BRADLEY S. SCHRAGER (NV Bar No. 10217)
DANIEL BRAVO (NV Bar No. 13078)
BRAVO SCHRAGER LLP
6675 South Tenaya Way, Suite 200
Las Vegas, NV 89113
(702) 996-1724
bradley@bravoschrager.com
daniel@bravoschrager.com

DAVID R. FOX (NV Bar No. 16536)
ELIAS LAW GROUP LLP
50 Massachusetts Ave NW, Suite 400
Washington, DC 20001
Tel: (202) 968-4490
dfox@elias.law

Attorneys for Intervenor-Respondents Rise, Institute for a Progressive Nevada, and the Nevada Alliance for Retired Americans

FIRST JUDICIAL DISTRICT COURT
IN AND FOR CARSON CITY, STATE OF NEVADA

CITIZEN OUTREACH FOUNDATION, CHARLES MUTH, individually,

Petitioners,

v.

SCOTT HOEN, in his official capacity as the Carson City Clerk, and JIM HINDLE, in his official capacity as the Storey County Clerk,

Respondents,

and

FRANCISCO V. AGUILAR, in his official capacity as Nevada Secretary of State,

Intervenor-Respondent,

and

RISE, INSTITUTE FOR A PROGRESSIVE NEVADA, and the NEVADA ALLIANCE FOR RETIRED AMERICANS,

Intervenor-Respondents.

Case No.: 20EW000201B
Dept. No.: 1

INTERVENOR-RESPONDENTS' OPPOSITION TO PRELIMINARY INJUNCTION MOTION

Petitioners ask the Court to order the processing of hundreds of facially inadequate voter challenges in Carson City and Storey County in the middle of the 2024 general election. And because it is already too late for the statutory challenge process to have any effect on the 2024 election, Petitioners further demand, in the last paragraph of their brief, that the Court impose an extraordinary segregation and cure process found nowhere in Nevada law that would require challenged voters to jump through additional, extra-legal hoops for their ballots to be counted.

There is no legal basis for any of this. Respondents properly rejected Petitioners' challenges because they are not based on personal knowledge that the challenged voters moved and established residence outside the county, as NRS 293.535(1) requires, but are instead based only on Petitioners' review of third-party databases. Federal law would preclude the processing of Petitioners' challenges in any event, because the tens of thousands of database-based challenges Petitioners have filed across the state are a program "to systematically remove the names of ineligible voters from the official lists," which federal law requires to have ended "not later than 90 days prior to" election day—in early August. 52 U.S.C. § 20507(c)(2)(A). Petitioners also fail to show irreparable harm absent relief, and the equities weigh strongly against the heavy-handed, eleventh-hour intervention in Nevada's election administration that Petitioners demand.

The motion should be denied.

BACKGROUND

I. Statutory Background

Maintenance of Nevada's voter rolls is primarily the responsibility of county officials, who "*may* use any reliable and reasonable means available" to correct the portions of the statewide registered voter list relevant to them, subject to procedural and substantive safeguards. NRS 293.530(1)(a) (emphasis added). Third parties like Petitioners may participate in that process only by filing voter challenges under either of two challenge statutes, NRS 293.535 and .547, both of which allow only challenges based on the challenger's "personal knowledge." This case involves challenges under NRS 293.535, which allows "any elector or other reliable person" to challenge a voter by swearing to facts based on personal knowledge showing that a voter is not a U.S. citizen or has moved outside the county where he or she is registered to vote and established residence

elsewhere. NRS 293.535(1). When a valid NRS 293.535 challenge is filed based on residency, the clerk must mail a written notice to the voter, and, if the voter does not return the mailed postcard within 30 days, mark the voter as inactive. NRS 293.530(1)(c), (g). Inactive voters do not automatically receive mail ballots, NRS 293.269911(1), and they will be fully removed if they do not vote or take certain other actions in the next two general election cycles. NRS 293.530(1)(c).

Several of these limitations on the voter challenge process reflect protections imposed by the National Voter Registration Act of 1993 ("NVRA"). The NVRA prevents states from removing voters from the rolls due to a change of residence unless they first fail to respond to a mailed notice and then fail to vote in two federal election cycles. 52 U.S.C. § 20507(d)(1)(B), (d)(2)(A). The NVRA also requires states to complete "any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters" no "later than 90 days prior to the date of a primary or general election for Federal office." *Id.* § 20507(c)(2)(A). Federal law therefore prohibits all such removal programs until after the November 2024 election.

II. Petitioners' Attempts to Remove Nevada Voters from the Rolls

This lawsuit represents the latest twist in Petitioners' years-long effort, which they call the "Pigpen Project," to remove Nevada voters from the voter rolls based on Petitioners' review of various third-party and government databases.[1] Petitioners' effort is flawed to its core because Nevada law makes list maintenance the responsibility of county officials, not third-party groups, and provides only narrow avenues—the two challenge statutes, NRS 293.535 and .547—for third parties to contribute to those efforts. Petitioners therefore sought to package their systematic review of databases into individual voter challenges, and on July 29, 2024, they filed almost 4,000 challenges under NRS 293.535 across the state,[2] including 480 in Carson City and 44 in Storey County. Pet. ¶¶ 1, 30–32. On August 27, 2024, the Secretary of State advised county clerks in Memo 2024-026 that voter challenges must be based on "firsthand knowledge through experience

[1] *See generally* Chuck Muth, *Follow-Up: My Conversation with NV SOS Aguilar*, PigPenProject.com (Aug. 29, 2024), https://pigpenproject.com/blog/follow-up-my-conversation-with-nv-sos-aguilar/.

[2] *See id.*

or observation" and that challenges based on "review of data from databases or compilations of information" were not based on "personal knowledge" and therefore invalid. *Id*., Ex. 1, at 1, 3 (quoting NAC 293.416(3)). Counties across the state accordingly rejected Petitioners' challenges. Petitioners brought three mandamus actions—in this Court and in Clark and Washoe Counties—to compel counties to process their challenges, which now number more than 30,000 in all.[3] Now, nearly a month after the Secretary's memo was issued and just weeks before the 2024 general election, Petitioners ask the Court to enter extraordinary preliminary injunctive relief requiring county clerks not just to process their challenges, but to segregate the ballots of challenged voters, without any basis in Nevada law.

STANDARD OF LAW

"A party seeking a preliminary injunction must show a likelihood of success on the merits of their case and that they will suffer irreparable harm without preliminary relief." *Shores v. Global Experience Specialists, Inc.*, 134 Nev. 503, 505, 422 P.3d 1238, 1241 (2018). The moving party "must make a prima facie showing through substantial evidence that it is entitled to the preliminary relief requested." *Id*. at 507, 422 P.3d at 1242. "[C]ourts also weigh the potential hardships to the relative parties and others, and the public interest." *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans 5 for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004) (per curiam).

ARGUMENT

I. Petitioners are unlikely to succeed on the merits.

A. The challenges are facially inadequate because Petitioners lack the necessary personal knowledge.

Respondents properly rejected Petitioners' challenges because they facially do not satisfy the "personal knowledge" requirement of NRS 293.535(1). Challenges under NRS 293.535 must be based on an affidavit stating that the challenged voter has moved outside the county with the

[3] Megan Barth, *Election Integrity Foundation Accuses NV SOS of Impeding and Discouraging Voter Roll Challenges*, NEVADA GLOBE (Sept. 13, 2024), https://thenevadaglobe.com/articles/election-integrity-foundation-accuses-nv-sos-of-impeding-and-discouraging-voter-roll-challenges/.

intention of remaining there, abandoning their prior residence, and establishing a new one elsewhere. NRS 293.535(1)(b). And those required facts—"the facts set forth in the affidavit"—must be based on the challenger's "personal knowledge." *Id.* [4]

Petitioners' challenges do not meet the personal knowledge standard. "Personal knowledge" means "[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said." *Knowledge*, BLACK'S LAW DICTIONARY (12th ed. 2024). The challenges themselves make clear that Mr. Muth has no "firsthand observation or experience" of whether the voters he challenged have moved, much less of their intentions to abandon their prior residence and establish a new one, as NRS 293.535(1)(b) requires. To the contrary, all of the factual assertions in the challenges are made "[a]ccording to the National Change of Address (NCOA) database maintained by the United States Postal Service (USPS)." Muth Decl., Ex. 5, at 1; *see also id.*, Ex. 5, at 2 (providing "[t]he new address of the challenged voter, *per NCOA*" and stating that the "*change-of-address form* the individual completed indicates their move is 'permanent,' not 'temporary'" (emphasis added)). That is not personal knowledge of the facts required by statute—it is secondhand knowledge obtained from a postal service database.

Courts have consistently held that individuals may not acquire "personal knowledge" merely by reviewing a publicly available database compiled by some unaffiliated third party. *See Commonwealth v. Trotto*, 487 Mass. 708, 732, 169 N.E.3d 883, 906 (2021) (research analyst's testimony about contents of database was inadmissible hearsay because she lacked "personal knowledge of how the databases that she consulted were created and maintained"); *Mackey v. State*, 333 So. 3d 775, 779 (Fla. App. 2022) (same); *People v. Veamatahau*, 9 Cal. 5th 16, 24, 459 P.3d 10, 14–15 (2020) (information obtained from database was not based on personal knowledge); *Cooper v. Southern Co.*, 213 F.R.D. 683, 687–88 (N.D. Ga. 2003) (plaintiffs' fact witness did not have "personal knowledge" based on reviewing data from defendant's human

[4] Moreover, electors or other reliable persons must file an "affidavit" to bring a challenge under NRS 293.535. The challenges that Petitioners filed are not affidavits, as they are not notarized and do not contain a jurat.

resources database produced in discovery); *People v. Guy*, 2017 IL App (1st) 143690-U, ¶ 22, 2017 WL 2257413, at *4 (Ill. App. May 18, 2017) (unpublished) (witness's testimony that car was reported stolen according to national database was inadmissible because the witness "did not testify that he had any personal knowledge of how NICB compiles and maintains its database").

It is a different matter when a witness's knowledge is based on business records that the witness is responsible for compiling or maintaining, as in the cases Petitioners cite. Mot. for Prelim. Inj. at 9 ("Mot."); *see Kroll v. Incline Village Gen. Improvement Dist.*, 130 Nev. 1206 (Table), 2014 WL 5840049 (Nev. Nov. 10, 2014) (unpublished) (affiants had "personal knowledge" based on their review of their employer's business records); *Wash. Cent. R.R. Co., Inc. v. Nat'l Mediation Bd.*, 830 F. Supp. 1343, 1352 (E.D. Wash. 1993) (declarant was "the official custodian of the Board's files and records"); *Vote v. United States*, 753 F. Supp. 866, 868 (D. Nev. 1990) (Internal Revenue Officer had "personal knowledge" "based upon her review of the IRS computer-generated files"). Petitioners are not responsible for the creation or maintenance of the NCOA records on which their challenges are based—they are mere licensees of the data. Their review of that data gives them only secondhand knowledge, not personal knowledge.

The legislative history only confirms this conclusion. As Secretary Aguilar observed in his memo to county clerks, the legislative history of this amendment to NRS 293.547 shows that the "personal knowledge" requirement was specifically added to preclude mass voter challenges just like this one. *See* Muth Decl., Ex. 1, at 2. And while a specific prohibition on using DMV records—not NCOA records—was added at one point to a draft bill and then deleted, nothing in the legislative history suggests that it was deleted for the purpose of authorizing mass challenges based on third-party records. Far more likely it was deleted as unnecessary, given the personal knowledge requirement, and to avoid any negative inference that because DMV records-based challenges were prohibited, challenges based on other records were allowed.

B. The relief that Petitioners seek would violate the NVRA.

Petitioners are also unlikely to succeed on the merits of their claim because the relief they seek—initiating the process to place hundreds of challenged voters on the "inactive" voter list in Carson City and Storey County—would be an unlawful systematic removal of voters within 90

days of a federal election in violation of the NVRA. *See* 52 U.S.C. § 20507(c)(2)(A) ("A state shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters."). The Petition was filed on September 20, 2024—just 46 days before the November 5 general election. The NVRA blackout period plainly applies to the systematic removal of hundreds of voters from the rolls that Petitioners seek here. *See Forward v. Ben Hill Cnty. Bd. of Elections*, 509 F. Supp. 3d 1348, 1355 (N.D. Ga. 2020) ("Here, the challenge to thousands of voters less than a month prior to the Runoff Elections [based on NCOA data] . . . appears to be the type of 'systematic' removal prohibited by the NVRA.").

While the NVRA "would not bar a state from investigating potential non-citizens and removing them on the basis of individualized information, even within the 90-day window," that is not what Petitioners seek. *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1348 (11th Cir. 2014). An "individualized" removal program is one in which a state determines eligibility to vote with "individualized information or investigation" rather than cancelling batches of registrations based on a "mass computerized data-matching process." *Id.* at 1344. That distinction matters: "individualized removals are safe to conduct at any time because this type of removal is usually based on individual correspondence or rigorous individualized inquiry, leading to a smaller chance for mistakes." *Id*. at 1346. "For programs that systematically remove voters, however, Congress decided to be more cautious" because "[e]ligible voters removed days or weeks before Election Day will likely not be able to correct the State's errors in time to vote." *Id*. Here, Petitioners seek to remove voters from the rolls en masse based on their own systematic review of a third-party database, without any investigation or "rigorous individualized inquiry." *Id.*

Petitioners cannot avoid the 90-day blackout period by arguing that the relief they seek would not amount to systematic removal "by the state." Mot. at 11. The fact that a private citizen, and not a public official, has conducted the review of the NCOA does not make the removal program any less "systematic." *See Arcia*, 772 F.3d at 1344 ("[T]he phrase 'any program' suggests that the 90 Day Provision has a broad meaning."). Were it otherwise, states could circumvent the NVRA simply by deputizing private citizens to undertake their systematic reviews for them. And,

of course, only "the state" may act on Petitioners' challenges by sending required notices and placing voters on inactive status.

Nor does it matter that the immediate result of Petitioners' challenge will be to place voters on inactive status, rather than remove them from the rolls altogether. Mot. at 11. That is *always* true of removals due to change of address. The NVRA forbids removal of a voter for that reason unless the voter has (a) confirmed the change in writing or (b) failed to respond to the required notice and does not vote in the two following general elections. 52 U.S.C. § 20507(d)(1). And such removals are not included in the enumerated exceptions to the blackout period. *Id.* § 20507(c)(2)(B). Moreover, the blackout period applies to "any program *the purpose of which* is to systematically remove the names of ineligible voters from the official lists of eligible voters." *Id.* § 20507(c)(2)(A) (emphasis added). The intermediate step of placing voters on inactive status does not change the fact that the ultimate purpose of Petitioners' systematic challenges is to remove the names of voters from the rolls. *See* Pet. ¶ 45 (complaining that, absent court intervention, "[t]he invalid registrant will not be removed, in some cases, until after the 2028 general election").

C. The relief that Petitioners seek is barred by laches.

Petitioners' eleventh-hour claims are also barred by the equitable doctrine of laches, "which may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable." *Miller v. Burk*, 124 Nev. 579, 598, 188 P.3d 1112, 1125 (2008) quoting *Carson City v. Price*, 113 Nev. 409, 412, 934 P.2d 1042, 1043 (1997)). Courts consider three factors: "(1) whether the party inexcusably delayed bringing the challenge, (2) whether the party's inexcusable delay constitutes acquiescence to the condition the party is challenging, and (3) whether the inexcusable delay was prejudicial to others." *Id.*

Petitioners first submitted their challenges to the Carson City Clerk in July 2024. Muth Decl. ¶ 1. There is no indication that the Carson City Clerk responded or otherwise acted upon those challenges, or that Petitioners took any action to follow up. On August 27, Secretary Aguilar issued the memorandum reminding county officials that personal knowledge is required to bring a

challenge under NRS 293.535 and NRS 293.547. Petitioners knew about this guidance at least by August 28, when Mr. Muth posted a blog post about Secretary Aguilar's memo, and certainly by September 8, when Mr. Muth sent an "open letter" responding to Secretary Aguilar's memo. *Id.* ¶ 2–4; *id.*, Ex. 2, at 1. Yet Petitioners then waited another two weeks until September 20 to bring suit, and another six days after that to file their Motion for Preliminary Injunction on September 26. In the lead up to election day, every week counts, and Petitioners' substantial delay before bringing this case and demanding immediate relief is inexcusable.

Petitioners' late-stage suit prejudices Respondents, Intervenor-Respondents, and Nevada voters in the middle of an ongoing election. Election officials have already mailed out some ballots and are preparing to mail out ballots to every registered Nevada voter who has not opted out in just weeks. The relief that Petitioners seek would burden election officials, threaten chaos, and confuse and disenfranchise Nevada voters. Petitioners themselves seem to understand that their Petition was simply filed too late. They unrealistically seek an order from this Court directing the Carson City Clerk to mail challenge notices to voters by October 1. That date has now passed. And their alternative relief—mailing notices by November 1, just days before the November 5 general election, is likely to confuse voters and deter them from voting. Having sat on their hands for nearly a month after becoming aware of the Secretary's guidance, Petitioners cannot now demand that the Court, the County Clerk, and the challenged voters bear the costs of their inaction.

II. Petitioners will not suffer irreparable harm absent an injunction, and the balance of hardships and the public interest weigh against a preliminary injunction.

Petitioners have not articulated *any* harm they would suffer from challenged registrants remaining on the voter rolls, much less *irreparable* harm. Petitioners first contend that irreparable harm has already occurred because it is now too late to prevent challenged voters from receiving mail ballots. Mot. at 11. That concession dooms their motion because a preliminary injunction cannot prevent harm that has already occurred. But in any event, Petitioners do not explain how this harms *them*. If ballots are sent to voters who have moved out of state, those ballots simply will not be returned. Petitioners seem to fear—without actually alleging—that some other voter may fill out that ballot and submit it, thus compromising "the integrity of the election ." *Id.* at 13. But

Petitioners have submitted *no* evidence to show that this speculative possibility is likely to occur. *See Shores*, 134 Nev. at 507, 422 P.3d at 1242 (the moving party "must make a prima facie showing through substantial evidence that it is entitled to the preliminary relief requested"). Petitioners also seek to have election officials process challenges now so that voters who may have moved can be removed sooner—that is, after the 2026 general election—rather than later. *See* Mot. at 12. Again, for the same reasons, Petitioners fail to explain how voters remaining on the rolls for another election cycle causes them irreparable harm.

While Petitioners will suffer no harm in the absence of a preliminary injunction, granting an injunction would harm Respondents—who would be forced to spend their critical and extremely limited time in the middle of an ongoing election processing Petitioners' challenges and inevitably fielding questions from voters confused about the notice they've received—as well as Nevada voters themselves (including Intervenors' members and constituents), and the public interest. If the Court grants the motion, hundreds of voters in Carson City and Storey County will receive alarming communications concerning their eligibility to vote just days before election day. Petitioners contend that challenged voters will suffer "minimal" hardship because they can simply respond to the notice or vote in an election, *id.* at 12, but as Intervenors explained in their Motion to Intervene, many voters, including retired voters and students who may not always immediately receive notices sent to their primary address, will not be able to respond in time. Rise Mot. to Intervene at 4–5.[5]

The public interest is "best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful" and "favors permitting as many qualified voters to vote as possible." *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012); *see also Election Integrity Project of Nevada, LLC v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 136 Nev. 804,

[5] The "minimal" hardship that Petitioners claim challenged voters will face is further contradicted by their request that the Court order challenged voters' ballots to be segregated until "Respondents can confirm the challenged registrant is eligible to vote," Mot. at 13, a request that—as explained below—has no basis in law. Petitioners do not elaborate on this confirmation process, but at this late date, any such new process is only likely to intimidate, confuse, and disenfranchise eligible voters.

473 P.3d 1021 (Table), 2020 WL 5951543, at *1 (2020) (unpublished) ("By definition, [t]he public interest ... favors permitting as many qualified voters to vote as possible." (alterations in original) (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014))); *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (recognizing that the public has a "strong interest in exercising the 'fundamental political right to vote'" that is threatened by last-minute court-ordered changes to election procedures (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)). The balance of hardships thus tips in favor of rejecting Petitioners' last minute demand that the Court compel county clerks to process challenges, segregate ballots, and remove voters from the rolls.

III. Petitioners are not entitled to their requested remedy.

Finally, in the very last paragraph of their motion, Petitioners seek an extraordinary remedy beyond the mere processing of their challenges—the segregation of the ballots of the challenged registrants pending some barely described confirmation and cure process. Petitioners cite no statutory basis for seeking this remedy and there is none. NRS 293.535 provides no such process—it provides only for notice to challenged voters, followed 30 days later (in the absence of a response) by inactive status for two general election cycles, during which time that voter *can still vote*, and become active again by doing so. NRS 293.530(1)(c)(4), (g).

There is thus absolutely no legal basis for Petitioners' demand that the ballots of challenged voters be segregated or that such voters be required to provide additional proof of residence—Petitioners have entirely invented it. And while Petitioners are correct that if their challenges are processed now, it will come too late to prevent the challenged voters from automatically receiving mail ballots for the general election, that fact is the direct consequence of Petitioners' own choice to delay for weeks before filing suit. The Court cannot save Petitioners from the consequences of their own delay by depriving hundreds of Nevada voters of the protections to which they are entitled under Nevada law and instead subjecting them to a burdensome cure process that Petitioners have simply made up.

CONCLUSION

The Court should deny Petitioners' request for a preliminary injunction.

AFFIRMATION

Pursuant to NRS 239B.030 and 603A.040, the undersigned does hereby affirm that this document does not contain the personal information of any person.

DATED this 7th day of October, 2024.

By: _____

David R. Fox (NV Bar No. 16536)
ELIAS LAW GROUP LLP
250 Massachusetts Ave NW, Suite 400
Washington, DC 20001

Bradley S. Schrager (NV Bar No. 13078)
Daniel Bravo (NV Bar No. 10217)
BRAVO SCHRAGER LLP
6675 South Tenaya Way, Suite 200
Las Vegas, NV 89113

Attorneys for Intervenor-Respondents Rise, Institute for a Progressive Nevada, and the Nevada Alliance for Retired Americans