

1 MARC E. ELIAS, ESQ. (D.C. Bar No. 442007)*
JOHN M. DEVANEY (D.C. Bar No. 375465)*

2 **PERKINS COIE LLP**
700 Thirteenth St. NW, Suite 800
3 Washington, D.C. 20005-3960
Tel: (202) 654-6200
4 melias@perkinscoie.com
jdevaney@perkinscoie.com

5 ABHA KHANNA, ESQ. (Wash. Bar No. 42612)*

6 **PERKINS COIE LLP**
1201 Third Avenue, Suite 4900
7 Seattle, Washington 98101-3099
Tel: (206) 359-8000
8 akhanna@perkinscoie.com

9 BRADLEY SCHRAGER, ESQ. (SBN 10217)
DANIEL BRAVO, ESQ. (SBN 13078)

10 **WOLF, RIFKIN, SHAPIRO,**
SCHULMAN & RABKIN, LLP
11 3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
12 Tel: (702) 341-5200
bschrager@wrslawyers.com
13 dbravo@wrslawyers.com

14 *Attorneys for Intervenor-Defendants Nevada*
State Democratic Party and Democratic
15 *National Committee*

16 **Pro hac vice to be submitted*

17
18 **UNITED STATES DISTRICT COURT**
DISTRICT OF NEVADA

19 JILL STOKKE, an individual, CHRIS
20 PRUDHOME, an individual, MARCHANT
FOR CONGRESS, RODIMER FOR
21 CONGRESS,

22 Plaintiffs,

23 vs.

24 SECRETARY OF STATE BARBARA
CEGAVSKE, in her official capacity, and
25 CLARK COUNTY REGISTRAR OF
VOTERS JOSEPH P. GLORIA, in his
26 official capacity,

27 Defendants,
28

Case No.: 2:20-cv-02046-APG-DJA

**PROPOSED INTERVENOR-
DEFENDANTS' OPPOSITION TO
PLAINTIFFS' EMERGENCY
MOTION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

1 and

2 NEVADA STATE DEMOCRATIC PARTY
3 and DEMOCRATIC NATIONAL
4 COMMITTEE,

5 Proposed
6 Intervenor-
7 Defendants.

8 This lawsuit is nothing more than a desperate attempt by Plaintiffs’ counsel to make an
9 end-run around the loss they suffered in Nevada state court just a few days ago on nearly
10 identical claims. Though the Plaintiffs here might be new, their causes of action are a nearly
11 identical to the petition for mandamus in *Kraus v. Cegavske*, No. 20 OC 00142 1B (Nev. Dist.
12 Ct. Oct. 23, 2020) (attached as Ex. 1). In *Kraus*, Judge James E. Wilson, Jr. of the First Judicial
13 District in Carson City found that Clark County’s use of the Agilis machine to sort and process
14 the historic number of mail ballots Clark County received was not only permissible, but the *only*
15 *way* the County would be able to process all ballots before the statewide canvass deadline on
16 November 15. *See Kraus v. Cegavske*, No. 20 OC 00142 1B, slip op. at 4 (Nev. Dist. Ct. Nov. 2,
17 2020) (attached as Ex. 2). Additionally, Judge Wilson held—after hearing testimony from seven
18 poll observers affiliated with President Trump’s reelection campaign—that Plaintiffs’ counsel
19 had “failed to prove Registrar Gloria has interfered with any right they or anyone else has as an
20 observer.” *Id.* at 11. Their claims here—supported by just two boilerplate declarations—fare no
21 better. For a variety of jurisdictional reasons, this Court should dismiss the lawsuit before even
22 reaching the merits. And at any rate, Plaintiffs’ claims both fail as a matter of law and are wholly
23 unsupported by compelling evidence. The law, facts, and equities all militate against the relief
24 Plaintiffs seek, and their motion for a temporary restraining order or preliminary injunction
25 should be denied.

26 **BACKGROUND**

27 In a special session this past summer, the Nevada Legislature enacted Assembly Bill 4
28

1 (“AB 4”), creating a category of “affected elections” during emergency periods for which the
2 State would mail ballots to voters, just as it did for the June 2020 primary. Those rules apply to
3 this election.

4 Plaintiffs’ complaint and motion touch on two areas of AB 4 and Nevada’s other election
5 laws: the processing and counting of mail ballots and the public’s right to observe that
6 processing and counting.

7 **I. Mail Ballots**

8 When a ballot is received by the county clerk, the counting board is required to check the
9 signature on the ballot return envelope against the signature in the registration records. NRS
10 293.8874(1)(a) (“The clerk or employee shall check the signature used for the mail ballot against
11 all signatures of the voter available in the records of the clerk.”). The statute does not require that
12 a manual or electronic process be used, specifying only that a ballot cannot be flagged for
13 rejection unless “at least two employees in the office of the clerk believe there is a reasonable
14 question of fact as to whether the signature used for the mail ballot matches the signature of the
15 voter.” NRS 293.8874(1)(b). AB 4 specifically allows the clerk to “establish procedures for the
16 processing and counting of mail ballots.” NRS 293.8871(1). Those procedures “[m]ay authorize
17 mail ballots to be processed and counted by electronic means.” NRS 293.8871(2)(a).

18 Once a ballot is accepted by the county clerk’s office, it is securely transferred to the
19 counting board. NRS 293.8874(3). The counting board then verifies the name on the return
20 envelope and the serial numbers on the return envelope and ballot. NRS 293.8884(2). After this
21 is completed, the ballot “must be counted.” *Id.*

22 Clark County is required to complete this process by November 12, 2020. *See* NRS
23 293.8881(1). Because Nevada allows ballots to be counted if they are postmarked on election
24 day and received by November 10, *see* NRS 293.317(b)(2), and also allows voters to cure an
25 issue with the signature on their ballots until November 12, *see* NRS 293.8874(4), Clark County
26 will be receiving ballots that it has to process and count throughout this period. This deadline is
27 followed in short succession by a number of interconnected deadlines that move the State
28

1 towards a final resolution of the election. The county is required to complete its canvass by
2 November 16. *See* NRS 293.387(1). This deadline triggers the window for recounts, which must
3 be requested by November 19, *see* NRS 293.403(1), and must conclude by November 29, *see*
4 NRS 293.405(3). On November 24, the Nevada Supreme Court canvasses the vote. *See* NRS
5 293.395(2). And the State’s election results must be certified by December 1, 2020. *See* NRS
6 293.395.

7 **II. Public Access to Handling, Processing, and Counting of Ballots**

8 The election laws provide very specific details about when and how the public must be
9 allowed to observe this counting process. For mail ballots, AB 4 states that once the counting
10 board begins counting ballots, “[t]he counting procedure must be public.” NRS 293.8881(1).
11 Neither AB 4 nor any other part of the Nevada Revised Statutes grants the public additional
12 rights to observe or access the processing of mail ballots by the county clerk.

13 For in-person voting, on the other hand, Nevada’s laws and regulations create a number
14 of qualified rights for members of the public to observe the process. For example, members of
15 the general public may observe voting at polling places from a designated area in the polling
16 location that “allow[s] for meaningful observation.” NAC 293.245(6). Members of the public
17 may also “observe the handling of the ballots” after the close of polls at polling locations so long
18 as the “do not interfere.” NRS 293B.330(4). Candidate representatives and members of the press
19 are permitted to observe the testing of voting machines used at polling places. NRS 293B.330(2).
20 And the code lays out a litany of other opportunities for members of the public to observe the
21 handling and processing of ballots from polling places. *E.g.*, NRS 293B.335(3) (members of the
22 public can observe delivery of ballots from polling places); NRS 293B.380(2)(a) (the ballot
23 processing board must allow public observation).

24 **LEGAL STANDARD**

25 “Injunctive relief, whether temporary or permanent, is an ‘extraordinary remedy, never
26 awarded as of right.’” *Welch v. Weise*, No. 2:19-cv-01243-APG-NJK, 2020 WL 3621246, at *1
27 (D. Nev. July 2, 2020) (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008)). “The
28

1 analysis for a temporary restraining order is ‘substantially identical’ to that of a preliminary
2 injunction,” and requires the movant to “establish four elements: ‘(1) a likelihood of success on
3 the merits, (2) that the plaintiff will likely suffer irreparable harm in the absence of preliminary
4 relief, (3) that the balance of equities tips in its favor, and (4) that the public interest favors an
5 injunction.’” *Rodriguez v. NaphCare, Inc.*, No. 2:17-cv-02344-RFB-DJA, 2020 WL 2748307, at
6 *2 (D. Nev. May 27, 2020) (first quoting *Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*, 240
7 F.3d 832, 839 n.7 (9th Cir. 2001); and then quoting *Wells Fargo & Co. v. ABD Ins. & Fin.*
8 *Servs., Inc.*, 758 F.3d 1069, 1071 (9th Cir. 2014)). Injunctive relief can be denied if a plaintiff
9 fails to state a claim on which relief can be granted, *see Villagrana v. Recontrust Co., N.A.*, No.
10 3:11-cv-00652-ECR-WGC, 2012 WL 1890236, at *7 (D. Nev. May 22, 2012), or establish
11 standing. *See Vazquez v. Bank of Am. Home Loans*, No. 2:10-CV-00116-PMP-RJJ, 2010 WL
12 3385347, at *1 (D. Nev. Aug. 23, 2010).

13 ARGUMENT

14 I. This lawsuit is improper.

15 As a threshold matter, this action is fundamentally improper. Plaintiffs’ counsel in this
16 case brought a lawsuit involving nearly identical claims in Nevada state court and failed to
17 prevail on a single count at the district court level. *See Exs. 1–2*. They then appealed to the
18 Nevada Supreme Court on the same day and asked for a stay, which was unanimously denied by
19 all seven justices within a matter of hours. *See Ex. 3*. That case is still pending. In fact, Plaintiffs’
20 counsel yesterday requested, and was granted, a one-week extension to their proposed
21 emergency briefing schedule. *See Ex. 4*. The instant case involves interpretation and application
22 of Nevada’s vote counting and observation laws. When state law “appears to furnish easy and
23 ample means for determining” a case’s resolution, a federal court should “stay its hand” until
24 resolution of such claims in parallel state court proceedings. *R.R. Comm’n v. Pullman Co.*, 312
25 U.S. 496, 501 (1941). This Court should therefore abstain from deciding Plaintiffs’ claims until
26 the Nevada Supreme Court has had its opportunity to rule, just as Plaintiffs’ counsel here
27 requested it to do only a few days ago.

1 **II. Plaintiffs cannot succeed on the merits of their claims.**

2 Plaintiffs' claims are premised on a misunderstanding of the law and a
3 mischaracterization of the facts. They cannot succeed on the merits of their claims.

4 **A. Plaintiffs lack standing.**

5 Plaintiffs bear the burden of establishing federal subject matter jurisdiction by a
6 preponderance of the evidence. *See United States ex rel. Solis v. Millennium Pharms., Inc.*, 885
7 F.3d 623, 625 (9th Cir. 2018). “[T]he irreducible constitutional minimum of standing contains
8 three elements.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). “The plaintiff must have
9 (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the
10 defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v.*
11 *Robins*, 136 S. Ct. 1540, 1547 (2016). Even at the pleading stage, the plaintiff must “clearly . . .
12 allege facts demonstrating” each element. *Id.* (alteration in original) (quoting *Warth v. Seldin*,
13 422 U.S. 490, 518 (1975)).

14 Plaintiffs lack standing to assert their equal protection challenge that “voters in Clark
15 County, including Plaintiff Stokke, are at unequal risk of having their legal votes diluted by votes
16 with mismatch signatures.” Compl. ¶ 27. As numerous courts have held, vote dilution by fraud
17 does not suffice as an injury for standing purposes both because it does not entail any differential
18 treatment—every voters’ vote is weighted and counted the same—and because claims of voter
19 fraud are entirely speculative. *See, e.g., Donald J. Trump for President, Inc. v. Way*, Civil Action
20 No. 20-10753 (MAS) (ZNQ), 2020 WL 6204477, at *6 (D.N.J. Oct. 22, 2020); *Donald J. Trump*
21 *for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5997680, at *59 (W.D. Pa. Oct. 10,
22 2020); *Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-CV-1445 JCM (VCF), 2020
23 WL 5626974, at *4 (D. Nev. Sept. 18, 2020); *Martel v. Condos*, No. 5:20-cv-131, 2020 WL
24 5755289, at *4 (D. Vt. Sept. 16, 2020); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926–27 (D.
25 Nev. 2020); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex.
26 2015).

27 Plaintiffs also lack standing to bring their claim under the Elections Clause. Plaintiffs
28

1 assert that Defendants have usurped the Nevada Legislature’s constitutional authority to set the
2 manner of elections by using the Agilis machine, in violation of the Elections Clause of the U.S.
3 Constitution. Compl. ¶¶ 19–23. Plaintiffs, however, have no authority or standing to assert the
4 rights of the Nevada Legislature. *See, e.g., Corman v. Torres*, 287 F. Supp. 3d 558, 567–73
5 (M.D. Pa. 2018) (per curiam). And the U.S. Supreme Court has squarely held that a private
6 citizen does not have standing to bring generalized challenges under the Elections Clause. *See*
7 *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (holding that four Colorado voters lacked standing
8 where “[t]he only injury plaintiffs allege is that the law—specifically the Elections Clause—has
9 not been followed” because “[t]his injury is precisely the kind of undifferentiated, generalized
10 grievance about the conduct of government that we have refused to countenance in the past”).

11 Plaintiffs’ standing deficiencies are not remedied by tacking on two candidate
12 committees as parties. Nowhere in their pleadings do Plaintiffs actually assert that these
13 candidate committees are injured by any alleged violations of Nevada or federal law.

14 In short, Plaintiffs have failed to establish standing by “clearly . . . alleg[ing] facts
15 demonstrating” each element. *Spokeo*, 136 S. Ct. at 1547 (first alteration in original) (quoting
16 *Warth*, 422 U.S. at 518). Plaintiffs’ Elections Clause and equal protection claims should be
17 dismissed for this reason alone.

18 **B. Clark County’s use of the Agilis machine is lawful.**

19 Even if Plaintiffs had standing to bring their claims, they cannot prevail on the merits of
20 their challenges to Clark County’s use of the Agilis sorting machine, which is consistent with
21 both state and federal law. Given the vast size of Clark County’s voting population and the
22 record number of mail ballots that needed to be tabulated, Registrar Gloria has opted to employ
23 the Agilis sorting machine to increase the efficiency with which mail ballots are processed. In
24 their complaint and motion, Plaintiffs claim that the use of the Agilis machine is impermissible
25 under the Nevada election code, and therefore violates the Elections Clause of the U.S.
26 Constitution, *see* Compl. ¶¶ 19–23; Mot. 6–7, and that Clark County’s use of the machine
27 constitutes an equal protection violation, *see* Compl. ¶¶ 24–28; Mot. 6–7. Both claims fail as a
28

1 matter of law: use of the Agilis machine is explicitly contemplated by, and therefore wholly
2 consistent with, Nevada law, and Plaintiffs have failed to even plead a viable equal protection
3 claim, let alone demonstrate a likelihood of success on the merits.

4 At the outset, Plaintiffs’ claims challenging use of the Agilis machine are barred by the
5 equitable doctrine of laches. *See, e.g., Sierra Club v. U.S. Dep’t of Transp.*, 245 F. Supp. 2d
6 1109, 1114–15 (D. Nev. 2003) (noting that “[d]eclaratory and injunctive relief are equitable
7 remedies and may thus be barred by laches,” for which “a court must consider two criteria: the
8 diligence of the party against whom the defense is asserted and the prejudice to the party
9 asserting the defense” (citing *Apache Survival Coal. v. United States*, 21 F.3d 895, 905 (9th Cir.
10 1994))). Clark County began using the Agilis machine to conduct signature matching during the
11 State’s June primary. Yet Plaintiffs waited until November 5—*two days after election day*—to
12 seek “emergency” relief that would fundamentally disrupt the manner in which Clark County
13 processes ballots, threatening to delay election results in Nevada’s largest county for weeks.
14 Plaintiffs could have and *should have* brought these claims at an earlier juncture, particularly
15 considering that their counterparts on the presidential tickets brought similar challenges to AB 4
16 in federal court more than three months ago. *See Donald J. Trump for President, Inc. v.*
17 *Cegavske*, No. 2:20-CV-1445 JCM (VCF) (D. Nev.). Plaintiffs’ inexplicable delay has
18 prejudiced the parties to this action—including Clark County, which has been planning for this
19 election for months and implementing its plan for almost three weeks, and Proposed Intervenor-
20 Defendants, who must now expend time and resources safeguarding the votes of its members and
21 for its candidates.

22 **1. Use of the Agilis machines does not violate the Elections Clause.**

23 Even if Plaintiffs’ claims were not lodged at a prejudicially delayed hour, Clark County’s
24 use of the Agilis machine is consistent with Nevada law. In passing AB 4, the Nevada
25 Legislature specifically authorized counties to adopt procedures that include the processing and
26 counting of mail ballots “*by electronic means.*” NRS 293.8871(2)(a) (emphasis added). Pursuant
27 to this authority, Registrar Gloria employs the Agilis machine to sort ballots and conduct a first
28

1 pass in matching the signature on each ballot-return envelope with the signature on file in Clark
2 County's records.

3 Plaintiffs maintain that this nonetheless violates Nevada law because the initial signature
4 match is not done by a person. *See, e.g.* Mot. 6 (“The use of the Agilis Ballot Packing Sorting
5 System to check signatures of ballots clearly violates Nevada law, enacted by the legislature,
6 which states ‘*the clerk or an employee in the office of the clerk shall check the signature used for*
7 *the mail ballot.*’” (quoting NRS 293.8874(1))). But *nothing* in NRS 293.8874 requires the clerk
8 or the clerk's employees to conduct its initial signature matching manually, or to abstain from
9 using a machine to process ballots. To the contrary, NRS 293.8871(2)(a) *explicitly permits* use of
10 electronic means to process ballots. Human intervention is only required when a ballot is to be
11 rejected. At that point, “at least two employees in the office of the clerk” must agree that “there
12 is a reasonable question of fact as to whether the signature used for the mail ballot matches the
13 signature of the voter.” NRS 293.8874(1)(b). Plaintiffs have not alleged—nor could they—that
14 Clark County has used the Agilis machine to *reject*, as opposed to approve, mail ballots.
15 Therefore, the use of the Agilis machine for the limited purpose for which Clark County uses it is
16 wholly consistent with the election scheme enacted by the Nevada Legislature—and, therefore,
17 with the Elections Clause.

18 **2. Use of the Agilis machine does not violate the Equal Protection**
19 **Clause.**

20 Plaintiffs' equal protection claim fares no better. They suggest that the Equal Protection
21 Clause is violated by Clark County's use of the Agilis machine because “[n]o other county in
22 Nevada uses this system, and accordingly, voters in Clark County, including Plaintiff Stokke, are
23 at an unequal risk of having their legal votes diluted by votes with mismatched signatures.”
24 Compl. ¶ 27. This claim fails on multiple grounds.

25 *First*, even accepting that their legal theories are viable—as discussed below, they are
26 not—Plaintiffs failed to adduce even a *shred* of compelling proof to support their equal
27 protection claim. Although their complaint makes allegations of “[i]rregularities” in Clark
28

1 County’s administration of this election—“including lax procedures for authenticating mail
2 ballots and over 3,000 instances of ineligible individuals casting ballots,” Compl. ¶ 11—they
3 have completely failed to substantiate these accusations in their motion for immediate relief.
4 Their equal protection claim in particular suffers from lack of evidence. This claim is predicated
5 on the assumption that Clark County’s use of the Agilis machines leads to compromised results,
6 and they allege that “use of Agilis signature-verification software [] allowed Plaintiff Stokke’s
7 ballot, which she had not signed, to be accepted and counted in the Election,” and that Clark
8 County “is using the Agilis signature-verification software in a manner which is contrary to the
9 manufacturer’s prescriptions.” *Id.* ¶¶ 13–14. But again, Plaintiffs *have no proof* to support these
10 allegations; the *only* evidence they have even submitted is Ms. Stokke’s declaration, which does
11 not support the assertion that the Agilis machine is responsible for any difficulties she might
12 have experienced. There is, ultimately, no evidence in the record that Clark County’s use of the
13 Agilis machine disadvantages any voters or imposes *any* burden on Nevadans’ franchise.
14 Plaintiffs therefore cannot succeed on the merits of this claim.

15 *Second*, even if Plaintiffs had provided evidence to support their case, their equal
16 protection claim fails as a matter of law. The implication of Plaintiffs’ equal protection claim is
17 that Clark County voters will have the value of their votes diluted by *unlawful* ballots—those
18 with “mismatched signatures.” But vote dilution is a viable basis for equal protection claims only
19 in certain contexts, such as when laws are crafted that structurally devalue one community’s
20 votes over another’s. *See, e.g., Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 406–07
21 (E. D. Penn. 2016); *see also Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (“Simply stated, an
22 individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in
23 a substantial fashion diluted when compared with votes of citizens living in other parts of the
24 State.”). In these unique cases, plaintiffs allege that their votes are devalued as compared to
25 similarly situated voters in other parts of the state. *See Reynolds*, 377 U.S. at 567–68. Here, by
26 contrast, Plaintiffs allege that Clark County voters will experience dilution caused by the alleged
27 casting of unlawful ballots. But “[t]he Constitution is not an election fraud statute.” *Minn. Voters*

1 *All. v. Ritchie*, 720 F.3d 1029, 1031 (8th Cir. 2013) (quoting *Bodine v. Elkhart Cnty. Election*
2 *Bd.*, 788 F.2d 1270, 1271 (7th Cir. 1986)). Plaintiffs’ theory of vote-dilution-by-fraud is
3 fundamentally speculative and applies to all voters equally, making it an ill-fit for an equal
4 protection challenge that requires disparate treatment—thus explaining why courts across the
5 country have repeatedly rejected it both on standing and merits grounds. *See supra* Part II.A; *see*
6 *also, e.g., Boockvar*, 2020 WL 5997680, at *76; *Donald J. Trump for President, Inc. v. Bullock*,
7 No. CV 20-66-H-DLC, 2020 WL 5810556, at *12 (D. Mont. Sept. 30, 2020); *Cortés*, 218 F.
8 Supp. 3d at 406–07.

9 *Third*, even if NRS 293.8871—which permits counties to adopt their own “procedures for
10 the processing and counting of mail ballots”—and Clark County’s consequent use of the Agilis
11 machine constituted disparate treatment, it is simply untrue, as Plaintiffs allege, that “[t]here is
12 no legitimate state interest that justifies this disparity” and that this disparity “violates Nevada
13 voters’ right to have uniform, statewide standard of counting and recounting all votes
14 accurately.” Compl. ¶ 28. To the contrary, the statute furthers a legitimate government purpose
15 and therefore passes constitutional muster. “County of residence is not a suspect classification
16 warranting heightened scrutiny,” *Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018), and because
17 Plaintiffs have provided *no proof* that Clark County accepts unlawful ballots, or rejects lawful
18 ballots, at a higher rate than Nevada’s other counties, rational-basis review applies. *See*
19 *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Nevada is made up of 16 counties and one
20 independent city that vary dramatically by population, size, and geographic attributes. Like many
21 other states, Nevada has acknowledged these differences by adopting a decentralized system of
22 election administration that empowers county clerks to make decisions about what their county
23 needs. NRS 293.8871(1) is part of this decentralized system: the statute facilitates “incremental
24 election-system experimentation,” *Short*, 893 F.3d at 679, and acknowledges the differing
25 demands on county election officials in Clark County—1,402,235 registered voters—and
26 Esmerelda County—607 registered voters. These interests alone justify any purported
27 differential treatment.

28

1 Ultimately, equal protection does not demand the imposition of “mechanical
2 compartments of law all exactly alike,” *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922), and
3 “few (if any) electoral systems could survive constitutional scrutiny if the use of different voting
4 mechanisms by counties offended the Equal Protection Clause.” *Donald J. Trump for President,*
5 *Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5997680, at *45 (W.D. Pa. Oct. 10, 2020) (quoting
6 *Donald J. Trump for President, Inc. v. Bullock*, No. CV 20-66-H-DLC, 2020 WL 5810556, at
7 *14 (D. Mont. Sept. 30, 2020)). Clark County, the most populous in Nevada, has an interest in
8 processing ballots in a different manner than other counties to ensure it is able to handle the large
9 numbers it receives. *See Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL
10 2748301, at *9 (D. Nev. May 27, 2020) (“[I]t cannot be contested that Clark County, which
11 contains most of Nevada’s population—and likewise voters (69% of all registered voters)—is
12 differently situated than other counties.”). Its decision to do so using the Agilis machine, which
13 neither infringes the right to vote nor targets any suspect classifications, is entirely rational and
14 consistent with the basic tenets of equal protection.

15 **C. Clark County has made its vote tabulation public.**

16 Finally, Plaintiffs allege that Clark County has violated Nevada laws requiring public
17 access to vote tabulation. *See* Compl. ¶¶ 29–30; Mot. 6. They seek injunctive relief requiring
18 Defendants “to allow meaningful access to the ballot counting process.” Mot. 8. But Plaintiffs
19 have failed to adduce any proof that Clark County violated any aspect of Nevada law relating to
20 public observation. The Nevada election code states that “the counting procedure” employed by
21 the counting board “must be public.” NRS 293.363(1); NRS 293.8881(1). *That’s it*. That is all
22 that Clark County is required to do by Nevada law. And Plaintiffs have provided *no evidence*
23 that Clark County has not made this process public. To the contrary, Mr. Prudhome’s declaration
24 actually indicates that the tabulation has been made public, since he was allowed to “remain[] in
25 the observer area as an observer.” Prudhome Decl. ¶ 6.

26 Ultimately, Plaintiffs’ dispute is that they have not been given the degree of access to the
27 tabulation process that they would prefer. But *nothing* in Nevada law mandates any greater
28

1 degree of public observation than what Clark County has already provided. Courts have
2 repeatedly concluded that there is no individual right to observe vote tabulation.¹ Indeed, as the
3 Nevada state court already found when the Trump Campaign attempted to similarly “unlimited
4 access to . . . ballot counting,” there is no “constitutional provision, statute, rule, or case that
5 supports such a request.” *Kraus*, slip op. at 10–11.² Plaintiffs cannot rewrite the State’s election
6 laws to impose any greater obligation on Defendants than what the Nevada Legislature has
7 prescribed. And because Clark County has complied with the State’s election code by making
8 their tabulation public, neither Nevada law nor any other law has been violated. Plaintiffs cannot
9 succeed on the merits of this claim.

10 **III. Equitable considerations militate against Plaintiffs’ requested relief.**

11 The remaining equitable factors weigh strongly against granting the relief Plaintiffs seek.

12 Plaintiffs assert that they “will suffer irreparable injury in the absence of immediate
13 relief.” Mot. 6. But the only injury they identify is the alleged “infringement of fundamental
14 constitutional freedoms such as the right to vote.” *Id.* This is simply a repackaging of their merits
15 arguments, which fail on the law and the facts. Given these shortcomings, Plaintiffs have fallen
16 far short of “establish[ing] that irreparable harm is *likely*,” let alone even possible. *All. for Wild*
17 *Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Moreover, as described above,
18 Petitioners also sat on their claims for far too long to raise them only *after* the Election and *after*
19 failing to achieve their requested relief in the Nevada state courts. Plaintiffs in this case have
20 known of Clark County’s use of the Agilis machine since just after the June primary. That they

21
22 ¹ See, e.g., *Boockvar*, 2020 WL 5997680, at *67 (“[T]here is no individual constitutional
23 right to serve as a poll watcher.” (quoting *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020,
24 2020 WL 5554644, at *30 (Pa. Sept. 17, 2020))); *Cortés*, 218 F. Supp. 3d at 413–14 (“[C]ourts
25 have found that ‘poll watching is not incidental to’ the right of free association and it therefore
‘has no distinct First Amendment protection.’” (quoting *Cotz v. Mastroeni*, 476 F. Supp. 2d 332,
364 (S.D.N.Y. 2007))).

26 ² The *Kraus* court further found, after conducting a thorough evidentiary hearing, that the
27 petitioners in that case “failed to prove Registrar Gloria has interfered with any right they or
28 anyone else has an observer.” Slip op. at 11.

1 waited months to bring these claims is further evidence that the extraordinary remedy of
2 preliminary relief is not warranted. *See GTE Corp. v. Williams*, 731 F.2d 676, 679 (10th Cir.
3 1984) (“By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action.”
4 (quoting *Gillette Co. v. Ed Pinaud, Inc.*, 178 F. Supp. 618, 622 (S.D.N.Y. 1959))).

5 Plaintiffs incorrectly assert that the final three factors weigh in their favor and that
6 “absence of injunctive relief outweighs any alleged harm the defendant will suffer if the
7 injunction is granted.” Mot. 7. This could not be further from the truth. Clark County must
8 process almost *75 percent* of the deluge of mail ballots received statewide during this election
9 cycle, and it must do so prior to the state’s canvassing deadline on November 16. Plaintiffs are
10 asking for relief that would require Clark County to dramatically alter its carefully designed
11 protocols three days after Election Day and more than two weeks after it first began processing
12 ballots. In his opinion in the nearly identical state court case, Judge Wilson found that “if Clark
13 County is not allowed to continue using Agilis the county will not meet the canvass deadline.”
14 *Kraus*, slip op. at 4. This will have enormous downstream effects for the County, the State, and
15 all Nevada voters. The public interest would certainly not be served by such an unnecessary
16 delay.

17 Finally, it should not be lost on this Court that Plaintiffs ask for emergency relief for just
18 one of Nevada’s 17 counties, the state’s largest Democratic stronghold. There is no reason to
19 upset ballots processing at this late hour anywhere in the state, but to do so under such politically
20 suspect motives makes the request relief all the more unwarranted.

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28

1 **CONCLUSION**

2 For these reasons, Proposed Intervenors respectfully request that this Court deny
3 Plaintiffs' emergency motion for temporary restraining order and preliminary injunction.
4

5 DATED this 6th day of November, 2020.

6 **WOLF, RIFKIN, SHAPIRO,**
7 **SCHULMAN & RABKIN, LLP**

8 By: /s/ Bradley S. Schrager

9 Bradley S. Schrager, Esq., SBN 10217
10 Daniel Bravo, Esq., SBN 13078
11 3556 E. Russell Road, Second Floor
12 Las Vegas, Nevada 89120

13 Marc E. Elias, Esq.*
14 John M. Devaney, Esq.*
15 **PERKINS COIE LLP**
16 700 Thirteenth St. NW, Suite 800
17 Washington, D.C. 20005-3960

18 Abha Khanna, Esq.*
19 **PERKINS COIE LLP**
20 1201 Third Avenue, Suite 4900
21 Seattle, Washington 98101-3099

22 *Attorneys for Proposed Intervenor-Defendants*
23 *Nevada State Democratic Party and Democratic*
24 *National Committee*

25 **Pro hac vice to be submitted*
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2020 a true and correct copy of **PROPOSED INTERVENOR-DEFENDANTS’ OPPOSITION TO PLAINTIFFS’ EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** was served via the United States District Court’s CM/ECF system on all parties or persons requiring notice.

By: /s/ Dannielle Fresquez
Dannielle Fresquez, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN &
RABKIN, LLP

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28