Nevadans' constitutional rights under the First Amendment to the United States Constitution, made applicable pursuant to the Fourteenth Amendment, which grants Nevadans the freedom of association. The Secretary's Interpretation would specifically exclude the major parties from the election process, yet, it would allow any individual to nominate themselves as the major party's nominee for Nevada's Representative to the United States House of Representatives in violation of the United States Constitution.

## VIII. LEGAL ARGUMENT

Judge James Russell's decision to grant Respondents' claim for a permanent injunction and enjoin the Secretary of State from "placing the names of members of a majority political party or a minority political party on the ballot until the candidates are designated by their respective major or minor political party pursuant to NRS 293.165" is correct, and should be affirmed. The Nevada Legislature did not intend to create the chaotic election process which the Secretary has imposed, especially since there is a substantial public interest for the election process to be conducted in an orderly way in compliance with all Nevada election law, and not as the Secretary believes, a "ballot

royale." One might ask, if the legislature intended to cut out the major political parties and allow any individual to become a nominee, then why didn't the legislature enact a statute with one sentence, "any individual may be a candidate for office simply by filing a declaration or acceptance of candidacy?" The legislature knew that the major party candidate would be designated pursuant to NRS 293.165.[4]

**a. The Secretary of State's Interpretation is not entitled to deference.**

The resolution of the issue before this Court rests solely on statutory construction principles, a question of law, and deference to the Secretary of State's Interpretation is not absolute. State v. State Farm, 116 Nev. 290, 293, 995 P.2d 482, 484 (2000)("[A] court will not hesitate to declare a regulation invalid when the regulation violates the constitution, conflicts with existing statutory provisions or exceeds the statutory authority of the agency or is otherwise arbitrary and capricious.") This Court may take the Secretary's interpretation for its persuasive value; however, in matters of purely legal questions, the Court may decline deference to the Interpretation and then undertake an independent review of the construction of Nevada's election statutes. Bacher v. State Engineer, 122 Nev. 1110, 1117, 146 P.3d 793, 798 (2006). Even reasonable agency interpretation of an ambiguous statute may be stricken by a court when a court determines that the agency interpretation conflicts with legislative intent. State v. State Farm, supra, 116 Nev. at 293, 995 P.2d at 484.

In this case, Secretary Miller's Interpretation, as applied, violates the Constitution,

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[4] The Minutes of the Meeting of the Assembly Committee on Elections, Procedures, and Ethics, March 27, 2003 contain a discussion between Chairwoman Giunchigliani and Janine Hansen who testified during the hearing concerning the adjustment of time to mail military or out-of-state ballots. www.leg.state.nv.us/Session/72nd2003/Minutes/Assembly/EPE/Final/2378.html. In response to the Chairwoman's question, Janine Hansen testified that the executive committees of the minor parties could act to add their "people" to the list to be filed with the Secretary of State. This testimony is based upon the procedure contained in NRS 293.165(1), although the specific reference is not contained in the minutes. The testimony on this procedure resolved the Committee's questions concerning adequacy of the timing mechanism. Thus it seems reasonable to assume that the Committee was aware of the corresponding provisions affecting the major parties in NRS 293.165(1).

conflicts with existing statutory provisions, exceeds his statutory authority, and is otherwise arbitrary and capricious, and thus, no deference to his improper decision should be given. The District Court may decide purely legal questions without deference to an agencies determination. 146 P.3d at 798. When resolving a statute, this Court has said that it will "resolve any doubt as to legislative intent in favor of what is reasonable, as against what is unreasonable. Desert Valley Water Co. v. State Engineer, 104 Nev. 718, 720, 766 P.2d 866, 866 (1988).

First, the Secretary's Interpretation would allow any individual to nominate themselves as a major party's nominee, in violation of every Nevadans' Constitutional Right to freedom of association.[5] The United States Supreme Court has "continually stressed that when States regulate parties' internal processes they must act within limits imposed by the Constitution." California Democratic Party v. Jones, 530 U.S. 567, 573, 120 S.Ct. 2402, 2407, 147 L.Ed.2d 502 (2000).

"In no area is the political association's right to exclude more important than in the process of selecting its nominee." 530 U.S. at 575. Here, the Secretary's Interpretation states "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." 1 JA 32. (emphasis added). More succinctly, major party candidates nominate themselves. As the Court stated best, "a single election in which the party nominee is selected by non-arty members could be enough to destroy the party." 530 U.S. at 579.

Second, the Secretary's Interpretation conflicts with existing statutory provisions and exceeds his statutory authority as the Secretary relies on statutes that are not applicable to special elections, yet he ignores the general election statutes that are applicable.

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[5] Additional analysis and argument on this issue are provided on pages through of this opening brief and are herein incorporated and referenced herein.

Contrary to the NSDP's claim, NRS 293.175 not only precludes the provisions in NRS 293.175 to 293.203, inclusive, but it also precludes the provisions provided for in NRS 293.175(1)-(4), which also precludes major parties from conducting a primary election to nominate, minor parties from nominating "in a manner prescribed pursuant to NRS 293.171 to NRS 293.174, inclusive," and independents from nominating "in a manner provided in NRS 293.200." NRS 293.175(1)-(4).[6] Throughout the Secretary's Interpretation, he makes reference to NRS 293.171(1), NRS 293.1715(2) and NRS 293.200 when dealing with the nominating requirements for minor and independent candidates. 1 JA 64. The Secretary's reliance on these statutes which are specifically inapplicable to special elections is in conflict with existing statutory provisions.

Further, the Secretary completely ignores NRS 293.260, which is applicable to special elections pursuant to NRS 304.240(a)&(b). NRS 293.260. If there is more than a candidate for each of the major parties in a race, then only one candidate per major party is nominated to the general election. State ex rel. Cline v. Payne, 59 Nev. 127, 130, 86 P.2d. 32, 33 (1939). This basic concept has been understood and applied in Nevada for many years. The Secretary has exceeded his statutory authority when he fails to understand or ignores Nevada's election statutes, as he has done here.

Moreover, the Secretary's actions regarding the special election show his decisions have been arbitrary and capricious. In fact, the Secretary initially claimed that the final day to resolve any issues would be July 15, 2011, yet the Interpretation only allowed for three (3) days to file the necessary documents with the Secretary of State. 3 JA 199. There is no rational reason to require a candidate to file within a three day

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[6] Interestingly, NRS 293.200 is precluded and made inapplicable to a special election, like the one in front of this Court twice. NRS 293.174(4) and NRS 293.164(5). However, the Secretary requires independent candidates to satisfy the requirements of NRS 293.200. The Secretary references subsections of NRS 193.200 four times in his Interpretation, however, this reference is incorrect and the interpretation should read as follows: The petition of candidacy required for an independent candidate must comply with the requirements set forth in NRS 293.200(2), NRS 293.200(3), NRS 293.200(5) and NRS 293.200(6). *Compare* 1 JA 33 with NRS 293.200.

window, except to preclude a party or individual from challenging the Secretary's decision. Additionally, as shown by the State's argument in the district court, it changed its position and stated that all issues must be resolved by July 8, 2011. 3 JA 199. Now, today, as this issue is presented to the Nevada Supreme Court, the Secretary again changes the deadline to resolve the issues, and again, restricts the time to July 6, 2011, claiming that information unknown at the time the motion to expedite was filed. Declaration of Secretary of State Ross Miller, filed May 26, 2011 in Supreme Court Case No. 58404 (1:19-24).[7]

**b. The plain language of NRS 304.240 compels the Nevada Supreme Court to accept the district court's findings.**

A thoughtful and comprehensive reading on NRS 304.240 with the understanding of Nevada's election process will allow only one reading and method of implementation of the provisions of NRS 304.240 and that is to allow the state central committees to designate their respective candidate and have that individual placed on the special election ballot. Respondents agree with Judge Russell that NRS 304.240 is ambiguous. Even if the language is clear, however, in order for a major party candidate to be nominated and placed on the special election ballot, the candidate must be designated by the respective parties' central committee.

In fact, Appellants have accepted the premise that if there is no primary, as in all special elections, then the political parties nominate their candidate under NRS 293.165. NSDP Brief, 17:5-10. Specifically, NSDP admits that:

> NRS 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.

The State attempts to argue that "Chapter 293 controls only to the extent NRS

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[7] How is it possible that the Chief Elections Official is unaware of the simple procedures of printing the ballots, especially since the Chief Elections Official would have determined this date before issuing his Interpretation?

304.240(1) itself does not provide the nomination procedures." Unfortunately, what the State's Interpretation fails to recognize is that NRS Chapter 293 applies to all election matters, not just the nomination process. NRS 304.240(2)(a)& (b).[8]

Appellants' reliance on a single sentence within NRS 304.240 without considering other statues within Chapter 293 produces an unreasonable and absurd result. Indeed, as Judge Russell correctly held, the important words in NRS 304.240 are, "a candidate of a major political party" and that the word candidate implies that an action must be taken for an individual to become the "candidate of a major political party" and not that any member of the political party is nominated. As such, in order to designate a candidate of a major political party, the provisions of NRS 293.165 must be followed. NRS 293.165.

Even assuming that every member, or in this case, even a non-member of a political party can nominate themselves as a candidate for the congressional election as Appellants argue, there is no mechanism to place each of these individuals on the ballot, except through NRS Chapter 293, which is specifically referenced in NRS 304.240. Courts should construe statutes to give meaning to all or their parts and language and has read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation. Coast Hotels v. State, Labor Comm'n, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001).

NRS 304.240 provides that the "general election laws of this State apply to the election." NRS 304.240(2)(b). And thus, the Secretary should have looked to the provisions of Chapter 293 of NRS to conduct this election. NRS 304.240(2)(a). Under Chapter 293, the process to place a candidates name on the election ballot is found in NRS 293.260 which provides that only one candidate per major or minor part is placed on the ballot for each office, when multiple major, minor or independent candidates are nominated. NRS 293.260; see also Payne, 59 Nev. at 130. NRS 293.260 is not one of

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[8] NRS 304.240(2)(a) & (b) provides, "Except as otherwise provided in NRS 304.200 to 304.250, inclusive: (a) The election must be conducted pursuant to the provisions of chapter 293 of NRS. (b) The general election laws of this State apply to the election."

the statutes that is expressly inapplicable pursuant to NRS 293.175(5), and thus the Secretary is required to follow, pursuant to NRS 304.240.

As such, under this analysis, only one candidate for a major party is allowed on the ballot, and if, as in this case, more than one individual is nominated for a specific party, there must be a fallback method to determine the one candidate placed on the ballot. In the absence of a fallback method to place one candidate on the ballot, a vacancy in the nomination exists. In this case, there is no primary pursuant to NRS 304.240 and NRS 293.165 and thus, no fallback method which now creates a vacancy in the nomination. In order to determine who is placed on the ballot, thankfully, the fallback method in NRS 293.165 is available and the respective central committee for a major party must designate its candidate.

Applying the plain language of NRS 304.240 and the relevant provisions of Chapter 293 of NRS and Nevada's general election statutes, a major party's candidate for office must be designated by his/her respective central committee, pursuant to NRS 293.165.

**c. Under the well-established precepts of statutory construction, the Nevada Supreme Court should accept the district court's findings.**

A correct reading of the statutory language in Chapter 304, incorporating by reference the election laws contained in Chapter 293, including NRS 293.165, provides that each major or minor political party is entitled to designate its respective candidate that is placed on the special election ballot.

Unfortunately, the cross-referencing Chapter 293 and confusing language in Chapter 304 has resulted in an ambiguous interpretation. In discerning the meaning of the statutory provisions regarding the specific election for CD2, the Court should rely on well-established precepts of statutory construction. "Unless ambiguous, a statute's language is applied in accordance with its plain meaning." See, e.g., We The People Nevada v. Miller, 124 Nev. 874, 881, 192 P.3d 1166, 1170 (2008). If, however, a statute

is "ambiguous, the plain meaning rule of statutory construction" is inapplicable and the drafter's intent "becomes the controlling factor in statutory construction." Harvey v. District Ct., 117 Nev. 754, 770, 32 P.3d 1263, 1170 (2001). An ambiguous statutory provision should also be interpreted in accordance "with what reason and public policy would indicate the legislature intended." McKay v. Bd. of Supervisors, 102 Nev. 644, 649, 730 P.2d 438, 442 (1986). This Court should construe the statutes to give meaning to all of its parts and language and should read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation. Coast Hotels, 117 Nev. at 841, 34 P.3d at 550. Further, no part of the statute should be rendered meaningless and its language "should not be read to produce absurd and unreasonable results." Banegas v. SIIS, 117 Nev. 222, 228, 19 P.3d 245, 248 (2001).

Respondents agree that NRS 304.240 is confusing, if not ambiguous, and thus this Court should look at the legislative intent. In reviewing the scant legislative history it is clear that the Legislature was concerned with a special election and that it intended for the election to be conducted pursuant to the provisions of NRS Chapter 293. NRS 304.240. Thus, the Nevada Legislature's intentions and public policy indicate that the general election laws of the State of Nevada, NRS Chapter 293, apply to this election. This statutory language was added to NRS Chapter 304, in 2003. See 2003 Statutes of Nevada Chapter 127, page 765 (AB 344). The written comments to the legislative hearings available from the Legislative Counsel Bureau show a concern for timing. See written testimony of Brian Woodson, Exhibit D, Committee on Government Affairs, May 5, 2003, page 4. AB 344 appears to have been drafted in response to an article that appeared in the Readers Digest. See Exhibit E, Senate Committee on Gov't Affairs, May 5, 2003. The article does not advocate any change to the nomination process, it simply points out the lack of a clear process for replacing members of the House of Representatives, if a catastrophe occurs. Likewise, the Minutes of the Meeting of the Assembly Committee on Elections, Procedures, and Ethics, April 3, 2003 show that discussion of AB344 focused on timing concerns, not on a change of the nomination

process.

NRS Chapter 304 establishes election as the method to fill a vacancy in the House of Representatives. It provides for abbreviated time schedules. Then it references the general election laws for the process. All statutes are to be read *in pari materia*. Farm Mut. v. Comm'r of Ins., 114 Nev. 535, 541, 958 P.2d 733, 737 (1998). When this is done, in this instance, the result is that a major or minor political party designates its candidates to be placed on the special election ballot.

Indeed, Respondents have urged this Court to affirm the district court's decision that the general election laws, NRS Chapter 293 can be harmonized with NRS Chapter 304 in a way that is not only reasonable, but does not violate the First Amendment. Appellants on the other hand argue that Chapter 293 cannot be harmonized with Chapter 304, and thus, to avoid this contrived conflict, Appellants urge this Court to adopt a process that ignores the general election laws of this State and deprives the major political parties of any role in the process of selecting their nominee. NSDP Brief 18:16-17. ("The two provisions are in direct conflict with one another.")

Appellants' only claim is that what they call "Clause 3" would have no function, unless the Court gives it the same interpretation they attempt to provide. NSDP Brief 19. Appellants are wrong.

The third sentence of NRS 304.240(1) refers the reader back to NRS 293.204 of the Secretary's authority to adjust the time frames in a special election, nothing more, nothing less. This meaning conforms with the language in the fourth and fifth sentences which also set forth the time frames for minor and independent candidate, nothing more, nothing less. These three sentences enable the minor adjustment to time frames, not a major change in the way candidates are nominated. In fact, the legislative history only shows a desire to have an election, rather than a gubernatorial appointment or a desire to move from a party nominating election system as is provided under the general election statutes, to a "ballot royale" election.

Additionally, and contrary to Appellant's argument, NRS 304.240 does not

supercede the provisions of Chapter 293 simply because NRS 304.240 is a specific statute while NRS 293.165 is a general statute. In fact, NRS 304.240 specifically references NRS 293 and provides that the election must be conducted pursuant to Chapter 293 and the general election laws of this state apply. NRS 304.240(2)(a)-(b).

There are two steps in regards to the process an individual takes to become nominated and then placed on the ballot as a candidate for the office of U.S. Representative, in Nevada. First, under NRS 304.240, the language sets forth that:

> [e]xcept as otherwise provided in this subsection, a candidate must be nominated in the manner provided in Chapter 293 of NRS and must file a declaration or acceptance of candidacy within the time prescribed by the Secretary of State pursuant to NRS 293.204, which must be established to allow a sufficient amount of time for the mailing of election ballots.

NRS 304.240(1). NRS 293.165 provides:

> [e]xcept as otherwise provided in NRS 293.166, a vacancy occurring in a major or minor political party nomination for a partisan office may be filled by a candidate designated by the party central committee of the county or State....

NRS 293.165(1). When reading these two statutes in harmony with each other, the important words in each are, NRS 304.240, "a candidate of a major political party" and NRS 293.165, "a candidate designated by the party central committee." Compare NRS 304.240 with NRS 293.165. There is no language in NRS 304.240 that conflicts with the right of a major party to designate its candidate, and thus, NRS 293.165 is applicable.

Although the language of NRS 304.240 does not state, "a member of a major political party" but specifically states, "a candidate of a major political party", under the Secretary's Interpretation, he would eliminate Nevada's long standing history of major political party nominations and would eliminate any involvement of the major parties in the nomination process, while allowing the minor party to preclude an individual from nominating themselves for the same office. Black's Law Dictionary, Seventh Edition, defines the word "nominate" to mean, "1. [t]o propose (a person) for election or appointment"; or "2. [t]o name or designate (a person) for a position." This language sets forth that an action must be taken for a designation or a "candidate" which in this case would be pursuant to NRS 293.165. Every member of a major party is certainly not a

candidate of that party and there must be a process to designate a candidate, namely, NRS 293.165.

Second, an individual must be placed on the ballot. The language in the third, fourth, and fifth sentences of NRS 304.240 specifies deadlines to place candidates on the ballot, after being designated. In order to give any meaning to the third sentence regarding major party candidates, the language must provide the timeframe in which a major party candidate designated by his/her party is placed on the ballot.

This process conforms with the general election statutes regarding the nomination and placement of candidates on the ballot and that in most case, only one candidate per major party is placed on the ballot for each position. See NRS 293.260; Payne, 59 Nev. at 130; NRS 293.1714(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.")

Finally, contrary to Appellants' claims, the resignation of former Congressman Dean Heller created a vacancy in the nomination. Appellants want this Court to ignore the long standing tradition in Nevada that political parties nominate their own candidates. The 1954 special election of Senator Alan Bible, and Brown v. Georgetta are applicable in this situation. Appellants want this Court to believe that Brown is not applicable because in 1954 there was no mechanism in which to nominate candidates. Again, Appellants are wrong.

In this special election, which is like Brown in that no primary was allowed; a vacancy is created. In fact, Nevada law in 1954, just like today provided for such a mechanism to nominate candidates in the event of a vacancy, and the mechanism was and continues to be by major party central committees.[9]

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[9] In Brown, it was contended that the provisions of § 25 of the primary election law, as amended 1947, p. 478, § 2429 N.C.L.1943-1949 Supp., relate only to the filling of a vacancy where a person nominated at the preceding primary election has died, resigned or for some other reason ceased to be a candidate. The section reads in part as follows: 'Vacancies occurring after the holding of any primary election shall be filled by the party committee of the county, district or state, as the case may be. Such action shall be taken not less than thirty days prior to the November election.' The Respondent, Clel Georgetta

**d. The Secretary of State's Interpretation is unreasonable would lead to an absurd result and should not be accepted.**

The Secretary's superficial reliance on a single sentence within NRS 304.240 without considering the context and other applicable statutes within Chapter 293 produces an absurd and unreasonable result. That result is a "ballot royale" election that deprives the major political parties of any role in selecting their nominees. It also treats the other parties differently without a justification. There is no overwhelming public interest that supports the Secretary's position.

The Secretary argues that the general election laws apply in every case, yet his application of NRS Chapter 293 is internally inconsistent, as discussed supra. He has chosen not to apply the general election laws such as NRS 293.260 and NRS 293.165, yet his Interpretation relies upon the reading of NRS 293.1715(2) in paragraph 3 and 4; NRS 292.1276 through NRS 292.1279 in paragraphs 3, 4, and 5; and incorrectly makes reference to NRS 193.200, which should be NRS 293.200 in paragraph 5 of the text. 1 JA 33. Most of these statutes are specifically excluded under the provisions of NRS 293.175 in special elections.

If the Nevada Supreme Court accepts the Secretary's Interpretation, it would allow any individual, whether a member of a political party or not, to file as a nominee of a major political party, yet at the same time, limit the same individual from filing as a minor party candidate or an independent candidate because that individual would either have to be placed on the minor party's list or file a petition of candidacy supported by 100 registered voters.

Additionally, while it is true that major, minor and independent candidates are

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argued that this section had no application to a vacancy in an office to which no candidate was to be nominated in the 1954 election, but that Senator McCarran's death created only a vacancy in office and not a vacancy in nomination. The Nevada Supreme Court reversed, observing that position of the Respondent was contrary to the holding of the court in State ex rel. Penrose v. Greathouse, 48 Nev. 419, 233 P. 527, 529 (1925). Brown, supra, 70 Nev. at 508.

treated differently by legislatures around the country, including here in Nevada, the district court's decision was not based upon disparate treatment. The court found the Secretary of State's Interpretation results in an application of the statute that demonstrates there is no coherent reason for the different treatment given each different party class. For the major parties it would save time, for the minors and independents, it would not. However, for the minor parties it would ensure party control over the process whereas the majors would lose all control. Indeed, even though NRS 293.175 specifically excludes the normal nominating process for each major, minor or individual candidate, the Interpretation relies upon the specifically exempt statutes to "fill in the gaps" or "picking and choosing", so that the Interpretation reaches its result that appears to benefit the Secretary's political party. This, rightly or wrongly, gives a poor impression of the process to the observer.

**e. The Secretary of State's Interpretation, as applied, violates the United States Constitution.**

The freedom of association is guaranteed to all Nevadans under the First Amendment to the United States Constitution, through the Fourteenth Amendment incorporation doctrine. Cousins v. Wigoda, 419 U.S. 477, 488, 95 S.Ct. 541, 548, 42 L.Ed.2d 595 (1975). If this Court does not affirm on the basis of statutory interpretation, then it must confront the issue of whether the State, through Secretary of State Miller may take from the major political parties and give to multiple individual candidates the right to determine who their "nominee" will be in a special election, and whether the Secretary's actions violate the members of the major parties' right of association. Because the Secretary has already issued his Interpretation (1 JA 32) and forms have been filed by individuals with the Secretary of State's office. Supra Note 2, this case presents an "as applied" challenge. In paragraph 2 of the Interpretation, the Secretary determined that, "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." 1JA 32. Pursuant

to the Secretary's interpretation, a person who self-nominates will be the major parties' nominee and must sign the form agreeing to accept the parties' nominee. 1 JA 32. Statutes must be construed consistent with the constitution.[10]

Appellants argue that this so-called open-access[11] or "ballot royale" does not violate the freedom of association. NSDP Brief, 24; State Brief, 17. However, Appellants rely solely upon cases that discuss the effect of state restrictions on the selection of nominees through the primary system, which is not applicable in this case. For example, the NSDP relies heavily upon Washington State Republican Party v. Washington State Grange, 2011 WL 92032 (W.D. Wash. Jan 2011) (Grange II) where the Court, following the United States Supreme Court's decision in Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 128 S.Ct. 1184, 170 L.Ed2d 151 (2008)("Grange I"), considered whether "party preference designations" reflected on the blanket primary ballot would create voter confusion. Grange II has no application here. In Grange I and II, Washington's voters had approved the People's Choice Initiative of 2004, Initiative 872 ("I-872"). Grange I, 552 U.S. at 444. Unlike I-872, Nevada's AB 344 concerns a special election, not a primary. Washington's "blanket primary" requires each candidate to list a "party preference". Id. Grange II highlighted this later, important distinction with a difference several times in its decision, as did the United States Supreme Court, observing, for example, that "[t]he primary ballot did not include "three other Democratic candidates. It included four candidates who stated a preference for the Democratic Party, one of whom the Democratic Party officially endorsed." Grange II at 7. The Washington State blanket "primary does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election." Id. at 9 (citing Grange I at 453).

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[10] Citizens for Honest Gov't v. Secretary of State, 116 Nev. 939, 946, 11 P.3d 121, 125 (2000).

[11] The so-called open-access election is only for individuals who self-nominate themselves as the nominee of a major party, yet the election is not open access to minor party or independent candidates.

Traditionally, and pursuant to Nevada law, the major political parties' nominees are selected through a closed primary. In this case, we are dealing with a special election, which since the early 1960s precluded the use of a primary election by the major political parties. NRS 293.175. The Secretary's Interpretation removes the major political parties from any role in nominating their candidate for the special election on September 13, 2011.

The United States Supreme Court disapproved of such restrictions in California Democratic Party v. Jones, 530 U.S. 567 (2000), which occurred about 3 years before NRS 304.240 was adopted. Striking down California's blanket primary system, the U.S. Supreme Court stated that "in no area is the political association's right to exclude more important than in the process of selection its ***nominee***" 530 U.S. at 575 (emphasis added). In reaching its decision, the U.S. Supreme Court observed that:

> a corollary of the right to associate is the right not to associate. Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interest and persuasions that underlie the association's being.

Id. at 574. In this case, it is not merely speculation, but fact, that individuals are able to claim to be the parties' nominee, who in fact, are not the parties' choice, but still will be the parties' nominees.

In reviewing the Secretary's Interpretation, this Court should apply strict scrutiny. Timmons v. Twin Cities Area New Party, 530 U.S. 351, 117 S.Ct. 1364, 137 L.Ed2d 589 (1997). In Timmons, the Supreme Court upheld Minnesota's anti-fusion laws and stated, "in deciding whether a state election law violates First and Fourteenth Amendment associational rights" it must "weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." Id. at 358. "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest." Id. The Court contrasted the statute in Timmons, which prohibited a candidate from appearing on the ballot as a candidate of more than one political party, and did not involve control of a party's nominating

mechanisms, with Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214, 230, 109 S.Ct. 1013, 1024, 103 L.Ed.2d 271 (1989) and Tashjian v. Republican Party of Conn., 479 U.S. 208, 214, 107 S.Ct. 544, 548-49, 93 L.Ed.2d 514 (1986), both of which struck down statutes interfering with a party's rights to select or nominate its candidates.

This court has applied a flexible standard to constitutional challenges to state election law, applying strict scrutiny when First Amendment rights are subjected to "severe" restrictions. Citizens for Honest Gov't, 116 Nev. at 945, 11 P.3d at 125. Denying the major political parties their traditional and ordinary right to nominate candidates qualifies as a "severe" restriction, justifying strict scrutiny. Neither the Secretary, nor the NSDP have provided a single compelling state interest that justifies depriving the major political parties of their right to nominate candidates. The legislative history and the specific language of NRS 304.240 merely suggest that time was the overriding issue. In their briefs, the Secretary and the NSDP do not suggest any compelling state interest that would require the exclusion of the parties from the nomination process, nor is there supporting legislative history.

Two years after NRS 304.240 was passed, the United States Congress recognized this issue and enacted amendments to 2 U.S.C. § 8. The changes provide for replacement of vacancies in the House of Representatives. Congress recognized that a change in the statutory election process needed a compelling state interest to justify it and addressed that interest in the text. Specifically, 2 U.S.C. § 8 provides a method to replace U.S. Senators and Congressmen in "extraordinary circumstances." In drafting the language, Congress was very careful to draft a statute in a way that does not infringe upon the political parties' rights of association, by providing first for nominations of a candidate by the political parties. 2 U.S.C. § 8(b)(3). Additionally, Congress anticipated a possible Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA")(42 U.S.C. §§ 1973ff-1973ff-6) problem and suggested that states consider alternative means, such as electronic voting. 2 U.S.C. § 8(b)(4). What is abundantly clear is that sec. 8 only

applies to an "extraordinary circumstance" in which there are 100 vacancies in the House of Representatives, and thus, a compelling need to change the election process.

In Grange I, the U.S. Supreme Court considered a facial challenge. There, the Petitioners had to demonstrate there was no set of circumstances under which the law would be valid. The high Court found that there were possible applications within the laws "plainly legitimate sweep." In the present case, we are faced with a plainly unconstitutional application of AB344, NRS 304.240(as amended 2003).

The U.S. Supreme Court's concluding paragraph in Grange I says, "[b]ecause I-872 does not on its face provide for the nomination of candidates" . . . "it does not on its face severely burden respondents' associational rights." Grange, 552 U.S. at 458-59. Appellants have argued that the U.S. Supreme Court, in Grange I, has rejected Respondents' position that allowing an individual to self-nominee is a violation of the freedom of association. NSDP Brief 24-29, State Brief 17-20. Appellants are wrong.

It is important to read the Supreme Court's analysis in Grange I thoroughly in order to fully understand why the Secretary's Interpretation results in NRS 304.240 being unconstitutional. In Grange I, the Supreme Court reversed the Ninth Circuit which had enjoined the enforcement of the initiative. The respondent, which included the Democratic Party, opposed the initiative and argued that I-872 suffered from the same constitutional infirmity that doomed California's blanket primary in Jones, 530 U.S. at 575. Grange I, 552 U.S. at 444. In Grange I, Respondents argued that, like Jones, I-872 allowed primary voters who are unaffiliated with a party to choose the party's nominee. 552 U.S. at 452. Writing for the majority, Justice Clarence Thomas stated, the "flaw in this argument is that, unlike the California primary, the I-872 primary does not, by its terms choose parties' nominees." Id. at 453. The Court later takes great pain to say this repeatedly by saying again later, "The law never refers to the candidates as nominees of any party, nor does it treat them as such." Id.

In light of the Secretary's Interpretation in this case, the Secretary has provided that an individual who files a nomination form is the major parties' nominee and placed

on the ballot as the major parties nominee. 1 JA 32. Under the Secretary's Interpretation, NRS 304.240 is facially unconstitutional because it specifically states that the major parties in Nevada have no role in nominating their candidate as the individuals themselves self-nominate by filing a declaration or acceptance of candidacy. 1 JA 32.

Additionally, and contrary to Appellants' claim, there is no remedy for the Secretary's unconstitutional interpretation like putting a disclaimer on the ballot or simply letting the major political parties spend time and resources advancing one major party nominee over another. Unlike Grange I and II, the Secretary's Interpretation leaves no other choice but to find the language unconstitutional because, the language of NRS 304.240 and the Interpretation specifically states that the self-nominating process chooses the parties' nominee. The statute, NRS Chapter 304 does not provide for disclaimers or party "preferences" to appear on the ballot.

The United States Supreme Court has repeatedly struck down attempts by the states to interfere with the internal governance and control by political parties of their nomination processes. In invalidating California's ban on party primary endorsements, a case that is in effect much more similar to the present case than Grange I, the unanimous Court speaking through Justice Marshall, said that the ban "prevents party governing bodies from stating whether a candidate adheres to the tenets of the party or whether officials believe that the candidate is qualified for the position sought." Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214, 223, 109 S.Ct. 1013, 1020, 103 L.Ed.2d 271 (1989). Allowing self-nomination as a party's nominee is even worse; since only one voter participates in the nomination, yet it is a nomination as the party's candidate.

Thus, the district court's decision, to harmonize Nevada's election laws in NRS Chapters 293 and 304 is correct and in conformance with the rights afforded under the United States Constitution.

**f. The Secretary of State's filing dates were arbitrary and capricious and the Nevada Supreme Court should accept the district court's findings.**

When reviewing an administrative decision, the Nevada Supreme Court's role is identical to that of the district court. Clements v. Airport Authority, 111 Nev. 717, 721, 896 P.2d 458, 460 (1995). This Court "review[s] the evidence presented to the agency in order to determine whether the agency's decision was arbitrary or capricious and was thus an abuse of the agency's discretion." Secretary of State v. Tretiak, 117 Nev. 299, 305, 22 P.3d 1134, 1138 (2001). Also, "[w]hen reviewing the decision of an administrative agency, a court is limited to the agency record, and may not substitute its judgment for that of the agency as to the weight of evidence on questions of fact." Id. Nonetheless, an administrative decision may be set aside in whole or in part, if the final decision is "[c]learly erroneous in view of the reliable, probative and substantial evidence on the whole record." Id.

In this case, the Secretary of State's decision to open the candidate filing period for only three days and not provide a period for the major and minor political parties to designate their respective candidate is clearly erroneous. 1 JA 66. In fact, the evidence presented in this case was that the Secretary of State originally found that the last day to resolve any issues related to this special election was on July 15, 2011. 3 JA 199. This decision was apparently based upon discussions with the county registrar of voters who needed to meet a specific deadline for the ballots to be printed and sent within the required timeframes of UOCAVA and the Military and Overseas Voter Empowerment Act ("MOVE Act"). Id. The Secretary found that the mailing of election ballots 45 day before the election under UOCAVA and the MOVE Act preempted Nevada law and found that the statutes did not provide sufficient time for minor parties and independents

to be placed on the ballot.[12] 1 JA 34. However, the Secretary's decision to open candidate filing for only 3 days fails to consider the time it would take for a candidate to meet the requirements under his Interpretation and it fails to consider that the only specific timing requirement was that there be "sufficient amount of time for mailing of the election ballots." NRS 304.240(1). Pursuant to NRS 304.240, the legislature clearly intended that the Secretary provide sufficient and adequate time for political parties to designate their candidate and have that candidate file the necessary documents with the Secretary of State. Additionally, there is no need to expedite the timeframes in this special election because there is sufficient time, over 120 days, before the special election, unlike a special election in the event of a catastrophe.[13]

Thus, the decision to only allow candidates three days is clearly erroneous, especially in a federal election in which numerous state and federal campaign finance laws must be met and when the legislature specifically provides for a filing period as close to the election as possible. NRS 304.240(1)("sufficient amount of time for the mailing of the election ballots," and "minor political parties...must file... not more than 46 days before... and not less than 32 days before the special election.").

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[12] Any state law that conflicts with the mandatory provisions of UOCAVA is preempted and invalid. See Doe v. Walker, 746 F.Supp.2d 667, (D.Md. 2010). In 2009, Congress passed the MOVE Act, which amended UOCAVA. 42 U.S.C. § 1973ff, et seq., Pub. L. No. 111-84 § § 577 to 582, 583(a), 584 to 587, 123 Stat. 2190 (2009). UOCAVA, as amended by the MOVE Act, is designed to prevent disenfranchisement of absent uniformed services and overseas voter . . .not later than 45 days before the election" so long as the absentee ballot request is received at least 45 days before the election. Id. (citing 42 U.S.C. § 1973ff-1(a)(8). Under UOCAVA, a state can apply for a one-time waiver of the 45-day transmittal requirement if the state demonstrates that complying with the requirement would cause it undue hardship as described in the statute. Id. (citing 42 U.S.C. § 1973ff-1(g).

[13] Obviously, if a special election is held in the future, the Secretary of State will need to set the dates for designation of candidates and to allow the candidates to file the necessary documents based upon the date provided in the Governor's proclamation. If the election is to take place 180 days after the proclamation, then it would be reasonable to provide more time for a candidate to file, while in the event of a catastrophe, it would be reasonable to expedite the filing period in order to satisfy the 90 day requirement. However, it is unreasonable in this case to set a 3 day period approximately 3 months before the election.

In addition, a finding that the Secretary's decision is erroneous is further supported by the testimony presented in the district court, in which the State argued that the issues must be decided by July 8, 2011, so that the ballots could be printed. Id. Changing his position yet again, on Friday, June 3, 2011, the Secretary filed a Declaration in which he claims new evidence exists to set a new final date for closing the candidate filing period of July 6, 2011. Miller Declaration, filed May 26, 2011, p. 11, ¶ 4. The original deadline set by the Secretary of State is erroneous since it was not based upon correct information, let alone substantial evidence at the time it was made, which should have been known by the Secretary prior to his decision. It is clear that a reasonable mind would not accept as adequate the evidence provided by the Secretary to support this conclusion. State Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986).

Additionally, the ignoring of the political parties' statutory and constitutional rights to designate their respective candidates and refusal to provide time for them to make such a determination is clearly erroneous. Apparently, the Secretary never considered this process. Thus, his decision for completing the candidate filing period was arbitrary and capricious. The district court's decision to extend the date for political parties to designate their candidates was proper and should stand.

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## IX. CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court affirm the Honorable James Russell's decision in the lower court. Judge Russell's decision correctly interpreted Nevada's election laws when he held that major political parties are entitled to designate specific candidates, pursuant to NRS 293.165, and only those major party candidates become the nominee of the party. Judge Russell's decision comports with the rules of statutory construction, the intent of the Nevada Legislature and the United States Constitution.

Accordingly, this Court should Affirm.

Dated: June 8, 2011.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Answering 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, in particular N.R.A.P. 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 that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: June 8, 2011

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## CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Parsons Behle & Latimer, and that on this 8th day of June, 2011, I filed a true and correct copy of the foregoing RESPONDENTS' ANSWERING BRIEF with the Clerk of the Court through the Court's CM/ECF system, which sent electronic notification to all registered users as follows:

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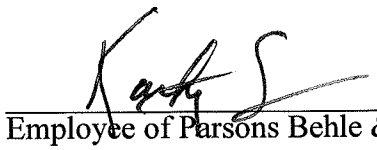

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