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, an individual,

Respondents,

Supreme Court No. 58404

District Court No. 11 OC 00147 1B

APPELLANT'S REPLY BRIEF

Appellant Ross Miller, Secretary of State, by and through counsel, Catherine Cortez Masto, Attorney General, and Kevin Benson, Deputy Attorney General, hereby submits his Reply Brief.

I.

ARGUMENT

In defending the district court's decision, it appears that the Nevada Republican Party's ("NRP") primary argument is that NRS Chapter 293 controls all aspects of the September 13 special election, including the nomination of candidates. However, it offers no convincing justification for a holding that is directly contrary to the plain language, legislative history, and purpose of NRS Chapter 304. Therefore this Court should reverse.

A. NRS Chapter 304 provides a new process for filling vacancies in the House of Representatives, including new nomination procedures.

NRP asserts that NRS Chapter 304, and NRS 304.240 particularly, was not intended to create a new election procedure, but was only intended to adjust the timing for holding the election. *See* Answering Brief, pp. 12-13. However, this assertion should be rejected because it conflicts with the plain language of the statute and is contrary to the legislative history.

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1. Chapter 293 only applies to the extent Chapter 304 does not address the subject matter.

Chapter 304 primarily controls this election, not Chapter 293. NRP repeatedly argues that the Secretary should have applied NRS Chapter 293, most specifically NRS 293.165 and 293.260, instead of relying on the provisions of Chapter 304. *See* Answering Brief, p. 10, ll. 19-20; p. 12, ll. 13-18; p. 14, ll. 2-4. But no matter how many times NRP says otherwise, this premise is false because the statutes themselves explicitly require Chapter 304 to control.

In each instance where Chapter 304 refers to Chapter 293, the statute uses the qualifier "except as otherwise provided" in that statute. NRS 304.040 provides: "*Except as otherwise provided in NRS 304.200 to 304.250,* inclusive, party candidates for Representative in Congress shall be nominated in the same manner as state officers are nominated." NRS 304.240(2) states that: "*Except as otherwise provided in NRS 304.200 to 304.250, inclusive*," chapter 293 and the general election laws apply. And for this case, the critical part of NRS 304.240(1) provides that in a special election, "*Except as otherwise provided in this subsection*, a candidate must be nominated in the manner provided in chapter 293 of NRS..." As discussed in the Opening Brief, this reference to Chapter 293 does not import all of that chapter's nomination provisions. Instead, it specifically states that Chapter 293 only applies to the extent NRS 304.240(1) ("this subsection") does not provide to the contrary. Since NRS 304.240(1) provides that a major party candidate "is nominated" by filing a timely declaration of candidacy, any other nomination provision of NRS Chapter 293 is made inapplicable.

NRS 304.240 was specifically enacted to control special elections to fill vacancies in the office of Representative. NRS 304.040; *see also In re Resort at Summerlin Litigation*, 122 Nev. 177, 185, 127 P.3d 1076, 1081 (2006) (specific statutes prevail over general ones). Therefore the provisions of Chapter 304 prevail over any contrary provisions in Chapter 293.

2. The district court's ruling contradicts the plain language of NRS 304.240(1), which does not merely adjust the timing for the election.

NRP argues that the third sentence of NRS 304.240(1) refers back to NRS 293.204, which permits the Secretary "to adjust the time frames in a special election, nothing more,

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nothing less." Answering Brief, p. 13, ll. 19-21. This, they argue, is consistent with the fourth and fifth sentences, which pertain to minor and independent candidates, and that "[t]hese three sentences enable the minor adjustment to time frames, not a major change in the way candidates are nominated." *Id.* at ll. 21-24. However, this argument, and the district court ruling, is directly in conflict with the actual language of the statute.

First, they both ignore the fact that the third sentence's reference to major party candidates being nominated by filing a declaration of candidacy "within the time prescribed by the Secretary of State pursuant to NRS 293.204" almost exactly mirrors the second sentence of NRS 304.240(1), which requires *all* candidates to file a declaration "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."

The Secretary's authority to set the filing deadline pursuant to NRS 293.204 is already covered by the second sentence, which additionally requires the Secretary to set that deadline soon enough to allow time to mail the ballot. If giving the Secretary this authority is all the statute was meant to do, the Legislature could have stopped there. But instead it added three additional sentences, one for each type of candidate. Thus the third sentence could not have been intended to merely relate to timing issues, since if so, it is entirely redundant of the second sentence. Instead, it should be given its plain meaning, which is that major party candidates are nominated by filing a timely declaration.

Second, NRP's argument that the fourth and fifth sentences "enable minor adjustment to time frames" is contradicted by those sentences. Those sentences require minor parties to file a list, and independents to file a petition, "not more than 46 days before the special election and not less than 32 days before the special election." NRS 304.240(1). They both mandate not only the time frame, but also what action is necessary for nomination of these types of candidates: filing a list of candidates or a petition. Therefore they do not support NRP's argument that they are related only to timing. Again, if that were the only issue, these sentences would not even be necessary.

Finally, NRS 304.040 was also amended in 2003 by AB 344. It previously read: "Party

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candidates for Representative in Congress shall be nominated in the same manner as state officers are nominated." 2003 Stat. Nev. 766. AB 344 amended it to provide: "*Except as otherwise provided in NRS 304.200 to 304.250*, inclusive, party candidates for Representative in Congress shall be nominated in the same manner as state officers are nominated." NRS 304.040 (emphasis added). NRS 304.200 to 304.250 only apply to special elections to fill vacancies in the office of Representative. Therefore NRS 304.040 requires that candidates in this special election "shall be nominated" pursuant to NRS 304.200 to 304.250.

Accordingly, it is evident from the language of the statutes themselves that NRS 304.240 was intended to provide for the nomination of candidates, and not merely to adjust time frames for a special election. If timing adjustments were all that was intended, most of the provisions of NRS 304.240(1) and the amendments to NRS 304.040 are rendered superfluous.

3. <u>The legislative history shows that NRS 304.240 was intended to create a new nomination process unique to special elections to fill vacancies in the office of Representative to Congress.</u>

NRP asserts that "the legislative history only shows a desire to have an election, rather than a gubernatorial appointment" and does not indicate intent to change the nominating process. *See* Answering Brief, p. 13, ll. 24-27. It also argues that the process in *Brown* still applies, because it asserts that before 2003, the U.S. Constitution and Nevada statutes provided the procedure to fill a vacancy. *See* Answering Brief, p. 3, fn. 3. However, both of these arguments are squarely contradicted by the legislative history.

First, as Brian Woodson, on behalf of the bill sponsor testified, no member has ever been appointed to the House of Representatives because of Art. 1, Section 2 of the U.S. Constitution, which provides: "When vacancies happen in the Representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies." *See* Minutes of the Assembly Comm. on Elections, Procedures, and Ethics (March 27, 2003) (Addendum A to Miller's Opening Brief).

This section has generally been construed to *prohibit* gubernatorial appointments. *See e.g.*, *Fox v. Paterson*, 715 F.Supp.2d 431, 434 (W.D.N.Y. 2010) (U.S. Const. Art. 1, § 2

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imposes on governor mandatory duty to issue proclamation of special election because vacancy in office of Representative could not be filled by appointment). The Reader's Digest article presented to the committee by Ms. Janine Hansen also states that the U.S. Constitution prohibits appointments, and suggests three alternatives, all of which involve amending the U.S. Constitution. *See* Exhibit Z to Minutes of the Assembly Comm. on Elections, Procedures, and Ethics (March 27, 2003). Plainly, NRS 304.200 to 304.250 was not enacted simply because the Legislature *preferred* a special election over a gubernatorial appointment. It understood that the latter is prohibited by the U.S. Constitution.

Second, Mr. Woodson testified that the original purpose of the bill was to create procedures for filling vacancies in the event of a catastrophe – but then he realized that Nevada had no procedures in place, even for ordinary vacancies. *Id.*; *see also* Opening Brief, pp. 8-9. Thus the bill was amended to apply to both situations. He urged support for the bill by stating: "While *Nevada remains one of the last states yet to provide procedures to fill a natural vacancy*, Nevada could be one of the first states to provide procedures to fill vacancies as a result of a catastrophe." *Id.* (Emphasis added.) This Court should reject the district court's determination that NRS 304.200 – 304.250 was not intended to create a new election procedure for the special election. The legislative history shows that that is exactly what it was intended to do, since at the time Nevada had no procedures at all.

Finally, contrary to NRP's arguments, there is no indication that the Legislature "knew" that major party candidates would be nominated pursuant to NRS 293.165, or that it intended that result. Nowhere in the legislative history is that statute or process mentioned. *See* Answering Brief, p. 6, n. 4. The exchange between Ms. Hansen and Alan Glover, Clerk-Recorder for Carson City, pertained to minor parties filing a list, which is consistent with the language of the fourth sentence in NRS 304.240(1), which was Section 7 of the bill as introduced. Near the beginning of Mr. Glover's testimony, Chairwoman Chris Giunchigliani clarified: "On the filing issue, that's in Section 7?" to which Mr. Glover responded, "Correct." *Id.* The Chairwoman then followed up with Ms. Hansen. *Id.* Thus the conversation clearly pertained to Section 7 of the bill, which they were presently discussing, rather than a statute in

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a different chapter, which had never been brought up. Therefore the argument that NRS 293.165 was implicitly discussed or understood to apply simply does not hold water.

Even as originally introduced, A.B. 344 prohibited holding a primary election. As NRP agrees, this is normally the way major party candidates are nominated. Therefore the need for a different type of nomination process was obvious. The bill provided these nomination procedures in NRS 304.240(1), and amended NRS 304.040 to reflect that change.

A.B. 344 was in fact intended to create a new process for the special election, including different nominating procedures. As discussed in the Opening Brief, pp. 6-10, NRS 293.165 and the reasoning of *Brown v. Georgetta* do not apply in a special election pursuant to Chapter 304, because that chapter provides the method of nominating candidates so that no vacancy in the nomination exists. The district court's holding was therefore erroneous and should be reversed.

B. The district court erred by permitting NRP to limit ballot access to one candidate it hand-picks.

The district court erred because there is no requirement in Nevada law that only one candidate from each major party may appear on the ballot. Nor is it unreasonable to treat the major and minor parties differently.

1. There is no legal requirement that only one major party candidate may appear on the special election ballot.

NRP argues that the Secretary's interpretation improperly ignores NRS 293.260, which it asserts limits the number of major party candidates that may appear on the special election ballot.[1] Answering Brief, p. 10, ll. 21-25. But NRP's reliance on this statute is misplaced, because even though it is not in the range excluded by NRS 293.175(5), none of its terms apply to special elections.

Even a cursory review of each of NRS 293.260's provisions shows that none of them are applicable to this case; they all pertain to primary or general election ballots. Thus the

[1] NRP also reiterates its assertion that the Secretary was "picking and choosing" only certain portions of Chapter 293, while ignoring others. *See* Answering Brief, p. 8. As the Secretary explained, Opening Brief, pp. 13-14, NRS 304.240 requires certain sections to be applied, in spite of NRS 293.175(5)(a). This includes, for example, NRS 293.200(2) which defines who the "appropriate filing officer" is for independent candidates.

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Secretary did not "ignore" the statute – it is simply inapplicable here.

If anything, a review of NRS 293.260 supports the Secretary's interpretation. In the event only one major party has candidates for an office and there are no minor or independent candidates, NRS 293.260(4) states that if there are more than twice the number to be elected, there must be a primary; otherwise, "the candidates must, without a primary election, be declared the nominees for the office."[2] NRS 293.260(5)(a) provides that for partisan offices, a primary is not necessary if no more than the number of candidates to be elected have filed. In that case, the candidates do not appear on the primary ballot; their names are placed only on the general election ballot. *Id.*

NRS 293.260 illustrates that Nevada law contemplates situations where candidates who have filed declarations of candidacy are nominated even in the absence of a primary election. Thus, in those situations, though there has not been a primary election, there is no vacancy *in the nomination* because someone has filed a declaration of candidacy. *See* NRS 293.260(4); (5)(a). It also allows situations where multiple candidates of the same party will run against each other in a general election. *Id.* Thus, contrary to NRP's arguments, NRS 293.260 does not stand for the proposition that there is some general rule that only one candidate from each major party may appear on the ballot.

NRP also cites *State ex rel. Cline v. Payne*, 59 Nev. 127, 86 P.2d 32 (1939). Answering Brief, p. 8, ll. 12-15. But neither does this case stand for that general proposition. At the time *Payne* was decided, Clark County was entitled to four seats in the Assembly, which were apparently elected at large. *Id.*, 86 P.2d at 32. Thirteen Democrats and one Republican filed for the four seats in the office of Member of the Assembly of Nevada. *Id.* Pursuant to Section 22 of the Primary Election Law, the predecessor statute to NRS 293.260, a primary election was held for the Democrats, and the county clerk certified only the four who received the highest number of votes to appear on the general election ballot. *Id.* The three

[2] NRS 293.260 further illustrates the point that, contrary to the district court's holding (JA 3:269-70), the word "candidate" as used in Nevada election laws does *not* imply that a person has already been nominated. *See* Opening Brief, p. 12-13. For major parties, anyone who files a declaration of *candidacy* is a "candidate," regardless of whether or not they have been nominated by the party. *See e.g.*, NRS 293.260(4); 293.260(5)(a); NRS 293.177(2)(a); NRS 294A.005(1).

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candidates who received the next highest number of votes sued, claiming that they too should appear on the general election ballot. *Id.*

The primary question in that case was whether each "position" or seat was a separate "office," and therefore whether there were any "offices" for which only one party had candidates. *Id.* If each position was a separate office, then the Republicans had a candidate for only one of those offices, and not the other three. Thus, the three candidates argued, there should be one Republican and one Democrat for one office, and six Democrats on the general election ballot for the remaining three offices. *Id.* The court rejected this argument because it disagreed that each seat was a separate "office." *Id.* at 33. The court held that since there was only one "office," both major parties had candidates for that office, so the statutory provision the Democrats relied on was inapplicable, because it only applied where only one major party had candidates for the office. *Id.* at 33-34.

Payne does not support NRP's position in this case because it relied entirely on the statutory language of Section 22 of the Primary Election Law as it existed at the time. It did not rely on any general principle that in every case no more than one major party candidate can advance to the general election. As discussed above, current NRS 293.260 is contrary to such a premise. Also, the court in *Payne* applied the statute in an ordinary election, where it clearly had application; the only question was interpreting the word "office." Here, by contrast, we have a special election without a primary, so *Payne* provides no guidance, let alone a binding rule, on who may appear on the special election ballot.

NRP appears to recognize that the plain language of NRS 304.240 provides that more than one person can be nominated. *See* Answering Brief, p. 11, ll. 3-6. However, it tries to escape this result by asserting, without any rationale or authority, that multiple nominations actually somehow create a vacancy in the nomination, and therefore NRS 293.165 applies so that only one person can be placed on the ballot. *See id.*, ll. 6-11. This is illogical. If there are multiple nominations, there cannot also be a vacancy in the nomination, so NRS 293.165 by its own terms does not apply. Second, nothing in NRS 293.165 requires that *only* the party's designated candidate may appear on the special election ballot. Thus, even assuming the

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parties may designate a candidate pursuant to NRS 293.165, it does not legally or logically follow that *only* that candidate may appear on the special election ballot.[3]

In short, the statutes and case law NRP cites does not support the proposition that there is some general rule that only one candidate from each major party may appear on the ballot. The statute it primarily relies on, NRS 293.260, shows the opposite. And in any event, even if prior statutes or case law did support NRP's position, there is no reason the Legislature cannot depart from that rule when it designs a new procedure to handle a particular type of special election where no primary election is allowed. Here, the plain language of the statute states that a major party candidate "is nominated" by filing a timely declaration of candidacy. NRS 304.240(1). Therefore, the district court erred by reaching a result that contradicts the specific statute that is on point, and is not required by any other law.

2. The Secretary's interpretation does not treat the different types of candidates unfairly, and the interpretation is not unreasonable.

The Secretary's interpretation provides consistency and predictability because it treats the candidates the same way they are treated in ordinary elections. As NRP concedes, major, minor, and independent candidates are treated differently by states across the country, including Nevada. Answering Brief, pp. 16-17, ll. 23-2.

It is the *rule*, not the exception, that major parties central committees are *not* permitted any control over who becomes the party nominees, while minor party leadership is permitted this control. *Compare* NRS 293.175(2) (requiring primary election for major parties) with 293.175(3) (requiring minor parties to file a list of candidates). The Legislature maintained this distinction in 304.240(1), and the Secretary's interpretation follows that directive.

NRP argues that, in this particular case, this is not a coherent result because it saves time for the major parties, but not for the minor parties. As discussed in the Opening Brief, pp. 14-16, states have ample reasons for treating the different types of candidates differently.

Major parties are vastly larger in membership than minor parties, and therefore in order

[3] NRP's theory that it has a *constitutional* right to exclude all other candidates has been rejected by the U.S. Supreme Court and the Ninth Circuit, as discussed in Miller's Opening Brief at 14-20, Intervenor's Opening Brief at 27-29, and infra at 12.

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for nominees to accurately reflect the values of "the party" (not just the values of leadership), and to reduce influence of special interests, "no measure short of the direct primary would be adequate." *Lightfoot v. Eu*, 964 F.2d 865, 873 (9th Cir. 1992). Minor parties, by contrast, do not have the vast membership that defines major parties. Accordingly, permitting minor party leadership control over nomination of candidates does not implicate voters' choice to even remotely the same degree. The Secretary's interpretation mirrors the language of NRS 304.240(1), which also parallels the nomination process in ordinary elections. The Legislature is free to treat minor and major parties differently, recognizing that the parties have different needs, potentials, and interests. *Jenness v. Fortson*, 403 U.S. 431, 441 (1971). Accordingly, there is nothing incoherent about the Legislature's decision to treat the major and minor parties in this special election the same way they are treated in regular elections.

NRP's argument that the decision is irrational because it does not save time for the minor parties lacks merit. The actual result of the district court's decision in this case was to extend the candidate filing period because NRP insisted that it needed more time to call a meeting to designate a candidate pursuant to NRS 293.165. So, apparently NRP is arguing that a "coherent" solution is to instead cause *more delay*. This is contrary to the clearly expressed legislative intent, which was to get candidates filed in a very short period of time.

Ms. Hansen testified that the timeframes did not pose a problem for the minor parties. She testified that ordinarily, their party selects candidates at a state convention, but that the party could hold a state convention at which it would authorize the executive committee to add people to the list. *See* Minutes (March 27, 2003). Therefore she was comfortable that it could be done in time for a special election. *See id.*

By contrast, in this case NRP argued, and the district court agreed, that it needed *at least* 45 days to pick a nominee. Also, it should be noted that the procedures in NRS 304.200 to 304.250 apply regardless of whether the special election is due to a catastrophe or not. If the district court's ruling stands, it means that in the event of a catastrophe, the major parties will designate candidates, and, according to NRP, this requires at least 45 days pursuant to the party's internal bylaws. This would make it impossible to hold an election in the event of

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the catastrophe and still comply with the federal MOVE Act. Thus the actual result in this case shows that allowing major party candidates to be nominated simply by filing is not just coherent, but necessary. Allowing the parties' internal bylaws to hijack the process does not serve either the intent of the statute or the public policy of quickly filling vacancies. It puts the election at the mercy of internal party bylaws, rather than the procedure adopted into state law by the Legislature. This is truly an absurd result.

There are valid reasons for treating major and minor parties differently, including in this special election. NRP's argument that this different treatment is not justified because it does not save time for the minor parties produces the perverse result that *more delay*, rather than less, should be the rule.

C. The Secretary's interpretation does not violate the Constitution.

The Nevada Republican Party ("NRP") argues that the Secretary's interpretation violates the U.S. Constitution because it violates the party's right to determine its nominee. *See* Answering Brief, pp. 17 – 22.

The Court should reject this argument for two reasons: first, it is based on the false premise that a party's right of association permits it to exclude all candidates it does not agree with from the ballot; and, second, even assuming its right of association is at stake, the Secretary's interpretation furthers compelling government interests that have been repeatedly upheld by the courts, even under strict scrutiny review.

1. This special election does not implicate the parties' right to nominate a candidate.

As discussed in the Opening Brief (pp. 17-18), the purpose of this Special Election is for the citizens of Congressional District 2 to elect a replacement Representative to Congress. Its purpose is *not* to choose party nominees. Therefore NRP's associational rights are not even implicated by this election. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 453 (2008).

NRP misrepresents the holding in *Jones* by asserting that it held that it is unconstitutional to "remove[] the major political parties from any role in nominating their

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candidate for the special election on September 13, 2011." *See* Answering Brief, p. 19, ll. 4-8. What *Jones* actually held is that it is unconstitutional to force parties to associate with *voters* who are *not members* by allowing those non-members to select the party's nominee. 530 U.S. at 577.

Here, by contrast, NRP is not being forced to associate with voters who are not members. Like in *Grange*, since the purpose of the election is not to pick a party standard-bearer, there is no risk that non-members will select the parties' nominees. 552 U.S. at 453-54. NRP's real complaint is that it is being forced to associate with unwanted *candidates*, since it would not be permitted to limit ballot access to the one candidate it hand-picked. This theory was rejected in *Grange*, where the Court upheld Washington's "top two primary," where the top two vote-getters in the primary advanced to the general election, regardless of party. *Id.* at 453. As the Court observed: "Whether parties nominate their own candidates outside the state-run primary is simply irrelevant." *Id.* at 453. It further remarked that it was "unexceptional" that, of the various party candidates, the parties could not designate their endorsed candidate, because: "The First Amendment does not give political parties a right to have their nominees designated as such on the ballot." *Id.* at 453, n.7 (citing *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 362-363 (1997)).

NRP's attempts to distinguish this case from *Grange* are unavailing. First, they assert that this case is different because *Grange* involved a primary election, whereas no primary is permitted in this case. *See* Answering Brief, p. 18. But this argument misses the major point of *Grange*: political parties have associational rights to pick a standard-bearer for the party; but where an election does not serve the purpose of picking such a standard-bearer, those rights are not implicated. *Id.* at 453; *see also Jones*, 530 U.S. at 585-86 (a nonpartisan blanket primary that reduces the number of candidates on the general election ballot, regardless of party, would be constitutionally permissible because it would not select party nominees). Thus it does not matter whether the election at issue is a primary election or not.

NRP argues that *Grange* is distinguishable because the law in that case uses the term "party preference designation" instead of "nominate." *See* Answering Brief, pp. 18-19. But the

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fact that NRS Chapter 304 does not use the term "party preference," as was used in *Grange*, does not change the substance of the election, and does not convert it into a nominating election. In *Grange*, the use of the term "party preference" was designed to distinguish the "top-two" primary from a "traditional" primary, the purpose of which is to choose party nominees. Here, since there is no primary of any kind, such distinctions are not necessary.[4] The one and only purpose of this election is to finally elect someone to Congress. There is no risk voters will confuse the special election with a "nominating" election. *See id.* at 454 (rejecting the argument that the party's associational rights were burdened since voters would *assume* that candidates on the general election ballot were endorsed by the parties).

Instead of a primary, NRS 304.240(1) provides a statutory nomination procedure. Just like in *Grange*, candidates are nominated by simply filing a declaration of candidacy. 552 U.S. at 447. Just like in *Grange*, all candidates appear on the ballot, and the party leadership cannot exclude those candidates it does not like. *Id.* Just like in *Grange*, Nevada's special election laws do not implicate the party's associational rights. *Id.* at 453.

2. Even assuming NRP's associational rights are implicated, compelling state interests justify allowing the voters to vote for their preferred candidate.

NRP's complaint is essentially that it will not be permitted to *exclude* Republican[5] candidates it does not like from the ballot. It argues that the Secretary has not put forward any compelling state interest that justifies preventing party leadership from limiting who can appear on the ballot. *See* Answering Brief, p. 20, ll. 9-16. Contrary to NRP's assertions, this was discussed at length in the Secretary's Opening Brief. *See* Opening Brief, pp. 15-16.

Courts have recognized that allowing the members of the party – the voters - rather than party leadership, to choose nominees reduces the power of party leadership and special

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[4] While the Secretary believes it is unnecessary, if the Court is concerned that voters might perceive any or all major party candidates as being endorsed by the party, that can be alleviated by printing a disclaimer on the ballot, as was suggested in *Grange I* and done in *Grange II*.

[5] NRP argues that "If the Nevada Supreme Court accepts the Secretary Interpretation, it would allow any individual, *whether a member of the political party or not*, to file as a nominee of a major political party..." Answering Brief, p. 16, ll. 17-18 (emphasis added). However, this is not true. Each major party candidate must sign a declaration of candidacy under penalty of perjury stating, among other things, that the person is a registered member of that party. *See* Declaration of Candidacy, available at: http://www.nvsos.gov/Modules/ShowDocument.aspx?documentid=2006 Thus the candidates must have formally affiliated with the major party by becoming a registered member before they can file.

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interests, in the hope of producing a cleaner, more democratic and more efficient government, and that these are compelling government interests that justify even "severe" burdens on the party's associational rights. *Alaskan Independence Party v. Alaska*, 545 F.3d 1173, 1177 (9th Cir. 2008); *Lightfoot v. Eu*, 964 F.2d 865, 873 (9th Cir. 1992); *see also American Party of Texas v. White*, 415 U.S. 767, 781 (1974).

Therefore the Ninth Circuit has rejected the argument that a party's associational rights are violated when a party candidate is permitted to appear on the ballot, against the wishes of the party's leadership. *Alaskan Independence Party v. Alaska*, 545 F.3d 1173, 1179-80 (9th Cir. 2008). In that case, "The [parties] would prefer to present primary voters with a limited set of pre-approved candidates, whereas Alaska law permits any registered affiliate of the party to run in the primary." *Id.* at 1179.

Since, unlike *Grange*, Alaska's primary was for the purpose of picking party nominees, the court felt that the law allowing any registered member of the party to run did put some burden on the party's associational right to formulate a nomination procedure that it deemed best. *Id.* It doubted that this imposed a "severe" burden on the parties' rights, but found it unnecessary to resolve that question, since the law furthered compelling state interests. *Id.* at 1180. It stated: "We have long recognized that a state's interest in eliminating the fraud and corruption that frequently accompanied party-run nominating conventions is compelling." *Id.* Therefore it found Alaska's law to be constitutional, even though it assumed strict scrutiny applied. *Id.*

Since there is no primary election, the *only* chance voters will have to influence who will become their Representative is by voting at the special election. If party leadership is permitted to limit who can appear on the special election ballot, voters are cut out of the process from the very start, and will not have any real opportunity to elect the candidate of their choice. On the other hand, the court in *Lightfoot* could "imagine no government interest more compelling" than enhancing the democratic nature of the election process by "mak[ing] government accessible to the superior disinterestedness and honesty of the average citizen." 964 F.2d at 872-73. Accordingly, the Secretary's interpretation does not violate the

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associational rights of the major parties. This Court should therefore reverse the district court and reinstate the Secretary's interpretation.

D. **The Court should reinstate the Secretary's interpretation.**

Even in purely legal matters, agency interpretations of their statutes are persuasive. *Bacher v. State Engineer*, 122 Nev. 1110, 1117, 146 P.3d 793 (2006). Therefore a court should uphold an agency's interpretation of a statute, so long as that interpretation is reasonable and does not conflict with legislative intent. *SIIS v. Snyder,* 109 Nev. 1223, 1228, 865 P.2d 1168, 1171 (1993). Additionally, in this case, the Secretary, as the State's Chief Elections Officer, has been given specific authority by the Legislature to interpret statutes in order to efficiently administer elections. NRS 293.247(4).

If this Court finds that NRS 304.240(1) is ambiguous, it should give the Secretary's interpretation deference and uphold that interpretation. The U.S. Supreme Court counseled that, given ambiguous statutes, courts should respect the judgment of the agency, "even if the issue with nearly equal reason [might] be resolved one way rather than another." *Holly Farms Corp. v. N.L.R.B.,* 517 U.S. 392, 399 (1996) (internal quotations and citations omitted).

The Secretary's interpretation follows the language of NRS 304.240(1) almost verbatim, whereas the district court's ruling renders most of NRS 304.240(1) meaningless. It also carries out the legislative intent and purpose of NRS 304.240, which was to have people file for office quickly, and replace the usual primary election with a statutory nomination process. Finally, it does not raise any constitutional problems. For these reasons, this Court should uphold the Secretary's interpretation.

CONCLUSION

For the foregoing reasons, Appellant Secretary of State Ross Miller respectfully requests this Court to REVERSE the district court's decision.

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DATED this 13th day of June 2011.

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CERTIFICATE OF SERVICE

I declare that I am an employee of the State of Nevada and on this 13th day of June, 2011, I served a copy of the foregoing APPELLANT'S REPLY BRIEF, by Nevada Supreme Court CM/ECF Electronic filing to:

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