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FIRST JUDICIAL DISTRICT COURT

IN AND FOR CARSON CITY, STATE OF NEVADA

ZENAIDA DAGUSEN, an individual;
REPUBLICAN NATIONAL COMMITTEE;
NEVADA REPUBLICAN PARTY; and
DONALD J. TRUMP FOR PRESIDENT 2024,
INC.,

    Plaintiffs,

    vs.

FRANCISCO AGUILAR, in his official capacity
as NEVADA SECRETARY OF STATE;
DEMOCRATIC NATIONAL COMMITTEE; and
NEVADA STATE DEMOCRATIC PARTY,

    Defendants.

Case No.: 24-OC-001531B

Dept. No.: 1

**MOTION FOR LEAVE TO FILE BRIEF
AS *AMICI CURIAE* IN SUPPORT OF
DEFENDANT FRANCISCO AGUILAR'S
MOTION TO DISMISS**

COME NOW the American Civil Liberties Union of Nevada ("ACLUNV") and Protect Democracy as *amici curiae*, and through their counsel of record, attorney Sadmira Ramic of ACLUNV, hereby move this Honorable Court for an order granting ACLUNV's and Protect Democracy's request for leave to file a brief on the above-captioned action in support of the motion to dismiss of Defendant Francisco Aguilar. Defendants have indicated that they do not oppose the instant motion; Plaintiffs have not provided a position on the motion.

This motion is made and based on the papers and pleading on file herein, the Points and Authorities submitted herewith, and any further evidence and argument as may be adduced at a hearing on this matter. A proposed brief is attached hereto as Exhibit A for the court's consideration should it grant *amici* leave to file.

Dated this 5th day of December 2024.

/s/ Sadmira Ramic
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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2024, a true and correct copy of **MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT FRANCISCO AGUILAR'S MOTION TO DISMISS** was served via electronic mail addressed to:

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INDEX OF EXHIBITS

Exhibit No.	Description	Number of Pages
1	BRIEF OF *AMICI CURIAE* IN SUPPORT OF DEFENDANT FRANCISCO AGUILAR'S MOTION TO DISMISS	10

DATED this 5th day of December 2024.

EXHIBIT A

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEVADA AND PROTECT DEMOCRACY PROJECT IN SUPPORT OF DEFENDANT FRANCISCO AGUILAR'S MOTION TO DISMISS

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF DEFENDANT FRANCISCO AGUILAR'S MOTION TO DISMISS

STATEMENT OF INTEREST

Amici Curiae American Civil Liberties Union of Nevada ("ACLUNV") and Protect Democracy respectfully submit this brief in support of Defendant Francisco Aguilar's motion to dismiss.

ACLUNV is a nonpartisan, non-profit organization dedicated to defending civil liberties and civil rights guaranteed by the federal and state constitutions. This includes assuring that all eligible Nevada voters can register to vote and cast their ballot, and that any actions related to elections comply with federal and Nevada state law. Protecting Nevada voters from being removed from the state's official list of eligible voters by methods in violation of state or federal law is of paramount importance to ACLUNV and its members, as it implicates the constitutional rights of Nevadans and will have a direct impact on their ability to vote.

Protect Democracy is a nonpartisan, non-profit organization dedicated to building more resilient democratic institutions and protecting free and fair elections. Protect Democracy uses litigation, research, and data analysis to promote trust in elections and defend the fundamental right to vote of all eligible citizens. Dispelling false narratives about the prevalence of noncitizen voting is central to Protect Democracy's efforts to defend the rule of law, election officials, and integrity in election results and the democratic process.

SUMMARY OF ARGUMENT

Amici submit this brief to highlight particularly troubling aspects of Plaintiffs' complaint: the unreasonable inferences regarding Nevada's voter rolls that Plaintiffs ask the Court to make based on uncontextualized data, and the legally flawed list maintenance practices Plaintiffs demand as relief. For example, Plaintiffs:

- rely heavily on responses from the 2017-2023 Cooperative Election Survey ("CES") to allege widespread noncitizen voting, yet, without justification, *omit all survey data from the 2020 election*, which, if included, would undermine their claims;

- draw unreasonable inferences from that survey data, contrary to basic statistical principles and the explicit warnings of the survey's principal investigators; and

- ask this Court to order the Nevada Secretary of State to request data that (at best) does not exist and (at worst) cannot reliably verify citizenship status, risking disenfranchising Nevadans.

The National Voter Registration Act (NVRA) requires that any list maintenance avoid disproportionately burdening recently naturalized citizens, but Plaintiffs' desired relief fails to satisfy this standard. Indeed, courts have routinely rejected similar list maintenance efforts as "a solution looking for a problem." *See, e.g., Texas League of United Latin Am. Citizens v. Whitley*, No. 5:19-cv-074-FB, 2019 WL 7938511, at *1 (W.D. Tex. Feb. 27, 2019). *Amici* respectfully request that the Court reject Plaintiffs' efforts to disrupt Nevada's electoral process.

ARGUMENT

I. Plaintiffs rely on unreliable and unreasonable methods of analysis.

Plaintiffs rely on CES survey data to support their claims, but Plaintiffs' allegations about Nevada's voter rolls are fundamentally flawed and the inferences Plaintiffs want the Court to draw from those allegations are unreasonable. "[T]he general rule that allegations are accepted as true on a motion to dismiss . . . gives way when the allegations are contradicted by . . . documents referenced in the complaint" or by judicially noticeable facts.[1] *See Northington v. Bennett*, 2022 Nev. Dist. LEXIS 513, at *1–2 (Second Judicial District Court of Nevada, Washoe County) (citing *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)). To that end, two fatal flaws underlie Plaintiffs' reliance on CES survey data, and those allegations cannot support Plaintiffs' claims.

First, Plaintiffs cherry-pick data, omitting key context from the data they do reference which contradicts their allegations. Plaintiffs base their claims on data from the 2017-2023 CES and look

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[1] Throughout this brief, *Amici* draw upon publicly available materials, including newspaper articles, state and federal government guidance, and publicly accessible databases and research. *See Mack v. Estate of Mack*, 125 Nev. 80, 91 (2009) (courts "may take judicial notice of facts generally known or capable of verification from a reliable source")

exclusively at information regarding the 2018 and 2022 elections. *See, e.g.*, Compl. ¶ 66–76. They infer a rate of noncitizen voting by "[c]omparing noncitizen responses . . . to the voter files" for those election years. *Id.* ¶ 72–74. But without explanation, Plaintiffs leave out information from the CES for 2020, the immediately preceding presidential election year. And based on *Amici*'s analysis of the 2020 survey data (and the CES's subsequent matching of respondents to the voter file), *none* of the 1,010 respondents who self-reported noncitizen status were matched to a voter record in 2020.[2] This glaring omission renders Plaintiffs' allegations misleading and unreliable.

 Second, Plaintiffs make invalid extrapolations from the CES data that its authors have specifically warned against—and in doing so, ask the Court to draw unreasonable inferences from their allegations.[3] Based on the 2018 and 2022 data, Plaintiffs allege that "nearly 4 percent of [Nevadan] noncitizen respondents both said they were registered to vote *and* had a voter-file match" within the CES data. *See* Compl. ¶ 75. But they fail to mention that "nearly 4 percent" amounts to a *single Nevadan respondent* to the CES.[4] And then Plaintiffs take another leap based on that *single* respondent, multiplying the 4-percent figure by the noncitizen population of Nevada (as estimated by the U.S. Census Bureau) to conjure a bogus estimate for the number of noncitizens registered to vote in Nevada. *See* Compl. ¶ 77.

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[2] In making these assessments, *Amici* analyzed data from the 2020 CES, *see* Brian Schaffner, Stephen Ansolobehere, and Samantha Luks, *Cooperative Election Study Common Content 2020*, HARVARD DATAVERSE (published Aug. 4, 2021), https://doi.org/10.7910/DVN/E9N6PH (relying on data file entitled: "CES20_Common_Output_vv.csv").

[3] When releasing survey results, the CES also releases an explanatory guide on sound methods for analyzing the data. *See* Brian Schaffner, Stephen Ansolabehere, and Marissa Shih, *Cooperative Election Study Common Content, 2022*, HARVARD DATAVERSE, https://doi.org/10.7910/DVN/PR4L8P (accessed Oct. 18, 2024).

[4] Here, *Amici* analyzed data from the 2018 CES, *see* Brian Schaffner, Stephen Ansolobehere, and Samantha Luks, *CCES Common Content 2018*, HARVARD DATAVERSE (published Oct. 2, 2019), https://doi.org/10.7910/DVN/ZSBZ7K (relying on data file entitled: "cces18_common_vv.tab"), as well as the 2022 iteration of the CES, *see* Brian Schaffner, Stephen Ansolobehere, and Marissa Shih, *Cooperative Election Study Common Content 2022*, HARVARD DATAVERSE (published Apr. 23, 2024), https://doi.org/10.7910/DVN/PR4L8P (relying on data file entitled: "CCES22_Common_OUTPUT_vv_topost.csv").

These extrapolations are unreasonable, completely flying in the face of guidance by the CES authors, who urge "caution when analyzing very small subsamples as random measurement error may lead to faulty inferences."[5] Indeed, the CES's principal investigators specifically repudiated a 2014 analysis by Dr. Jesse T. Richman and others that Plaintiffs emulate and cite with approval.[6] *See* Compl. ¶ 88. According to the CES investigators, the Richman analysis "presents a biased estimate of the rate at which non-citizens voted" because people sometimes make mistakes when filling out surveys, resulting in a "misclassification" error.[7] And when one group (*i.e.*, citizens) vastly outnumbers another (*i.e.*, noncitizens) in a survey, the risk of misclassification error is substantially higher within the smaller subgroup, thus making statistical inferences drawn from that smaller subgroup more error prone.[8] In fact, the CES authors found that citizens mistakenly responding that they are noncitizens likely made up for *100 percent* of the purported "noncitizen voting" suggested by an earlier CES dataset.[9] In their analysis of the instant dataset, Plaintiffs extrapolate statewide figures based on a single survey respondent—meaning that only one respondent from a pool of over 900 Nevada respondents had to respond incorrectly to yield Plaintiffs' purported result.

Whether based on the warnings of the CES authors or just plain logic, it is unreasonable to infer rampant noncitizen voting based on a single survey respondent. Conclusions that "cannot reasonably be drawn from the facts alleged . . . need not be credited." *Bender v. Wenevada, LLC*, 2024 WL 2746760, at *2 (Nev. App. 2024); *see also Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994)

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[5] *See* Brian Schaffner, Stephen Ansolabehere, and Marissa Shih, *Guide to the 2022 Cooperative Election Study* (Aug. 2023), at 22, available at
https://dataverse.harvard.edu/file.xhtml?fileId=7359254&version=4.0 (accessed Oct. 18, 2024).
[6] *See* Stephen Ansolobehere, Samantha Luks, and Brian F. Schaffner, *The Perils of Cherry Picking Low Frequency Events in Large Sample Surveys*, Harvard University (Sept. 5, 2014),
https://perma.cc/7X7Q-XTWX.
[7] *Id.*
[8] *Id.*
[9] *Id.*

1 (noting that at the pleading stage, "the court is not required to accept legal conclusions cast in the form of

2 factual allegations if those conclusions cannot reasonably be drawn from the facts alleged"). As another

3 court noted in evaluating Dr. Richman's debunked extrapolation, "small samples have large margins of

4 error, and do not amount to reliable or probative statistical evidence." *Fish v. Kobach*, 309 F. Supp. 3d

5 1048, 1087 (D. Kan. 2018). That court favorably cited testimony by one of the CES principal investigators

6 that, given the tiny subsample of noncitizens in the CES, misclassification error "fatally contaminates any

7 attempt to use the [dataset] to make statistical estimates about noncitizens." *Id.* "In fact, a group of

8 approximately 200 political scientists signed an open letter criticizing Richman's work on essentially the

9 same grounds." *Id.* This Court should reject any allegations or inferences based on that same debunked

10

11 methodology.

12 **II.   Plaintiffs' requested relief requires the Secretary to use data sources that are inaccessible
13   and unworkable.**

14   **A. Systematic Alien Verification for Entitlements (SAVE) data**

15   Plaintiffs' request that the Secretary of State rely on the SAVE database to verify citizenship

16 suffers from at least two flaws.

17   *First*, Plaintiffs fail to make any allegation that the Secretary can even access the SAVE database.

18 SAVE requires the user to input an individual's unique identification number used for immigration

19 proceedings to access information about that individual's citizenship status. *See Mi Familia Vota v.*

20 *Fontes*, 719 F. Supp. 3d 929, 955 (D. Ariz. 2024), *stayed on other grounds sub nom., Republican Nat'l*

21 *Comm. v. Mi Familia Vota*, 2024 WL 3893996 (mem.) (Aug. 22, 2024). Yet Plaintiffs do not allege that

22 the state has that information (and to the best of *Amici*'s knowledge, the state does not). Further, Plaintiffs

23

24 fail to allege that the Secretary could plausibly receive and use any information from the SAVE database

25 for retrospective application to the recent election. *See Strong Communities Found. of Arizona Inc. v.*

26 *Richer*, No. CV-24-02030-PHX-KML, 2024 WL 4475248, at *11 (D. Ariz. Oct. 11, 2024) (denying relief

27

where plaintiffs did not "even allege [] that DHS will be able to respond to tens of thousands of requests before the general election").

Second, the SAVE database "cannot conclusively 'confirm' non-citizenship.'" *Mi Familia Vota,* 719 F. Supp. 3d at 959. Indeed, because U.S. born citizens generally do not appear in the SAVE database, it cannot verify citizenship status for those individuals. *See* USCIS, *About SAVE*, https://perma.cc/9KTV-A6TD (accessed Oct. 19, 2024). Thus, the SAVE database cannot be a reliable indicator of citizenship status for U.S. born citizens. Further, in recent testimony before the Texas Senate Committee on State Affairs, former acting director of USCIS Ken Cuccinelli explained that use of the SAVE database to check voter eligibility is "not a smooth process," that SAVE is "not particularly well designed," and that "the way you may have a person's name in a [state] database may differ ever so slightly from how that name might be included in the SAVE database." Texas Senate Committee on State Affairs (Oct. 16, 2024), https://senate.texas.gov/videoplayer.php?vid=20786&lang=en (4:51:18–4:52:46) (hereinafter "Cuccinelli Testimony"). Those factors elevate the risk of inaccurate matching efforts, potentially disenfranchising eligible voters.

B. Other Department of Homeland Security (DHS) data

Plaintiffs also ask the Court to order the Secretary to use other "information acquired or accessed regarding citizenship status in the possession of the United States Department of Homeland Security or one of its components." Compl. Prayer for Relief (a)(ii). But Plaintiffs fail to allege what information DHS has and whether that information can reliably verify citizenship.

Nor could they. Native-born citizens will not appear in any other DHS database because they do not interact with the immigration system. See *United States v. Arizona*, 703 F. Supp. 2d 980, 997 n.9 (D. Ariz. 2010). As former Acting Director Cuccinelli recently noted, "There is no database of who is a citizen. The American government doesn't keep that." Cuccinelli Testimony (4:53:37–4:53:45). To the extent that other DHS data sources can be queried, those sources would require DHS making inquiries based on

limited information—such as only first name, last name, and date of birth—in the absence of any unique

immigration identification number.[10] With nothing more than a name and date of birth, false matches are

inevitable—particularly for voters of color living in densely populated communities where certain names

are more common.[11] And those false matches would risk that Nevadans would be removed improperly

from the voter rolls.

Further, in response to recent inquiries from officials from other states about alternative databases,

USCIS has explained that it "currently cannot offer any alternative process" beyond the SAVE database

"to any state." *See, e.g.*, Letter from the Director of U.S. Citizenship & Immgr. Servs. to Sec'y of State

Scott Schwab (Oct. 10, 2024), at 3, available at

https://www.uscis.gov/sites/default/files/document/foia/RegisteredVoters-SecretarySchwab.pdf

(accessed Nov. 14, 2024). USCIS noted that one option proposed by some states—the Person Centric

Query Service (PCQS)—"does not return a definitive answer on immigration status and thus is not an

appropriate use for voter registration and/or list maintenance purposes." *Id*. USCIS also emphasized that

"PCQS returns aggregated results across many different immigration systems and can only perform one

query at a time." *Id*. at 3 n.6. Using that system therefore "would require manual review of the results in

each case to determine immigration status, as the systems may return disparate or conflicting results." *Id*.

Thus, Plaintiffs fail to allege how the Secretary can obtain, much less rely on, any such alternative

_____

[10] *See* U.S. Dep't of Homeland Sec., *DHS/USCIS/PIA-010 Privacy Impact Assessment for the Person Centric Query Service* 2 (2016).

[11] *See* Lise Olsen, *Texas' voter purge made repeated errors*, HOUSTON CHRONICLE (Nov. 12, 2012), https://www.chron.com/politics/article/texas-voter-purge-made-repeated-errors-4001767.php (describing "68,000 'weak matches' - many based on names and birth dates alone" and explaining how "voters living in legislative districts with high percentages of Hispanics or African-Americans were more likely to [match other databases] than others statewide"); *see also* Jonathan Brater, *Voter Purges: the Risks in 2018*, Brennan Center for Justice (Feb. 27, 2018), at 5, https://www.brennancenter.org/our-work/research-reports/voter-purges-risks-2018 ("Shared names and birthdates are extremely common, making this an insufficient and imprecise method of identifying potentially ineligible voters").

information from DHS. Plaintiffs therefore cannot support with plausible allegations their proposed relief as to information in possession of DHS.

C. Department of Motor Vehicles data

Plaintiffs also urge that the Secretary should rely on citizenship data from the Department of Motor Vehicles (DMV) to remove persons from the voter rolls. *See* Compl. Prayer for Relief (a)(iv). But DMV databases do not automatically update when a person is naturalized, and Nevadans routinely go multiple years between DMV visits. *See* Barbara K. Cegavske, *Re: Elections Integrity Violation Reports*, at 4, NVSOS.GOV (Apr. 21, 2024), https://www.nvsos.gov/sos/home/showpublisheddocument?id=9428. That means DMV data can incorrectly label an individual as a noncitizen for *years* after they naturalize.

In April 2021, then-Nevada Secretary of State Barbara Cegavske responded to a similar argument made by Nevada Republican Party officials. *See id.* Analyzing five years of DMV data of persons who presented an immigration document while obtaining a driver's license, Secretary Cegavske found that 4,057 such individuals were registered and voted in the 2020 election. *Id.* at 4. But she did not jump to the conclusion that these were noncitizens voting; rather, she noted that 40,676 Nevadans had naturalized between 2015-2019, and, on average, almost three years had passed between each registered voter's DMV transaction and the 2020 election. *Id.* As she explained, "[g]iven the large number of naturalizations that occur on an annual basis in Nevada, the data suggests that many voters were likely naturalized between the date of the DMV transaction and the election" and "that some voters had already been naturalized as [sic] the date of the DMV transaction but were still in possession of their immigration documents." *Id.*

Federal courts that have scrutinized list maintenance programs relying on DMV data have reached the same conclusion: reliance on outdated DMV data is a flawed and unreliable means for verifying the citizenship of individuals on voter rolls. *See, e.g.*, *United States v. Florida*, 870 F. Supp. 2d 1346, 1348 (N.D. Fla. 2012); *Texas LULAC*, 2019 WL 7938511, at *1. This Court should conclude the same.

III. Plaintiffs' requested relief would violate federal law.

Plaintiffs' proposed relief would require the Secretary to undertake a list maintenance program that violates the NVRA's mandate that such maintenance be "uniform" and "nondiscriminatory." 52 U.S.C. § 20507(b)(1). Under that requirement, "[a] state cannot properly impose burdensome [voter registration] demands in a discriminatory manner," *Florida*, 870 F. Supp. 2d at 1350, and any "trigger" for initiating voter removal meet this standard, *see Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 776 (2018).

Plaintiffs' requested remedies would fail to meet this standard. As discussed, using DMV databases to identify noncitizens for list maintenance disproportionately affects naturalized voters. *See supra*, Section II(C). Plaintiffs' proposed methods would thus make it "likely that the properly registered citizens who would be required to respond and provide documentation would be primarily newly naturalized citizens." *Florida*, 870 F.Supp.2d at 1350. As such, this "program [is] likely to have a discriminatory impact on these new citizens," violating the NVRA. *See id.* (analyzing voter purge program based on outdated DMV records); *see also Texas LULAC*, 2019 WL 7938511, at *1 (same).

Plaintiffs' proposal to use the SAVE database or other potential information from DHS would also violate this provision of the NVRA. For example, "because SAVE requires an immigration number," "[n]aturalized citizens will always be at risk of" a database inquiry, whereas such inquiries "will never apply to native-born citizens." *See Mi Familia Vota*, 719 F. Supp. 3d at 995 (D. Ariz. 2024); *see also id.* at 999. "This would have a non-uniform and discriminatory impact on naturalized citizens" in violation of the NVRA. *Id.* at 999 (concluding that monthly checks of SAVE database based on who local officials had "reason to believe" were not citizens would violate this requirement of the NVRA); *Florida*, 870 F.Supp.2d at 1350. In addition, at least with respect to any non-SAVE DHS database, queries based on limited information—such as only first name, last name, and date of birth—would likely result in false positives, disproportionately impacting people of color and recently naturalized citizens by exposing them

to a heightened risk of erroneous removal. *See supra*, Section II(B); *see also* U.S. Dep't of Justice, *NVRA List Maintenance Guidance* (Sept. 2024), https://www.justice.gov/crt/nvra-list-maintenance-guidance; *Florida*, 870 F.Supp.2d at 1350.

Because the NVRA bars the requested relief, Plaintiffs cannot satisfy the requirement of redressability for their suit. Their claims therefore should be dismissed.

CONCLUSION

Plaintiffs seek relief based on flawed data, and federal law bars their requests. *Amici* therefore respectfully request that the Court grant Defendant Francisco Aguilar's Motion to Dismiss.

Dated this 5th day of December 2024.

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