

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

AMERICAN CIVIL LIBERTIES UNION OF  
NEVADA, a domestic nonprofit corporation;

Petitioners,

vs.

THE COUNTY OF NYE, a governmental entity; and  
MARK KAMPF, in his official capacity as interim  
County Clerk,

Respondents.

Electronically Filed  
Nov 14 2022 12:45 PM  
Elizabeth A. Brown  
Clerk of Supreme Court  
Case No. 85636

**COUNTY OF NYE AND MARK KAMPF'S ANSWER TO EMERGENCY  
PETITION FOR WRIT OF MANDAMUS PURSUANT TO NRAP 21(a)(6)**

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## **NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies the below representations in accordance with NRAP 26.1(a). These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. County of Nye is a governmental party and, thus, is not required to make a NRAP 26.1 disclosure.

2. Mark Kampf is an individual and, thus, has no parent corporation or ownership by a publicly-traded company.

3. County of Nye and Mark Kampf are represented by Marquis Aurbach.

Dated this 18th day of November, 2022.

MARQUIS AURBACH

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## **I. STATEMENT OF ISSUES**

1. Can Nye County conduct a hand count after all ballots have already been counted via a mechanical tabulator?
2. Does Nye County's procedures regarding ballot accuracy/security comply with Nevada law?
3. Can Nye County conduct a hand count outside of a central counting place under Nevada law?

## **II. STATEMENT OF FACTS**

On October 27, 2022, this Court issued an order in a related matter involving substantially the same parties (Case No. 85507) and the same issue at hand – the legality of the hand count process used by Nye County and its Clerk Mark Kampf.<sup>1</sup> In that order, this Court said “*[t]he specifics of the hand-count process and observer positioning so as not to violate this mandate is for respondents and the Nevada Secretary of State to determine*” (emphasis added).<sup>2</sup> Seemingly disappointed with the fact that they were not invited to take part in crafting a compliant hand-count process, petitioners took matters into their own hands and directly contacted Deputy Secretary of State Mark Wlaschin, expressing a litany of

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<sup>1</sup> Respondents respectfully request that this Court take judicial notice of the proceedings in said matter.

<sup>2</sup> See October 27, 2022 Order at pg. 3 (Case No. 85507).

concerns (the same concerns constitute the basis for the instant writ requested).<sup>3</sup> When Mr. Wlaschin seemingly refused to further intervene in or reverse his prior approval of Nye County’s revised hand count process, petitioners responded by filing the instant writ. For the reasons set forth below, petitioners’ instant request for a writ of mandamus should be denied.

### **III. LEGAL ARGUMENT**<sup>4</sup>

#### **A. NEVADA LAW DOES NOT EXPRESSLY PROHIBIT A HAND COUNT OF BALLOTS THAT DOES NOT QUALIFY AS AN AUDIT, RECOUNT OR CONTEST**

Petitioners offer absolutely no legal or statutory authority whatsoever for the proposition that there are only “three circumstances under which a ballot that has already been counted may be counted again.”<sup>5</sup> Petitioners want this Court to just

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<sup>3</sup> See **Exhibit 1**, Declaration of Mark Kampf in support of Answer to Petition (“Kampf Decl.”) at Respondents’ Appendix (“RA”) 001, at ¶ 3; see **Exhibit 2** for letter petitioners sent jointly with other entities to Mark Wlaschin at RA 002-008.

Petitioners knew or should have known, based upon their involvement in the prior related litigation, that Mr. Wlaschin was a represented party with respect to the subject of the hand count. Their effort to directly contact him and influence his decision-making process regarding the hand count was improper. It is for this reason that counsel for respondents communicated through the Attorney General’s Office (representing Mr. Wlaschin) regarding the hand-count, so as to not improperly pressure Mr. Wlaschin.

<sup>4</sup> Respondents are not dissatisfied with Petitioners’ proffered legal standard for issuing writs of mandamus in general, and thus pursuant to NRAP 28(b), do not offer their own legal standard for the same.

<sup>5</sup> Petition at pg. 13.

assume that since NRS 293 offers three examples of when a ballot can be counted again (audit, recount or contest), every other circumstance for counting a ballot again (such as conducting a “parallel process”) is necessarily excluded. Petitioners seem to conveniently forget that under NRS 293.124, the Secretary of State is the “Chief Officer of Elections” that is responsible for the “execution and enforcement” of provisions of “state and federal law relating to elections in this State.” And in this instance, the Secretary of State, acting through Mr. Wlaschin, has approved the resumption of Nye County’s hand count process,<sup>6</sup> when it undoubtedly knew that said process would be parallel to the mechanical tabulation being used as the primary method of counting. Given that Nevada law does not expressly prohibit re-counting ballots outside the scope of an official audit, recount or contest, this Court should decline petitioners’ invitation for judicial policymaking, and instead defer to Mr. Wlaschin’s judgement pursuant to NRS 293.124.

**B. NEVADA LAW DOES NOT EXPRESSLY PROHIBIT ALTERATIONS TO BALLOT SECURITY / VOTING ACCURACY PLANS WITHIN 90 DAYS OF A GENERAL ELECTION**

Petitioners once again want this Court to just assume that the lack of statutory approval for an action equates to a statutory prohibition. Petitioners

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<sup>6</sup> See Kampf Decl., RA 001, at ¶ 4.

acknowledge that Nye County timely submitted its original ballot security/voting accuracy plan in February, but indicate that since said plan did not address the hand count, Nye County had to submit a new plan by August 10, 2022 or otherwise not be able to conduct a hand count under NAC 293B.040.<sup>7</sup> Again, nothing in the NRS or NAC indicates that a county cannot alter, update, revise or even re-submit its ballot security/voting accuracy plan, even within 90 days of the general election (so long as it submitted an original plan on time). NAC 293B.040 merely says a plan has to be submitted before 90 days of the general election, which petitioners admit was done in this case. This Court interpreting NAC 293B.040 in such a harsh manner (i.e. no changes/revisions/re-submissions are allowed within 90 days of a general election) would disincentivize county clerks and the Secretary of State from working together and revising ballot security/voter plans as issues arise in the lead up to general elections.

In this case, Mr. Wlaschin and Mr. Kampf worked together on revising Nye County's hand count plan. Specifically, Mr. Kampf made modifications to the hand count procedure to address certain concerns Mr. Wlaschin expressed (namely using certain types of gloves and pens), with Mr. Wlaschin subsequently approving

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<sup>7</sup> Petition at pg. 20.



said hand count procedure and indicating that the hand count may resume.<sup>8</sup> This exchange shows exactly why this Court should not construe NAC 293B.040 as not allowing changes to a ballot security/voting accuracy plan within 90 days of an election. Clerks should be incentivized to work with the Secretary of State on issues that may arise, even within 90 days of a general election. So again, respondents respectfully ask that this Court grant Mr. Wlaschin the deference he is entitled to under NRS 293.124, especially when there is no explicit prohibition on revising (or even re-submitting) a ballot security/voting accuracy plan under NAC 293B.040.

**C. THE VALLEY ELECTRIC CONFERENCE CENTER DOES NOT CONSTITUTE A CENTRAL COUNTING PLACE AS DEFINED UNDER NRS 293.0335**

NRS 293.0335 defines a central counting place as the “location designated by the county clerk for the compilation of *election returns*” (emphasis added). “Election returns” clearly refer to the official, aggregate results that a county reports to the Secretary of State.<sup>9</sup> Petitioners have not alleged nor offered any indication that Nye County’s “election returns” are being tabulated at the Valley

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<sup>8</sup> Kampf Decl., RA 001, at ¶ 4.

<sup>9</sup> NRS 293.387, which addresses the canvass of “returns,” is just one example of how the statutory scheme set forth in NRS 293 clearly refers to “returns” as an official, aggregate number that is reported.

Electric Conference Center – precisely because Nye County’s official returns being reported to the Secretary of State are being generated via mechanical tabulator.<sup>10</sup> In fact, petitioners acknowledge that Nye County has already tabulated all of its ballots via a mechanical tabulator (and do not contend that said mechanical tabulation was not performed at a pre-approved central counting place).<sup>11</sup> Simply put, the Valley Electric Conference Center is not required to be a “central counting place” as defined under Nevada law when it is not be used to compile and report official “election returns.”

#### **IV. CONCLUSION**

For the foregoing reasons, respondents respectfully request that this Court deny the request for a writ of mandamus.

Dated this 18th day of November, 2022.

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<sup>10</sup> Kampf Decl., RA 001, at ¶ 5.

<sup>11</sup> Petition at pg. 14.

## **CERTIFICATE OF COMPLIANCE**

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 21(d) because it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 1,647 words; or

☐ does not exceed \_\_\_\_\_ pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 18th day of November, 2022.

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **COUNTY OF NYE AND MARK KAMPF'S ANSWER TO EMERGENCY PETITION FOR WRIT OF MANDAMUS PURSUANT TO NRAP 21(a)(6)** was filed electronically with the Nevada Supreme Court on the 18th day of November, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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