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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DWAYNE CHESTNUT, an individual; JOHN CAHILL, an individual; VICKY BIRKLAND, an individual; PATRICIA MONTEGOMERY, an individual; LYNN WARNE, an individual; NEVADA STATE EDUCATION ASSOCIATION, a Nevada nonprofit cooperative corporation Plaintiffs, vs. DEMOCRATIC PARTY OF NEVADA, a Nevada nonprofit cooperative association, Defendant.	CASE NO. CV-S-08-00046 **OPPOSITION OF DEFENDANT DEMOCRATIC PARTY OF NEVADA TO PLAINTIFFS' MOTION FOR EMERGENCY RELIEF**

Defendant, the Democratic Party of Nevada (the "Party"), respectfully submits this opposition to the motion for a temporary restraining order and preliminary injunction filed by Plaintiffs Dwayne Chesnut *et al.* Plaintiffs' extraordinary last-minute effort to derail the Party's presidential caucus lacks any legal or equitable legitimacy, and should be summarily denied for one or more of the following independently sufficient reasons:

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1. THE DOCTRINE OF LACHES BARS PLAINTIFFS' ABUSIVE ELEVENTH-HOUR FILING.

Plaintiffs have known since March 2007 that the Party's presidential caucus would include the at-large caucus feature they now challenge. In fact, four individual Plaintiffs who serve as Party officials voted *in favor* of the plan creating the at-large caucuses — the very thing they now challenge as unconstitutional. By sitting on their hands until a few days before the caucus and thereby maximizing the disruptive prejudice the Party and Nevada's voters will suffer if the at-large caucuses are enjoined, Plaintiffs have forfeited any claim to equitable relief. *See Nader v. Keith*, 385 F.3d 729, 736-37 (7th Cir. 2004); *Nader v. Brown*, 386 F.3d 1168, 1169 (9th Cir. 2004).

2. PLAINTIFFS CANNOT SHOW ANY LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE THEIR CLAIMS LACK ANY LEGAL OR FACTUAL BASIS.

Plaintiffs' Fourteenth Amendment challenge to the Party's at-large caucuses is meritless. The Party's choice to include the at-large feature in order to maximize participation — particularly by historically disenfranchised Latino and African-American citizens — is private associational conduct, not state action, and is thus not subject to an equal-protection challenge. *See Cousins v. Wigoda*, 419 U.S. 477, 489-90 (1975). And even if the Party's conduct were wrongly treated as state action, Plaintiffs' equal-protection claim still fails. No court has ever held that a party's presidential caucus violates equal protection because it has the potential to "dilute" the votes of some participants, much less applied the "strict scrutiny" Plaintiffs demand. To the contrary, the Party has a First Amendment right to structure its internal delegate selection procedures in the manner it thinks best. If any equal-protection scrutiny is appropriate, it is at most a highly deferential rational-basis scrutiny. *LaRouche v. Fowler*, 152 F.3d 974, 995 (D.C. Cir. 1998). The Party's plan easily satisfies that standard because it is entirely rational (indeed, "laudable" in Plaintiffs' words) for the Party to provide a venue for shift-workers whose work obligations would otherwise prevent them from participating in the caucus. Moreover, Plaintiffs' "vote dilution" claim is based on a fanciful hypothetical that is unlikely

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ever to come to pass in the real world and cannot possibly provide a valid predicate for anticipatory relief.

Plaintiffs' state-law claims are also meritless. Remarkably, Plaintiffs omit all mention of the fact that the Nevada statutes they invoke do not apply at all to the choice of delegates to presidential nominating conventions, and in all events expressly state that a party's internal rules trump any provision otherwise applicable to the delegate selection process. *See* Nev. Rev. Stat. §§ 293.133(1), 293.137(1).

3. THE EQUITIES PRECLUDE RELIEF.

Wholly apart from the merits, it would be grossly inequitable to grant Plaintiffs the relief they seek. That relief would have the certain consequence of denying to thousands of shift-workers the ability to participate in the presidential caucus process. It would also create the very real risk that the Party will be denied the right to seat any delegates at the Democratic National Convention because, as a result of court-ordered changes that Plaintiffs demand, the caucus process will not have been approved by the Democratic National Committee. And it would throw the carefully planned caucus process into chaos just two days before it will occur, sowing mass voter confusion.

Plaintiffs insist that all those harms must be inflicted to avoid any possibility of "vote dilution." But even if "vote dilution" were an actionable wrong in this context (and it is not), Plaintiffs have shown nothing more than a remote and entirely speculative possibility that such dilution might occur. Plaintiffs' speculative musing falls far short of the certain and great harm they must show to establish irreparable injury, *see Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918-19 (9th Cir. 2003) (*en banc*), and cannot possibly outweigh the certain harms that will be inflicted upon the Party and Nevada's citizens if Plaintiffs receive the relief they request. All of that would be more than enough to deny Plaintiffs relief had they brought their challenge in a timely manner. That they waited until the last minute to launch this destabilizing salvo further confirms the inequitable character of their request for injunctive relief.

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STATEMENT OF THE CASE

A. The Party's Convention and Caucus Process.

Plaintiffs have not accurately described either the Party's convention and caucus process or the Nevada state laws applicable to that process. Once the true facts and the governing law are brought into clear focus, it is apparent that Plaintiffs' claims lack any foundation.

The Party is engaged in two separate processes relevant to this lawsuit. First, it is complying with state law by holding a three-tier convention system through which party members can participate in the governance of a major political party. *See* Nev. Rev. Stat. §§ 293.135, 293.140, 293.150. Through this convention system, the Party conducts business other than choosing delegates to presidential nominating conventions. It elects members of county and state central and executive committees, elects party officers, and adopts a statewide platform. Nev. Rev. Stat. §§ 293.140(1), 293.150(1), 293.160(1). Second, the Party selects the delegates it will send to a national party convention to pick the party's presidential nominee. *See* Ex. 10 (Nevada Delegate Selection Plan).

With respect to the first process, the three-tier convention system, Nevada law provides for major political parties to hold a statewide convention in each year in which a general election is held. Nev. Rev. Stat. § 293.150(1). State law fixes the number of delegates to the state convention at one delegate for each 150 registered party members in a county, with the state delegates to be chosen at the party's county conventions. *Id.* § 293.145. (In Clark County, using figures from October 1, 2007, this means that the county convention will produce 2,372 delegates to the state convention.) In turn, state law provides for parties to hold precinct caucuses, or individual caucuses like those to be held on Saturday, January 19, 2008, at which the parties can select delegates to go on to their county conventions. *Id.* § 293.133(1). But unlike the county conventions, which produce a fixed number of delegates to the state convention, *id.* § 293.145, state law allows parties to set for themselves the number of delegates who will go from the voting precincts on to the county convention. *See id.* § 293.133(1) (providing a statutory

formula to determine the number of delegates going from voting precincts to county convention, but making clear that parties may set a different number or even a different formula "pursuant to the rules of the party").

Nothing in state law requires that the Party accomplish its second task, the selection of national delegates who will choose the Party's presidential nominee, through this three-tier convention process. To the contrary, state law expressly recognizes that parties are *not* required to select their national convention delegates through the three-tier convention system that begins with a precinct caucus. *See* Nev. Rev. Stat. § 293.137(1) (recognizing that "the election of delegates [at a precinct caucus] *may* be a part of" the presidential preference process (emphasis added)). In other words, while a major party must hold a precinct meeting to elect delegates to a county convention, *id.* § 293.135, state law does not impose any particular method of selecting delegates to a national convention, or of choosing a party's presidential nominee.

Against this backdrop, the Party created a hybrid presidential-preference process that uses both the state-required conventions and certain internal party-chosen processes. Rather than running its preference process solely by means of the state-mandated conventions, and rather than keeping its preference process entirely independent of that statutory process, the Party created a separate, at-large caucus process that would feed — along with the voting precincts established by state law — into the county conventions.

In doing so, the Party sought to comply with national party rules regarding the processes by which delegates to the national convention are selected. For Nevada's delegates to be seated at that convention, the national rules of the Democratic National Committee ("DNC") require the Party to prepare a "Delegate Selection Plan," or "DSP," giving effect to a number of principles. First, the DNC requires that "[a]ll official Party meetings and events related to the national convention delegate selection process, including caucuses, . . . shall be scheduled for dates, times, and public places which would be most likely to encourage the participation of all Democrats." Ex. 11 at 5 (DNC's

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Delegate Selection Rules). Second, the DNC requires state parties "to encourage full participation" by historically excluded groups, including African-Americans and Latinos. Ex. 11 at 7 (DNC's Delegate Selection Rules). State DSPs must "encourage participation in the delegate selection process and in Party organizations at all levels by the aforementioned groups." *Id.*

The Party determined that "[m]ost Nevada workers would be off Saturday, but shift workers have a unique circumstance." Ex. 7, ¶ 16 (Brock Decl.). Because shift workers would be unable to leave work to participate in a voting precinct near their home, *see* Exs. 1-6 (Voter Decls.), holding an at-large caucus would expand participation in the Party's process by shift-workers. Ex. 7, ¶ 16 (Brock Decl.). Further, because workers on the Strip are approximately 80% minority, holding at-large caucuses there would further the national party goals of facilitating participation by historically underrepresented groups. Ex. 9 (Bonaventure Decl.); Ex. 7, ¶ 21 (Brock Decl.).

To create this hybrid process, the Party relied on an avenue open under state law regarding county conventions. While state law imposes caps on attendance at the *state* convention by employing a fixed ratio from which the parties cannot deviate, *see* Nev. Rev. Stat. § 293.145, no provision imposes any cap on attendance at the *county* convention. Accordingly, state law leaves political parties free to use other vehicles, besides the voting precinct, to pick delegates for the county conventions. Accordingly, just as other parties might provide for the inclusion of "superdelegates" — perhaps party or elected officials — the Party here sought to create separate, at-large caucuses, to be held on the same day as the state-mandated voting precincts. Ex. 10 at 52-55 (Nevada DSP, App. C).

B. Plaintiffs Endorsed the Party's Plan, Including Its At-Large Caucuses.

The Party and its State Central Committee ("SCC") oversaw the preparation of a very detailed DSP. The SCC included four of the named plaintiffs in this suit: Dwayne Chesnut, John Cahill, Vicky Birkland, and John Birkland. Ex. 7, ¶ 7 (Brock Decl.). The

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SCC authorized the Party to comply with DNC requirements. Ex. 13 (Resolution for Early Nevada Caucus).

The SCC (including the four named Plaintiffs) participated fully in the DSP's preparation. Ex. 7, ¶¶ 4-15 (Brock Decl.); Ex. 8, ¶¶ 4-9 (Gholar Decl.). Contrary to the conclusory claims made in Plaintiffs' declarations that they "recently learned that the Democratic Party of Nevada intends to hold At Large Precinct Caucuses in Clark County," Pls.' Chesnut Decl. ¶ 6, there can be no doubt that the Plaintiffs have been aware of the at-large caucuses and the very aspects of those caucuses challenged here since March 2007:

- In March 2007, the Party posted its draft plan on its website, www.nvdems.com, for a 30-day comment period. Ex. 8, ¶ 6 (Gholar Decl.). The draft plan made public at that time specifies that the DSP would have precisely the feature challenged here — attendance-based, at-large caucuses designed to enfranchise thousands of shift-workers to participate:

> *Nevada will hold At-Large-Precincts where there is a large concentration of shift workers* so that these voters have every possible opportunity to participate in a precinct caucus. . . .
>
> Once [attendance at At-Large-Precincts is determined], the number of delegate positions to the county convention from each At-Large-Precinct will then be calculated and be assigned *based on actual attendance at each At-Large-Precinct caucus*.

Ex. 14 (3/1/07 Draft Rules) (emphasis added). None of the Plaintiffs, including those on the SCC, challenged or otherwise commented on the proposed rules. Ex. 15 (Public Comment Certification); Ex. 7, ¶ 6 (Brock Decl.); Ex. 8, ¶ 6 (Gholar Decl.).

- Following the March 2007 comment period, the SCC approved these draft rules unanimously. Plaintiffs Dwayne Chesnutt, John Cahill, Vicky Birkland, and John Birkland were all present *and voted in favor*. Ex. 16 at 4, 10-11 (3/31/07 Minutes).

- After the national party asked for more information about how the at-large caucuses would operate, the SCC held an August 11 meeting to discuss the DNC's call for "additional detail related to caucus and convention procedures." Ex. 17 at 3 (8/11/07

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SCC Minutes). The minutes specifically indicate that Plaintiff Dwayne Chesnut was present at the meeting where this was discussed. *Id.* at 1.

Although the Plaintiffs who were members of the SCC were the most directly responsible for the DSP, the process was entirely transparent in other ways as well. Besides national and local press stories highlighting the at-large caucuses, Ex. 21 (8/23/07 *USA Today*), Ex. 22 (4/1/07 *Review Journal*), there was no shortage of consultation:

- All eight presidential campaigns were advised of the attendance-based, at-large caucuses in a public guide issued in May 2007. That guide specifically laid out the attendance-based formula by which delegates would be assigned. Ex. 18 at 4-5 (5/2/07 Winning in the West Guide).
- The campaigns were again briefed on the process in October 2007. Ex. 19 at 1 (10/4/07 Final Apportionment Mem.). No campaign objected. Ex. 7, ¶¶ 13, 20 (Brock Decl.); Ex. 8, ¶ 20 (Gholar Decl.).
- Plaintiff Nevada State Education Association ("NSEA") was similarly involved. On October 4, 2007, the Party sent the NSEA's political director, Julie Whitacre, an advisory reminder her that "[t]he number of delegates from at-large caucuses will be determined the day of the caucuses." Ex. 19 at 1, 3 (10/4/07 Final Apportionment Mem.). The NSEA raised no objection. Ex. 7, ¶¶ 13, 20 (Brock Decl.); Ex. 8, ¶ 20 (Gholar Decl.).

On October 24, 2007, the DNC found the Party's plan to be "in full Compliance" with national party rules. Ex. 20 (10/24/07 Compliance Letter). The plan was finalized at that time and placed on the Party's website. Ex. 7, ¶¶ 5-15 (Brock Decl.); Ex. 8, ¶¶ 4-9 (Ghomar Decl.). No Plaintiff objected at any time. Ex. 7, ¶¶ 13, 20 (Brock Decl.); Ex. 8, ¶ 20 (Gholar Decl.).

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C. Despite Having Endorsed the Party's Caucus Plan, Plaintiffs Now Challenge It.

On January 11, 2008, just six business days before the scheduled caucus date but months after the DSP was finalized, Plaintiffs did an about-face and filed this complaint challenging the caucus plan. The only circumstance that changed since Plaintiffs' approval of the caucus plan many months ago was the decision by a hotel workers' union that represents tens of thousands of the shift-workers to endorse a candidate for the Democratic nomination — a candidate Plaintiffs apparently do not support.

Moreover, to make this last-minute challenge to the Party's caucus plan, Plaintiffs have been forced to resort to wild speculation about a remote possibility that those who participate in precinct caucuses will have their votes "diluted" as compared to those who participate in at-large caucuses. Even if such claims of "dilution" were relevant (and, as discussed *infra*, they are not), Plaintiffs' assertions lack any grounding in the real world. To begin with, it is impossible to evaluate whether any particular voter's vote will be "worth" less than any other until the voting takes place. If, for example, there is high turnout in at-large caucuses and low turnout in precinct caucuses, Plaintiffs' votes could be "worth" far more on a per-capita basis than those of any at-large caucus-goer. Moreover, the speculative "dilution" that Plaintiffs' posit is predicated on fanciful scenarios in which almost no one shows up to the at-large caucuses and every single eligible Democrat shows up at the precinct caucuses. There is thus no factual basis for finding harm. In reality, as explained in the Declaration of Party Executive Director Travis Brock, under any realistic scenario, the voter-to-delegate ratio for precinct participants and for at-large participants are likely to be similar, and the ratios may slightly "favor" the precinct participants. Ex. 7, ¶ 17 (Brock Decl).

Meanwhile, the DSP accomplished important objectives for the Party and the workers whose participation it is trying to facilitate. The at-large caucuses are the only way shift-workers and others working on Saturday will have the opportunity to vote, and those workers have relied on the existence of the at-large caucuses in structuring their

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affairs. Exs. 1-6 (Voter Decls.); Ex. 7, ¶ 19 (Brock Decl.). Eliminating those caucuses at this late date will ensure that many of Defendant's members, including the declarants, will simply not be able to participate in the caucus. Exs. 1-6 (Voter Decls.). This will disproportionately affect minority voters, who make up almost 80% of the shift-worker population, and especially Latino voters, who constitute approximately 50% of the shift-workers likely to attend the at-large caucuses. Ex. 7, ¶ 21 (Brock Decl.); Ex. 9 (Bonaventure Decl.).

ARGUMENT

The general standards for emergency injunctive relief in the Ninth Circuit are well-established and rigorous: Plaintiffs must demonstrate (1) a likelihood of success on the merits; (2) irreparable injury if injunctive relief is not granted; (3) a balance of hardships favoring plaintiffs; and (4) advancement of the public interest. *Barahona-Gomez v. Reno,* 167 F.3d 1228, 1234 (9th Cir. 1999); *see also Behymer-Smith ex rel. Behymer v. Coral Acad. of Science*, 427 F. Supp. 2d 969, 972-74 (D. Nev. 2006) (applying test in TRO context). Plaintiffs in this case must meet an even higher burden — they must show that they are entitled to relief on the merits and that they are certain to suffer irreparable harm — for two reasons.

First, as the *en banc* Ninth Circuit has stressed, "election cases are different from ordinary injunction cases. . . . Interference with impending elections is extraordinary." *Southwest Voter Registration Educ. Project*, 344 F.3d at 918-19 (rejecting a last-minute Equal Protection challenge to statewide election procedures). Indeed, "the decision to enjoin an impending election is so serious that the Supreme Court has allowed elections to go forward even in the face of an undisputed constitutional violation." *Id.* at 918 (citing cases). Thus, courts can grant injunctive relief of the kind requested here only in rare circumstances where plaintiffs' entitlement to the relief is beyond all doubt.

Second, the relief Plaintiffs seek is in reality tantamount to a permanent injunction that will permanently foreclose thousands of voters who are relying on the at-large caucus option to participate in the nomination process. The grant of a preliminary

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injunction in such circumstances is "specifically disfavored" and a request for such an injunction "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *Schrier v. University of Colo.*, 427 F.3d 1253, 1259 (10th Cir. 2005). A plaintiff must therefore establish both an indisputable entitlement to relief on the merits and truly irreparable harm. *See Libertarian Party of Colo. v. Buckley,* 938 F. Supp. 687, 690 (D. Colo. 1996).

As will be shown, Plaintiffs' cannot meet even the general standard for interim relief, and certainly cannot meet the heightened burden applicable to their extraordinary claims.

1. LACHES BARS PLAINTIFFS' CLAIMS.

Even if Plaintiffs' claims were otherwise colorable (and they are not), their abusive last-minute filing disentitles them to relief. Indeed, this is a classic case for applying the doctrine of laches. Plaintiffs have no excuse for sitting on their hands for months and filing this challenge on the eve of the State's long-scheduled caucus, and their delay manifestly prejudices Defendant and thousands of Democrats who are planning to participate in the Nevada caucus at the at-large gatherings that Plaintiffs seek to bar. *See generally Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 555 (9th Cir. 2006).

Laches "bars injunctive relief where plaintiff unreasonably delays in commencing action." *TriStar Pictures, Inc. v. Leisure Time Prods., B.V.*, 17 F.3d 38, 44 (2d Cir. 1994); *National Council of Arab Americans v. City of New York*, 331 F. Supp. 2d 258, 265-66 (S.D.N.Y. 2004) (denying relief on First Amendment challenge where plaintiffs waited 1½ months from permit denial until 15 days before the date of the planned demonstration). This doctrine applies with particular force in federal election cases. *See White v. Daniel,* 909 F.2d 99, 102-04 (4th Cir. 1990); *Arizona Minority Coalition for Fair Redistricting v. Arizona Ind. Redistricting Comm'n*, 366 F. Supp. 2d 887, 907-09 (D. Ariz. 2005). As the Ninth and Seventh Circuits each held when Ralph Nader attempted to challenge the

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constitutionality of state ballot-access rules at the last minute, "it would be inequitable to order preliminary relief in a suit filed so gratuitously late in the campaign season." *Nader v. Keith*, 385 F.3d at 736-37; *Nader v. Brown*, 386 F.3d at 1169 (rejecting similar claims in Arizona). Both courts emphasized that delay by itself — regardless of the merits — precluded interim relief. *Id.* In circumstances such as these, it is the plaintiff who has "created the situation in which any remedial order would throw the state's preparations for the election in turmoil." *Nader v. Keith*, 385 F.3d at 736-37; *see also McNeil v. Springfield Park Dist.*, 656 F. Supp. 1200, 1202-04 (C.D. Ill. 1987) (citing cases).

As in the *Nader* cases, here laches bars Plaintiffs' effort to use litigation to derail the Party's caucus process. Plaintiffs have known since March 1, 2007 that the Delegate Selection Plan would involve at-large caucuses that included the very features of that plan that Plaintiffs now challenge. On March 31, 2007, individual Plaintiffs actually voted to approve that plan, including the provisions establishing that the number of delegates elected in at-large caucuses would be determined by attendance at those caucuses. The final plan itself was approved by the DNC on October 24, 2007, almost three months ago.[1] At no time before their filing of this lawsuit a few days ago did Plaintiffs raise any objection to the plan. It was not until another union — the Culinary Workers Union, whose membership includes many workers who will have an opportunity to vote because of the at-large caucuses — endorsed a candidate for the Democratic nomination for President that Plaintiffs decided to file this disruptive lawsuit.

Prejudice is equally clear. The Party worked for months, expending time and financial resources, to develop the DSP and obtain approval from the DNC. Ex. 7, ¶¶ 6-

[1] Plaintiffs cannot plausibly claim that they are merely challenging the details of the plan that were released subsequently. First, all of Plaintiffs' claims would apply to any at-large caucus system whose total number of delegates would be determined on the day of the caucus. Second, even if Plaintiffs were merely challenging those details, those details have also been released for months. They were publicly available in May 2007 and provided to the candidates on May 2, 2007. The final plan was implemented following DNC approval on October 24, 2007. Plaintiffs have no explanation for their tactical decision to lay in wait until the eve of the election.

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16, 18 (Brock Decl.). At no time during that process did Plaintiffs object (indeed, they expressly approved the very feature of the plan at issue in this proceeding). Ex. 7, ¶¶ 13, 20 (Brock Decl.); Ex. 8, ¶ 9 (Gholar Decl.). There is now no time to send a revised version of the plan to the DNC for approval. Ex. 7, ¶ 18 (Brock Decl.). Moreover, the Party has expended significant time and resources arranging for the at-large caucuses — expenditures that cannot now be recouped. Ex. 7, ¶ 18 (Brock Decl.). Enjoining at-large caucuses now would throw the delegate selection process into disarray. Ex. 7, ¶ 18 (Brock Decl.). That, by itself, is prejudice sufficient to preclude injunctive relief. *See Arizona Minority Coalition for Fair Redistricting*, 366 F. Supp. 2d at 908-09 (finding that laches barred a constitutional claim brought just weeks before critical election deadlines). Moreover, there is a very real prospect that Nevada will lose the right to seat any delegates at the Democratic Party's national convention because, if Plaintiffs prevail, those delegates will have been chosen by a process the DNC has not approved. Indeed, Florida and Michigan have already suffered that fate as a result of their failure to use a DNC-approved process for selecting delegates.

The Party's members will also suffer great prejudice, especially individual voters who intend to take advantage of the at-large caucuses. As explained in the attached declarations, those members have relied on the availability of the at-large caucuses in structuring their affairs so that they might vote. Exs. 1-6 (Voter Decls.). The prejudice to those workers is caused solely by Plaintiffs' delay. *Id.*; *Libertarian Party of Colo. v. Buckley,* 938 F. Supp. at 690 (finding that plaintiffs' own delay caused the potential for harm to voters).

Thus, laches plainly bars Plaintiffs' claims for relief.

2. PLAINTIFFS' CLAIMS ARE MERITLESS.

Wholly apart from the issue of abusive delay, Plaintiffs' claims provide no basis for injunctive relief because they are meritless. As will be shown, Plaintiffs' federal constitutional claims are fashioned out of whole cloth. No court has ever held that a political party's choice about how to design a caucus process is "state action" subject to

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constitutional scrutiny, much less upheld a speculative vote-dilution claim of the kind Plaintiffs press here. Indeed, to make their claim seem plausible, Plaintiffs are forced to ignore the applicable legal precedent and engage in fanciful speculation about what might happen at the caucuses. Plaintiffs' state-law claims are likewise without foundation. Remarkably, Plaintiffs fail to mention that the Nevada statute they invoke specifically states that political parties are free to choose their own procedures for selecting delegates to a national party's nominating convention for the office of the Presidency.

A. Plaintiffs' Fourteenth Amendment Claim Is Baseless.

1. There Is No State Action.

The Fourteenth Amendment does not apply to the Party's presidential caucus because it is not "state action." Absent state action, Plaintiffs have no Fourteenth Amendment claim. *Brunette v. Humane Soc'y of Ventura County*, 294 F.3d 1205, 1209-10 (9th Cir. 2002). Under no stretch of the imagination can the Party's private choices be deemed to be an "infringement of federal rights fairly attributable to the government." *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003) (internal quotations and alterations omitted).

The Ninth Circuit recognizes four theoretical ways to establish that a private entity's conduct should be considered state action: "(1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus." *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835-36 (9th Cir. 1999). These criteria are extremely difficult to satisfy (as they should be, because private conduct generally should not be subject to Fourteenth Amendment scrutiny), and Plaintiffs do not come close to satisfying any of them. Defendant's caucus is obviously a private function. *See Flagg Bros. v. Brooks*, 436 U.S. 149, 158 (1978) (limiting public functions to "state-regulated elections or elections conducted by organizations which in practice produce 'the uncontested choice of public officials'") (quoting *Terry v. Adams*, 345 U.S. 461, 484 (1953)). *See generally Cousins*, 419 U.S. at 489-90. Nor is there "joint action" here

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because the caucus is indisputably the product of the Party's independent choice — as state law recognizes. *See* Nev. Rev. Stat. § 293.137(1) ("[T]he election of delegates *may* be a part of expressing preferences for candidates for the party's nomination for President of the United States *if the rules of the party permit*.") (emphasis added). For the same reason, there is no coercion here. *See also* Nev. Rev. Stat. § 293.133(1). And there is no nexus sufficient to create state action because the at-large caucus is actually a (legally permitted) departure from the state-prescribed process.

Plaintiffs cannot rely on the so-called "white primary" cases to establish state action. *See* TRO App. at 5 (citing *Nixon v. Herndon*, 273 U.S. 536 (1927), and *Nixon v. Condon*, 286 U.S. 73 (1932)). Those cases dealt with a situation in which a party primary effectively chose the ultimate officeholder and thus functioned as the equivalent of the actual state election. Thus, denial of participation in the primary process effectively denied the right to vote. Those cases also dealt with invidious discrimination and the deep-seated historical problem of using illicit stratagems to deny the right to vote based on race, and uniformly have been limited to their historical context. *See San Francisco County Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 826 n.1 (9th Cir. 1987) (collecting cases in which "the court has limited the [White Primary caselaw] to its unusual context"), *aff'd*, 489 U.S. 214 (1989). It should go without saying that the present case is entirely different.

Thus, this Court should do as other courts have done when faced with claims similar to those the Plaintiffs advance here, and hold that there is no state action. *See Cavallo v. Elk Grove Township Republican Central Comm.*, No. 85-C-1501, 1985 WL 3921, at *4 (N.D. Ill. Nov. 20, 1985); *Jackson v. Michigan State Democratic Party*, 593 F. Supp. 1033, 1046 (E.D. Mich. 1984); *Ferency v. Austin*, 493 F. Supp. 683, 699 & n.16 (W.D. Mich. 1980).

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2. Even If There Were State Action, There Would Be No Equal-Protection Violation.

Even if the Party's presidential caucus were wrongly treated as state action, Plaintiffs' equal-protection claim fails. Plaintiffs lack any basis in the law for asserting that strict scrutiny applies. In fact, the law is the polar opposite. The Party has a well-established First Amendment right to structure its nominating procedures to advance its interests. *Cousins v. Wigoda*, 419 U.S. at 487. The Supreme Court has made crystal clear that this right is at its zenith when a political party is choosing the individuals who will pick its standard bearer. *See, e.g.*, *California Democratic Party v. Jones*, 530 U.S. 567, 574-75 (2000); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986); *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973). For example, in *Democratic Party v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981), the Court ruled that a State had no power to force a party to seat delegates chosen in violation of party rules. *Id.* at 122. The Court held that the State, which wanted to impose an open primary, "may not substitute its own judgment for that of the Party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution." *Id.* at 123-24. Any effort to apply rigorous equal-protection scrutiny to a political party's choices would crash head-on into the Party's First Amendment rights.

As the D.C. Circuit recognized in an analogous constitutional challenge to party delegate rules, "even if the Party were a state actor, the Constitution was 'satisfied if [the party's rules] rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals.'" *LaRouche*, 152 F.3d at 995 (quoting *Ripon Soc'y, Inc. v. Nat'l Republican Party*, 525 F.2d 567, 586-87 (D.C. Cir. 1975) (*en banc*)); *see Weber v. Shelley*, 347 F.3d 1101, 1107 (9th Cir. 2003) ("So long as [the State's] choice [of its elections laws] is reasonable and neutral, it is free from judicial second-guessing"); *see also Hole v. North Carolina Bd. of Elections*, 112 F. Supp. 2d 475, 478-79 (M.D.N.C. 2000) (denying vote-dilution claim that unaffiliated voters should not have been

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permitted to vote in a primary election).[2] That reasoning is fully applicable here and defeats Plaintiffs' equal-protection challenge.

An at-large caucus that selects a delegation proportionate to the size of the caucus plainly serves a legitimate party interest. National party rules require state parties to schedule their delegate selection process to maximize participation, and particularly to reach out to African-American and Latino voters. Ex. 11 at 5, 7 (DNC's Delegate Selection Rules). The goal is obvious: To select a presidential nominee who will represent the interests of all Americans, the Party wants to maximize participation in its nomination process. *See Tashjian*, 479 U.S. at 214 (recognizing importance of "[t]he Party's attempt to broaden the base of public participation in and support for its activities"). Accordingly, recognizing that large numbers of Nevada voters work on shift schedules that would remove them from the political process, the Party scheduled at-large caucuses where there were large concentrations of such voters. And because the Party wanted its delegates to county conventions to reflect support they gathered at the first tier of voting, the Party elected to assign delegates for those at-large caucuses based on the number of voters who turn out at each caucus: More voters elect more delegates. Ex. 10 at 52-55 (Nevada DSP, App. C). The Party's formula was similar to one provided under state law for selecting delegates from voting precincts, Nev. Rev. Stat. § 293.133(1)(a)-(f), but is based on attendance rather than registration. The Plaintiffs acknowledge that the Party's interests — including shift-workers in the political process and basing delegates on the number of voters supporting them — are "highly laudable." TRO App. at 15.

Having conceding that the Party's objective is not merely rational but affirmatively desirable, Plaintiffs are forced to argue that the Party's efforts to achieve this laudable

[2] Plaintiffs are simply wrong that a challenge to a state party process that reflects the Party's own constitutional interests would be subject to strict scrutiny. TRO App. at 15. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), their only authority for invoking the heightened standard, involved a direct challenge to *state election laws*, not internal party rules.

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goal are nonetheless illegitimate because they do not guarantee a perfect one-person, one-vote equilibrium. But under rational-basis scrutiny — the only level of scrutiny that could apply here — the Party need not achieve the perfect equilibrium Plaintiffs demand. Rather, the Party's rules need only be rationally related to the "laudable" goal of allowing shift-workers to participate in the presidential caucus. Plaintiffs do not even attempt to argue that the Party's at-large caucuses are not rationally related to the goal of increasing shift-worker participation, and no such argument could plausibly be made. It is only by demanding the kind of "least restrictive means" analysis appropriate only to strict scrutiny that Plaintiffs can even begin to fashion an argument against the Party's caucus plan. But as demonstrated, there simply is no requirement of such narrow tailoring, nor could there be without infringing Defendant's core First Amendment rights. *LaRouche*, 152 F.3d at 995. And in all events, Plaintiffs' contention that caucus votes will not have equal weight is entirely speculative and hypothetical at this juncture.

Accordingly, Plaintiffs have offered no reason to think that they will ultimately prevail on their equal-protection claims under the U.S. and Nevada Constitutions.

B. Plaintiffs' State-Law Claims Are Also Meritless.

Because Plaintiffs' federal claims lack merit, the Court should deny relief without exercising its supplemental jurisdiction to consider Plaintiffs' state-law claims. If, however, the Court considers those claims, it should reject them as well. By their plain terms, the Nevada Code provisions Plaintiffs invoke do not apply to a caucus like the one that the Party created here.

On its face, the Election Code does not govern the presidential nomination process. To the contrary, in its only substantive mention of the presidential nomination system, the Code makes clear that the State must defer to political-party rules: "In Presidential election years, the election of delegates may be a part of expressing preferences for candidates for the party's nomination for President of the United States if the rules of the party permit such conduct." Nev. Rev. Stat. § 293.137(1). The other mentions of presidential elections either govern technical, procedural aspects of the

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conventions or govern the general election, and not a party's presidential nomination process. *See, e.g.*, Nev. Rev. Stat. § 293.163 (governing dates of state conventions in presidential election years); § 293.269 (governing the registration of opposition to presidential candidates); § 293.3155 (governing the use of absentee ballots); § 293.5057 (governing the residency requirements for voting for President). Because the Election Code does not by its terms apply to the presidential nomination process, and indeed, expressly defers to the Party (as it must under the First Amendment's guarantee of freedom of association), the Code simply has nothing to say about the Party's plans to allocate delegates and cannot support Plaintiffs' claims for relief.

Nor can the Party's choice to rely in part on precinct caucuses subject the Party's entire presidential caucus process to pervasive regulation by state law. Nevada "requires each major political party, in every year during which a general election is held, to have a precinct meeting held for each precinct. All persons registered in the party and residing in the precinct are entitled to attend the precinct meeting." Nev. Rev. Stat. § 293.135. The Defendant's Plan complies with that provision because every precinct will hold a precinct meeting on January 19, and all registered party members may attend those precinct meetings. Nothing in state law forbids a party, however, from adding a separate process — in this case, at-large caucuses — to create a second channel for political participation.

The reality is that the at-large caucuses are not "precincts" as defined by state law. Under Nevada law, a precinct is "the smallest voting area in a political subdivision," and the boundaries of a precinct are defined by certain natural geographical boundaries. Nev. Rev. Stat. §§ 293.077, 293.205. To be sure, the at-large caucuses do not meet this definition. But nothing in the Code requires that precincts be the exclusive avenue for selecting delegates. To the contrary, as noted above, the Code expressly leaves to the Party the freedom to choose how to select the delegates sent to the county convention.

Plaintiffs' laundry list of particular state-law claims fails because each claim is predicated on the false assumption that the at-large caucuses are "precincts" under the

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Election Code. For example, Plaintiffs allege that the Party violated Nev. Rev. Stat. §§ 293.205 and 293.208 by creating the at-large caucuses in 2007, because under the Code, the county clerk, and not the Party, is tasked with establishing election precincts, and precincts should have been created in 2006. *See* TRO App. at 23, 24. Similarly, Plaintiffs assert that the Party violated Nev. Rev. Stat. §§ 293.205 and 293.206 because the at-large caucus boundaries do not follow visible natural ground features, and the at-large caucus boundaries are not defined on the election-precinct map produced by Clark County. *See* TRO App. at 24-25. Plaintiffs further claim the at-large caucuses violate Nev. Rev. Stat. §§ 293.135 and 293.207 because "they were not established based on the number of registered Democrats in a geographic location" and claim that proper notice will not be given to attendants of the at-large caucuses. TRO App. at 23, 25. Each of these contentions incorrectly assumes that the at-large caucuses are "precincts" under the Code, and thus must follow the rules set out for election precincts. As demonstrated above, however, the at-large caucuses are not "precincts" under the Code's definition of the term, and accordingly the Party need not comply with the Code's requirements for precincts.

Finally, even if state law governed the Party's internal processes, Plaintiffs assert purely technical violations that cannot trump the Party's fundamental right to include shift-workers in selecting its presidential nominee. In *Cirac v. Lander County*, 602 P.2d 1012 (Nev. 1979), the Supreme Court of Nevada considered the question whether a county board of commissioners acted within its authority in validating technically invalid signatures in a petition concerning moving of a county seat. The board validated 71 signatures of persons who personally were not on the county tax rolls, but whose spouses were validly on the rolls. *Id.* at 1014. In holding that the board legally validated those signatures despite their technical noncompliance with the Code, the court emphasized that "the right to vote should not be taken away due to a doubtful statutory construction or 'mere technicality.'" *Id.* at 1016-17 (quoting *Lynip v. Buckner*, 22 Nev. 426, 439, 41 P. 762, 765 (1895)); *see also Bennett v. Yoshima*, 140 F.3d 1218, 1226 (9th

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Cir. 1998) (distinguishing between pervasive election irregularities, which invalidate an election, and "garden variety" errors, which do not). The principle in *Cirac* applies even more strongly here — any purported violations of the Code amount to mere technicalities relating to notice requirements and precinct boundaries. As *Cirac* makes clear, minor or questionable violations of the Code cannot interfere with the fundamental right of Nevada citizens to vote.

2. IT WOULD BE GROSSLY INEQUITABLE AND MANIFESTLY AGAINST THE PUBLIC INTEREST TO GRANT THE RELIEF PLAINTIFFS SEEK.

Plaintiffs' plea for injunctive relief should be denied for the additional reason that it is inequitable in the extreme. If this Court were to grant the relief Plaintiffs seek, the result would be to inflict certain harm both on the Party's First Amendment right to choose how to structure its delegate selection process, and on the thousands of shift-workers who will be denied all realistic opportunity to participate in the presidential caucus. Conversely, the purported harm Plaintiffs seek to avert — a possibility of some "dilution" of the vote of those who participate in the caucus at election precincts — is, to put it charitably, speculative, and a far cry from the kind of certain and great harm needed to establish irreparable injury. *See Nava v. City of Dublin*, 121 F.3d 453, 459 (9th Cir. 1997), *rev'd on other grounds*, *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). This gross imbalance between the certain and grave harms that will be inflicted if relief is granted and the speculative character of the harms that Plaintiffs seek to avoid would foreclose interim relief even if Plaintiffs had colorable claims on the merits (which they do not) and even if Plaintiffs had not waited until the last instant to seek this relief. Given the palpable weakness of Plaintiffs' case on the merits and the unconscionable timing of their filing, there is no conceivable basis for affording them the injunctive relief they seek.

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A. The Relief Plaintiffs Request Is Certain To Harm the Party and Thousands of Shift-Workers in Nevada, and Is Manifestly Against the Public Interest.

The relief Plaintiffs seek would directly and irremediably infringe the Party's First Amendment right to structure its process for selecting presidential delegates in the manner it deems most appropriate. *See LaFollette*, 450 U.S. at 122-24; *Tashjian*, 479 U.S. at 214. Even if Plaintiffs' equal-protection claim had a colorable legal and factual basis (and it does not), this certain injury to the Party's core First Amendment rights forecloses the relief Plaintiffs seek.

Equally to the point, the relief Plaintiffs seek would have the effect of preventing thousands of shift-workers from participating in the presidential caucus. This Court must consider that harm. *Sammartano v. First Judicial Dist. Court, in and for the County of Carson City*, 303 F.3d 959, 974 (9th Cir. 2002) (requiring court to address a TRO's impact on nonparties). The at-large caucuses have been publicized for almost a year and were created for the sole purpose of enabling shift-workers — who are the voters who would be systematically unable to attend a Saturday caucus — to participate. Thousands are expecting to vote at these caucuses, and, especially at this late hour, few will realistically be able to rearrange their shifts to return home to attend a precinct caucus. *See* Exs. 1-6 (Voter Decls.); Ex. 9 (Bonaventure Decl.). Not only would eliminating the at-large caucuses leave these voters unable to participate in the 2008 nominating process, but — with an on-again, off-again caucus — it would erode all citizens' confidence in the election process as a whole. *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (recognizing importance of right to vote); *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg. Transit Auth.*, 163 F.3d 341, 363 (6th Cir. 1998) (guarding against "the fear that . . . persons will be deterred, even if imperceptibly, from exercising [their constitutional] rights in the future") (citation and internal quotation marks omitted). Eliminating the at-large caucuses, and thus changing the DNC-approved DSP, also runs the risk of significant punishment — including the

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punishment meted out to Florida and Michigan for selecting delegates in a manner not approved by the DNC.

These harms, which are certain to occur if the Court grants Plaintiffs the relief they seek, are more than enough reason to deny interim relief.

B. The Speculative Risks of "Vote Dilution" Advanced By Plaintiffs Fall Far Short of A Showing of Irreparable Injury.

Plaintiffs insist that, absent injunctive relief, they will suffer "immense hardship" as their "voice and participation in the delegate selection process will be diluted and marginalized." TRO App. at 27-28. That claim is ridiculous. Neither Plaintiffs nor any other voters anywhere in the State of Nevada will suffer any cognizable harm if the at-large caucuses go forward as planned. Plaintiffs grossly overstate both the likelihood and degree of harm that the attendance-based, at-large caucuses could even possibly impose.

First, no voters residing outside Clark County will suffer *any* vote dilution because the number of delegates that each of Nevada's 17 counties will send to the April 2008 State Convention is fixed. Nev. Rev. Stat. § 293.145. Whether the at-large caucuses attract thousands of voters, or none, Clark County's delegation to the state convention will be precisely the same size and will constitute precisely the same fraction of the delegates at that convention. *See id.*

Second, there will be no illegal dilution of votes cast by Plaintiffs or other voters who participate at precinct caucuses in Clark County. Plaintiffs hypothesize about a "John Voter" who will have ten times as much voting power as a "Jane Voter," solely because he is working on the Strip on Caucus Day, while she has the day off. *See* TRO App. at 3-4. In addition to being a hypothetical scenario that is absurd, that argument proves far too much. The relative "value" of two individual voters in different districts or precincts is always different based on turnout, and there is no "right" to precisely equal "value" in a given election.

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Disparities in the relative impact of a single vote are inevitable because turnout in individual geographic areas is unpredictable and uneven. For example, there very well could be two adjoining precincts that each have 400 registered Democratic voters and therefore are each entitled to elect eight delegates to the Clark County convention. But in Precinct *A*, 200 of those voters may participate in Saturday's caucus, while in Precinct *B* only 20 voters participate. An individual voter in Precinct *A* admittedly has much less voting power than an individual voter in Precinct *B* — but he doesn't have a "one person, one vote" claim under the Constitution.

To find an example of constitutionally apportioned districts that generate wildly different turnouts on Election Day, one need not look beyond the confines of Clark County. In the most recent general election for the Nevada State Senate, 62,926 voters cast ballots for Senate candidates in District 5 (a double district represented by 2 senators) while only 6,523 did so in District 2 — a significant gap. *See* Nevada Secretary of State, 2006 Official Statewide General Election Results, November 7, 2006, *available at* http://sos.state.nv.us/elections/results/2006StateWideGeneral/ ElectionSummary.asp. But that disparity does not make out a claim of unconstitutional vote dilution.

In any event, Plaintiffs' claim for vote dilution relies entirely on fanciful hypotheticals about massive turnout in the precincts and oddly light turnout in the at-large caucuses. Plaintiffs' "John and Jane" hypothetical assumes relatively low turnout at John's at-large caucus (only 261 voters, even though the caucus site employs at least 4,000 people) and simultaneously an unheard-of *100%* turnout at Jane's precinct caucus (261 voters out of 261 registered Democratic voters). *See id.* Given that bizarre premise, the conclusion of Plaintiffs' fable hardly comes as a surprise. Because the number of delegates to be chosen at each precinct is fixed, Plaintiffs' hypothetical 100% turnout would minimize the voting strength of each individual voter, including Jane Voter.

But *in reality*, the at-large caucus system reflects a good faith attempt by the Party to give as many voters the opportunity to vote and to apportion delegates equitably among voters. Plaintiffs ignore that, as turnout in the at-large caucuses increases, the

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number of delegates per voter declines dramatically. *See* Ex. 10 at 54-55 (Nevada DSP).[3] So the plan is designed to ensure that the at-large caucus-goers will not be over-represented at the Clark County convention if turnout is high. Indeed, if turnout at one of the at-large caucuses exceeds 2,000, a 30-to-1 ratio would apply — not the 5-to-1 ratio that Plaintiffs repeatedly cite in their papers. *Id.* at 55. Even Plaintiffs seem to admit that, at the Clark County convention, delegates chosen at the precinct caucuses will overwhelmingly outnumber delegates chosen at the at-large caucuses. *See* TRO App. at 7, 11 (noting that the former caucuses are certain to select exactly 7,224 delegates while the latter have only "the potential . . . [to select] 720 or more").

Although estimating voter turnout is always a risky enterprise, a much more realistic expectation for the nine at-large caucuses is that, on average, each will attract somewhere between 400 and 1,200 voters and, under the formula just described, will elect between 50 and 80 delegates. *See* Ex. 7, ¶ 17 (Brock Decl.). So in total, at all nine at-large caucuses combined, somewhere between 3,600 and 10,800 voters will elect somewhere between 450 and 720 delegates. Meanwhile, in the rest of the County, at the precinct caucuses, a reasonable estimate is that somewhere between 40,000 and 60,000 voters will elect 7,224 delegates. *See id.* (This 40,000-to-60,000 figure is roughly in line with the turnout rate at the Iowa Democratic presidential caucus earlier this month and thus may be overstated, given the enormous amount of time and money that the presidential candidates and campaigns invested in that State.[4])

[3] Plaintiffs repeatedly cite only the part of the formula that assumes very low turnout, with 400 or fewer voters at each at-large caucus. *E.g.*, TRO App. at 4, 10. Under that assumption, as Plaintiffs repeatedly note, one out of every five at-large voters can become a delegate. *Id.* But if turnout increases and there are between 401 and 600 voters at an at-large caucus, only one out of eight can become a delegate; and if there are between 601 and 800 voters, only one out of ten can become a delegate. *See* Ex. 10 at 54 (Nevada DSP).

[4] In Iowa, of the almost 1.4 million non-Republican registered voters who were eligible to participate in the Democratic presidential caucus, about 239 thousand (*i.e.*, less than 18%) actually did so. If that percentage were applied to Clark County's 280,379 active Democratic registered voters (*see* http://www.co.clark.nv.us/election/RegStatsDist_Active.pdf), the total countywide turnout this Saturday would be less than 49,000 voters.

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Under this scenario, the ratio of voters to delegates would be between 8.0-to-1 and 15.0-to-1 in the at-large caucuses and between 5.5-to-1 and 8.3-to-1 in the precinct caucuses elsewhere in Clark County. That is hardly a disturbing disparity. *Compare Brown v. Thomson*, 462 U.S. 835 (1983) (tolerating a far greater mathematical disparity, where two counties each got to elect one state representative, even though one county had more than three times the population of the other county). If anything, the Party's delegate-allocation system for Clark County somewhat *dis*favors the voters who participate at the at-large caucuses — directly contrary to Plaintiffs' unfounded, and utterly unrealistic, speculation.

In all events, the one thing that can be said with certainty about Plaintiffs' claims is that the "harm" they assert is completely speculative. Until voters actually go to the caucuses, Plaintiffs cannot know whether an individual voter at an at-large caucus or an individual voter at a precinct caucus will have greater power. Such rank speculation is insufficient, as a matter of law, to constitute irreparable harm. *See, e.g.*, *Southwest Voter Registration Educ. Project*, 344 F.3d at 918-19 (refusing to grant injunctive relief because "[a]t this time, it is merely a speculative possibility, however, that any such denial will influence the result of the election"); *Goldie's Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) ("Speculative injury does not constitute irreparable injury."); *Hole*, 112 F. Supp. 2d at 478-79 (denying relief because speculative harm based on votes that should not have been counted was insufficient when compared to the burden on the electoral system of an injunction).

Even in the context of state-legislative redistricting (where courts have been far more willing to intervene than in the political-party caucus context), as long as there is some good-faith basis for apportioning legislative seats equitably, a mere disproportionality in ultimate voting strength — even the disparity exhibited in Nevada Senate Districts 2 and 5 — simply does not give rise to irreparable harm or a justiciable controversy. This Court should not wade into these waters — especially not in the previously unaddressed setting of a multi-tiered political-party caucus system, and on the

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eve of what may well be the most closely watched presidential nominating contest in this State's history. Plaintiffs have identified no harm that would justify doing so.

C. The Last-Minute Nature of Plaintiffs' Filing Further Confirms the Inequitable Character of Their Claim for Relief.

The abusive last-minute character of Plaintiffs' filing provides further confirmation that they have no equitable entitlement to interim relief. Plaintiffs have known of the Party's plans for attendance-based, at-large caucuses since March 2007. Since then, and despite constant involvement and consultation in the plan's development, no Plaintiff complained about the at-large caucus system. As the attached voter declarations show, if the at-large caucus had been cancelled months or weeks ago, some voters could have rearranged their shift schedules to caucus in their home precinct. Exs. 1-6 (Voter Decls.). Had Plaintiffs sought and obtained this relief earlier, these voters would have still been able to participate in the process. Thus, whether intentionally or not, Plaintiffs have engineered this harmful result by their own conduct. *See, e.g.*, *Western Land Exchange Project v. U.S. Bureau of Land Mgmt.*, 315 F. Supp. 2d 1068, 1098 (D. Nev. 2004) (refusing to grant injunction that agency requested when the harm "has been largely of the agency's own making").

Courts regularly invoke equitable considerations to refuse injunctive relief sought only days before the clock is scheduled to expire, including when the potential harm is far more serious than the harm Plaintiffs allege here. *See Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 654 (2004) (stating that a court may consider "the last-minute nature of an application . . . in deciding whether to grant equitable relief" to halt a pending execution). That is both because Plaintiffs ought not be rewarded for these tactics, especially at the expense of the Party and voters who seek only to participate in the electoral process, and because the Plaintiffs' "calculated delay" in seeking an adjudication is evidence that the claimed harm is trivial. *Lucas County Democratic Party v. Blackwell*, 341 F. Supp. 2d 861, 864 (N.D. Ohio 2004); *see Flint v. Dennison*, 336 F. Supp. 2d 1065, 1070 (D. Mont. 2004) (noting that by "sleeping on its

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rights, a plaintiff demonstrates the lack of need for speedy action"); *Taylor v. Angarano*, 652 F. Supp. 827, 828-29 (S.D.N.Y. 1986).

Thus, for all the foregoing reasons, Plaintiffs lack any equitable basis for the relief they seek.

CONCLUSION

For the foregoing reasons, Plaintiffs' Application for a TRO should be denied.

DATED this 16th day of January, 2008.

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