

IN THE SUPREME COURT OF THE STATE OF NEVADA

AMERICAN CIVIL LIBERTIES UNION OF
NEVADA, a domestic nonprofit corporation; and
STEVEN BACUS, an individual,

Petitioners,

vs.

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

Respondents.

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Case No. 85509

**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 19th day of October, 2022.

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I. STATEMENT OF ISSUES

1. Does Nye County’s hand counting procedures, which involves poll workers announcing a ballot’s selection of particular candidates as part of a manual tallying process, violate NRS 293.3606 and NRS 293.269935 by impermissibly releasing election results prior to the close of all polls?

2. Does Nye County’s announced plans for accommodating voters with special needs impermissibly allow or require poll workers to inquire about a voter’s disability in contravention of federal and Nevada law?

3. Does Nye County’s announced plans for using voter identification as part of the signature verification process violate Nevada law?

II. STATEMENT OF THE CASE

On August 26, 2022, the Nevada Secretary of State adopted a regulation allowing for the hand counting of ballots (the “Hand Counting Regulation”).¹ Less than a week later, the Progressive Leadership Alliance of Nevada (“PLAN”) challenged the Hand Counting Regulation, filing both a complaint and a motion for a preliminary injunction in the First Judicial District Court.² Among other allegations, PLAN primarily challenged the Hand Counting Regulation on the

¹ See Respondents’ Appendix (“RA”), at 001-014 for Hand Counting Regulation; *see also* RA 016, at ¶ 5.

² See RA 015-028 (complaint); RA 029-042 (preliminary injunction motion without exhibits affixed).

basis that it allowed for disparate methods of voting in contravention of Nevada law. RA 022.³

Shortly after PLAN's challenge of the Hand Counting Regulation, Petitioners American Civil Liberties Union of Nevada and Steven Bacus (collectively, "Petitioners" or "ACLU"), filed suit in the Fifth Judicial District Court against the respondents County of Nye ("Nye County") and Mark Kampf ("Mr. Kampf") (Nye County and Mr. Kampf, collectively, the "Respondents"). RA 049. The suit alleged that Nye County's proposed electoral processes associated with the hand counting of ballots violated Nevada and federal law in assorted ways, with Petitioners filing an emergency petition for a writ of mandamus, as well as a complaint for injunctive and declaratory relief.⁴ The Fifth Judicial District Court denied both the emergency petition and the complaint.⁵ As a result, Petitioners filed the instant Petition for Writ of Mandamus ("Petition").

³ For a more comprehensive history of this related case challenging the hand counting of ballots, Respondents respectfully request that this Court take judicial notice of the proceedings currently pending before this Court (Case No. 85434).

⁴ *See generally* Petitioners' Appendix, Vol. 1 ("APP"), at 0015-0032 (ACLU's emergency petition and complaint filed with the Fifth Judicial District Court).

⁵ *See* APP0051-0053 for Judge Wanker's order.

III. STATEMENT OF FACTS

Following the Nevada Secretary of State’s promulgation of regulations allowing for the hand counting of ballots, Nye County announced, on September 6, 2022, its intention to use paper ballots for the general election, which would be tallied via a hand count.⁶ Following this announcement, Mr. Kampf made a presentation to the Nye County Board of Commissioners (“Board”) on September 20, 2022.⁷ This presentation offered the Board a general overview of Nye County’s electoral processes in light of the decision to use paper ballots and hand counting procedures.⁸ Mr. Kampf made the following assertions during the presentation⁹:

1. With respect to the ADA touch screen available at each polling location, Mr. Kampf said “*we will not deny anybody who feels they need that special assistance.*” Presentation at 1:54:25 – 1:54:34.

⁶ See APP0001 for Nye County press release announcing the adoption of paper ballots and a hand count.

⁷ See APP003-0013 for the slides used in Mr. Kampf’s presentation.

⁸ See *id.*

⁹ Respondents concur with Petitioners’ observation that the minutes/transcript for the September 20, 2022 Board meeting are not available online. See Petition at pg. 5, n. 6. Respondents likewise offer this Court detailed time-stamps of the video link cited to in the Petition, which Petitioners correctly note is the only public record available of Mr. Kampf’s presentation (“Presentation”).

2. Answering a question about any changes still to be made, Mr. Kampf said that with respect to the proposed recording of the hand count process, “*I want to make sure that it doesn’t cause anyone to interpret that the results would be made available before election day.*” Presentation at 2:07:22 – 2:07:35. Minutes earlier, Mr. Kampf had also said “*we have to make sure we cover any of our legal issues* associated with that [recording the hand count].” Presentation at 2:01:20 – 2:01:28.

3. Mr. Kampf also noted that “*if the signature or address verification fails*, we have the right to ask for voter identification.” Presentation at 2:02:06 – 2:02:14.

Following this September 20, 2022 presentation, Mr. Kampf followed through on his promise to clarify the recording issue, emailing Deputy Secretary of State Mark Wlaschin for guidance.¹⁰ Mr. Wlaschin indicated that “[r]egarding the videos and after discussing it with the DAGs [Deputy Attorney Generals], no issues on our end as long as the recordings are held until after the close of polls.”¹¹

¹⁰ See RA 044-046 (email sent from Mark Kampf to Mark Wlaschin); see also Declaration of Mark Kampf (RA 043, hereinafter “Kampf Decl.”) at ¶ 4.

¹¹ See RA 045 (email response sent from Mark Wlaschin to Mark Kampf); see RA 047-048 for email attachment setting forth the counting observer form; Kampf Decl. at ¶ 4.

IV. SUMMARY OF ARGUMENT

In dismissing Petitioners' request for an emergency petition and complaint, the Fifth Judicial District Court astutely noted that “[j]udges are not like pigs, hunting for truffles buried in briefs.” APP0052. It is worth further noting that judges are not fortune tellers either, and cannot be counted on to predict the future and speculate as to what may or may not happen. Finally, judges are not lugubrious “Eeyore’s” that are expected to presume the worst-case scenario just because it may suit a movant’s needs (especially when there is no basis for doing so). Yet, that is exactly what the ACLU is asking this Court to do. Specifically, it wants this Court to assume the following: (1) Nye County will be interrogating voters about their specific disability,¹² a non-sensical assertion given Mr. Kampf’s statement that anyone who feels they need to use an ADA screen will be able to do so,¹³ (2) election results will somehow be released prior to the close of the polls,¹⁴ even though Mr. Kampf specifically clarified the issue with Deputy Secretary of State Wlaschin¹⁵ as he promised he would during the September 20, 2022 presentation,¹⁶

¹² See Petition at pgs. 19-21.

¹³ See Presentation at 1:54:25 – 1:54:34.

¹⁴ See Petition at pgs. 15-19.

¹⁵ See RA 044-046.

¹⁶ See Presentation at 2:07:22 – 2:07:35.

and (3) Nye County's plans for using identification as part of the verification process is somehow improper and contrary to Nevada law,¹⁷ when in fact it is not.

Despite these aforementioned illogical leaps of faith and contradictory assertions, the Petition fails as a matter of law for the following reasons: (1) Petitioners have no private right of action to enforce election laws, a right which is expressly reserved to the Nevada Secretary of State, (2) the Petition rests on speculation and a distorted view of Mr. Kampf's September 20, 2022 presentation, which proffered procedures that as a matter of law, are entirely permissible.

V. LEGAL ARGUMENT¹⁸

A. PETITIONERS HAVE NO PRIVATE RIGHT OF ACTION TO ENFORCE NEVADA OR FEDERAL ELECTION LAW

The Petition fails as a matter of law for a very simple, straightforward reason: Petitioners have no private right of action to enforce Nevada or federal election law. This Court has expressly noted that "when an administrative official is expressly charged with enforcing a section of laws, a private cause of action generally cannot be implied." *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951,

¹⁷ See Petition at pgs. 21-24.

¹⁸ Respondents are not dissatisfied with Petitioners' proffered legal standard for writs of mandamus, and thus pursuant to NRAP 28(b), do not offer their own legal standard.

961, 194 P.3d 96, 102-03 (2008). Indeed, in *Baldonado*, this Court observed, “the fact that the Legislature has ordered the Labor Commissioner to enforce NRS 608.160 *weighs heavily against finding any intent to create a private remedy.*” *Baldonado*, 124 Nev. at 961 (emphasis added).¹⁹ With this standard in mind, NRS 293.124 becomes dispositive of the entire Petition and the allegations made therein.

NRS 293.124 sets forth the following: “*The Secretary of State shall serve as the Chief Officer of Elections for this State... is responsible for the execution and enforcement of the provisions of title 24 of NRS and all other provisions of state and federal law relating to elections in this State*” (emphasis added). Clearly, NRS 293.124 expressly charges the Nevada Secretary of State with enforcing NRS 293, including all of the NRS provisions forming the basis for the Petition. Thus, under *Baldonado* and *Allstate*, Petitioners are barred from bringing a private right action to enforce assorted provisions under NRS 293.

¹⁹ See also, *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007) (finding that since the Nevada Division of Insurance had exclusive jurisdiction over Nevada’s prompt-pay statutory provisions, individuals had no private of action to bring claims under such provisions (and could only seek administrative relief)). Notably, the ACLU could have sought administrative relief with Nevada Secretary of State’s Office but declined to do so.

As a minor aside, Petitioners also allege that Nye County asking voters about their specific disability violates the Help America Vote Act (“HAVA”).²⁰ Yet for one, NRS 293.124 would still prohibit the instant petition, as it says the Nevada Secretary State is also expressly in charge of enforcing “federal” election law (not just state law). Moreover, at least one federal appeals court has found that HAVA does not even allow for a private right of action. *See Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir. 2004) (“HAVA does not itself create a private right of action”).

B. PETITIONERS’ REQUEST FOR A WRIT OF MANDAMUS IS BASED ON SPECULATION AND A DISTORTION OF MR. KAMPF’S SEPTEMBER 20, 2022 PRESENTATION, WHICH SETS FORTH PROCEDURES THAT DO NOT VIOLATE STATE OR FEDERAL LAW

To be sure, this Court can issue the requested writ of mandamus to prevent and enjoin imminent harm. Yet, such harm must be within the realm of reason and an actual possibility, and cannot stem from speculative actions that may never come to fruition. Indeed, this Court has repeatedly denied requests for legal relief that are rooted in speculation. *See Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986) (“Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief. Moreover, litigated matters must

²⁰ *See* Petition at pgs. 19-21.

present an existing controversy, not merely the prospect of a future problem”).²¹ See also *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 231, 181 P.3d 670, 674 (2008) (...this argument is without merit because it relates to a speculative future act...). In this case, Petitioners’ claims are rooted in brazen speculation and, thus, provide no basis for this Court to provide the requested writ of mandamus.

1. **Nye County’s Hand Count Procedures Will Not Reveal Election Results Prior to the Close of the Polls**

Starting with the first claim that Nye County’s hand count procedures will impermissibly reveal election results prior to the close of the polls, the ACLU has conveniently omitted the fact that twice during the September 20, 2022 presentation, Mr. Kampf indicated he still needed to confirm whether or not the proposed recording of the hand count would be legally permissible (i.e., by not pre-maturely revealing election results).²² Subsequently, on October 6, 2022, Mr. Kampf emailed Deputy Secretary of State Mark Wlaschin seeking advice on the issue, and specifically noted that “[w]e plan to release the footage *after the polls close*” (emphasis added). See RA 045. Mr. Wlaschin responded on October 9, 2022

²¹ In *Doe*, this Court noted that since the appellants could not provide any indication that they were facing “an immediate threat or arrest,” their claims regarding the constitutionality of NRS 201.190 were without legal merit. See *Doe*, 102 Nev. at 525.

²² Presentation at 2:07:22 – 2:07:35; 2:01:20 – 2:01:28.

that after conferring with the Attorney General’s Office, Nye County would be fine so long as the recordings were held until the close of the polls. *See* RA 044.

Of course, the video recording of the hand count is only one part of the “problem” that the ACLU has cried foul over, as in-person observers would still presumably have access to (and, thus, the ability to prematurely disclose) election results.²³ Yet, this is exactly why Mr. Wlaschin further responded that the Nevada Secretary of State was updating the “counting observer form” to specifically reference NRS 293.3606 and have individuals certify they will not prematurely release “information relating to the count of returns.” RA 044, 047-048. Mr. Kampf seeking out and receiving guidance from Mr. Wlaschin²⁴ (in conjunction with the NV SOS-prescribed certifications for observers) render the Petitioners’ claims under NRS 293.3606 and NRS 293.269935 nothing more than speculation at this point.

²³ *See* Petition at pg. 18 (“observers of the hand counting will hear the selected candidate, as will viewers at home watching the live stream of the count.”)

²⁴ It should be noted that Mr. Kampf told Mr. Wlaschin prior to receiving any guidance that the County would not be releasing any footage of the hand count process until after the polls close. RA 045.

2. **Nye County’s Hand Count Procedures Do Not Permit Poll Workers to Interrogate Voters About Any “Special Needs” or “Disability”**

The ACLU’s second claim that Nye County will be asking individuals about their alleged disability (and even requiring proof thereof) is also too speculative to warrant the issuance of the requested writ. Much like how the ACLU ignored the entirety of Mr. Kampf’s statement regarding the premature release of election returns, it has also conveniently ignored important context regarding Nye County’s plans for ADA voters. The ACLU essentially argues that Nye County’s plan to limit touch screens to those with “special needs” inevitably will involve poll workers prodding voters about the nature of their disability.²⁵ Such an assertion flies in the face of what Mr. Kampf actually said during the September 20, 2022 presentation (“we will not deny anybody who feels they need that special assistance”).²⁶

By providing the ADA touch screens to anyone who feels they need to use a touch screen, Nye County is expressly allowing voters (not poll workers) to unilaterally determine whether they have “special needs” or a “disability.” With voters in charge of making this determination, poll workers have no reason to

²⁵ See Petition at pgs. 20-21.

²⁶ Presentation at 1:54:25 – 1:54:34.

inquire as to whether a voter is disabled as a prerequisite to using the ADA touch screen. The ACLU crying foul over Mr. Kampf's innocuous statement that the screens will be limited to those with "special needs"²⁷ is non-sensical speculation in light of the foregoing and Mr. Kampf's declaration.²⁸

3. Nye County's Signature Verification Procedures Do Not Violate Nevada Law

Despite Respondents having clearly established, as set forth above, that Nye County does not intend to release election results early, nor interrogate voters with a disability, the ACLU would nonetheless have this Court believe that Nye County will choose signature verification as the issue for which it will "go rogue" and violate Nevada law. Ultimately, Petitioners' claims regarding Nye County's signature verification process once again distorts, speculates, and ultimately fails to pass muster.

²⁷ There is absolutely nothing wrong or incriminating about making such a statement. Voters who feel they have "special needs" or a "disability" will self-select and use the ADA touch screen without any objection or questioning from Nye County poll workers. As such, the touch screen will inherently be limited to those with "special needs" or a "disability" – an innocent statement of fact made by Mr. Kampf.

²⁸ For all of the foregoing reasons, Petitioners' argument that Nye County's ADA procedures violate the Nevada Constitution's mandate of equal access to the electoral process also fails. *See* Petition at pg. 20.

As a preliminary point, the Petitioners making issue of the “stringent signature verification” bullet-point from the September 20, 2022 presentation rings hollow.²⁹ The Fifth Judicial District Court’s admonishment that judges are not pigs hunting for truffles is especially appropriate here. In essence, the ACLU wants this Court to connect the dots and find the hidden “truffle” within this bullet-point. Even if this bullet-point was suggestive of some nefarious plot, this Court needs more than just speculation and the possibility of a future act to provide legal relief. *See Doe v. Bryan*, 102 Nev. at 525; *Buzz Stew*, 124 Nev. at 231. If anything, the “stringent signature verification” bullet-point is likely just a nod to the fact that Nevada’s election laws afford voter identification a prominent role in the signature verification process, and that Nye County plans to strictly adhere to the law.³⁰

With respect to NRS 293.285, the ACLU argues that Mr. Kampf forcing voters to provide an identification card only (and not allowing for other permissible methods of verification that do not involve identification cards)

²⁹ *See* APP0012 for slide setting forth “stringent signature verification” bullet point.

³⁰ As buzz-worthy as it may seem to make hay over Nye County’s plan to use “stringent signature verification,” there is nothing per se wrong with vowing to strictly follow the law. If anything, Nye County should be lauded for striving to do so.

violates NRS 293.285.³¹ Again, before this Court just accepts this assertion as emblematic of the truth, it should reference the actual presentation Mr. Kampf gave. Critically, that presentation specifically noted that there would be “[n]o prompting of voter verification information.” APP00012. As a preliminary point, there is nothing wrong with, nor does the NRS prohibit, barring poll workers from prompting voters with information they should know anyway.³² But more importantly, the inclusion of this statement in the presentation *clearly indicates that this option of providing identifying information will be afforded to Nye County voters as a verification option* – why else would Mr. Kampf bar prompting if it was not to be an option? His presentation merely stated that if this verification option failed, then identification (the sole remaining option under NRS 293.285(2)) would then be required. In short, Petitioners’ fears over voters only being able to show an identification card, in violation of NRS 293.285, have no basis in reality.

Moving on to NRS 293.277, it is rather unclear how Nye County’s proposed procedures violate this provision, especially since this provision deals almost exclusively with the types of identification cards that can verify a voter’s signature.

³¹ See Petition at pgs. 23-24.

³² Prompting voters, e.g., by saying “Don’t you live at 123 Rainbow Ave.?” rather than “Tell me your residential address” would defeat the purpose of NRS 293.285(2)(a)-(b). Nye County’s approach of no prompting is arguably what the statute intended.

Perhaps the ACLU is saying that Nye County’s “stringent signature verification” will restrict and/or limit the identification options set forth NRS 293.277. Yet, the September 20, 2022 presentation merely said “identification,” and in no way suggested that the different permissible options set forth in 293.277 would somehow be off limits to Nye County voters. *See* APP0012.

Finally, Petitioners argue that Nye County’s announced signature verification processes further violate NRS 293.8874.³³ Putting aside the procedural misstep of citing a statutory provision that expired on December 31, 2021 (the NRS provision Petitioners presumably meant to cite was NRS 293.269927, effective January 1, 2022), Petitioners’ arguments fail for the same reason as their arguments under NRS 293.285. Indeed, nothing in Mr. Kampf’s September 20, 2022 presentation remotely suggests that Nevada’s statutorily-mandated mail ballot procedures will not be followed.³⁴ The presentation merely hones in on NRS 293.269927(8), which is essentially identical to NRS 293.285(2) except that it applies to mail ballots (yet, for the same reasons stated above, Nye County’s procedures would not violate NRS 293.269927(8)). Overall, the ACLU’s belief

³³ *See* Petition, at pgs. 21-22.

³⁴ As has been articulated throughout this brief, without having any actual evidence, this Court cannot assume, nor can it take the ACLU’s word, that Mr. Kampf and Nye County are intending the violate the law.

that Nye County’s processes are vague and stringent beyond what is permitted by statute is its own cherry-picked concoction of the facts. The September 20, 2022 presentation was exactly that – a high-level presentation of the general processes to be used. The ACLU’s choice to focus on certain bullet points and statements from this presentation, while conveniently ignoring others, is fatal to its request for an emergency writ.

VI. CONCLUSION

The instant Petition is more or less a game of “gotcha” by the ACLU, a dangerous one at that, considering that Mr. Kampf’s September 20, 2022 presentation was meant to foster transparency, something the ACLU has now disincentivized with the instant litigation.³⁵ The strategy of cherry-picking certain statements and bullet-points from the presentation, without presenting the full context thereof, is not enough for this Court to issue an extraordinary writ and upend Nye County’s electoral processes mere days before the start of early voting – especially when Petitioners have no private right of action to even request such a writ. For this reason, Respondents respectfully ask that this Court deny the request

³⁵ To be clear, Nye County and Mr. Kampf intend to continue conducting the election in a transparent manner, perhaps, even more so, considering the national attention that has arisen from the ACLU’s legal action.

for an emergency petition for writ of mandamus, and allow Nye County and Mr. Kampf to focus on delivering a free, transparent election for their voters.

Dated this 19th day of October, 2022.

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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 3,596 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 19th day of October, 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) AND RESPONDENTS' APPENDIX** were filed electronically with the Nevada Supreme Court on the 19th day of October, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Sadmira Ramic, Esq.
Sophia Romero, Esq.
Christopher Peterson, Esq.

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

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/s/ Leah Dell
An employee of Marquis Aurbach Coffing