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**Pro hac vice granted*

EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR CLARK COUNTY, STATE OF NEVADA

THE ELECTION INTEGRITY PROJECT OF NEVADA, a Nevada LLC; and SHARRON ANGLE, an individual,

Plaintiffs,

v.

THE STATE OF NEVADA, on relation of BARBARA CEGAVSKE, in her official capacity as Nevada Secretary of State,

Defendants,

Case No. A-20-820510-C

Dept. No.: 26

INTERVENOR-DEFENDANTS' OPPOSITION TO PLAINTIFFS' APPLICATION FOR PERMANENT INJUNCTION

and

INSTITUTE FOR A PROGRESSIVE NEVADA; and PROGRESSIVE LEADERSHIP ALLIANCE OF NEVADA,

Intervenor-Defendants.

INTRODUCTION

The people of Nevada have spoken. On November 3, 2020, more than 1.3 million Nevadans cast their votes in races up and down the ballot. Their votes have since been received, processed, and counted by a dedicated team of election officials and volunteers, operating under intense scrutiny in the midst of a public health crisis. The State's efforts were aided by the reforms implemented in July by Assembly Bill 4 ("AB 4"), which afforded state and local officials greater flexibility to serve Nevada voters during an unprecedented pandemic. Dissatisfied with the choices of Nevada voters, Plaintiffs seek to undo the democratic will of the electorate and disenfranchise 1.3 million Nevadans. This Court should not oblige them.

This case is a tale of two litigations, tethered together by the insistence on the widely debunked notion that vote by mail is riddled with fraud. Plaintiffs initiated this action on September 1, challenging AB 4 with a hodgepodge of speculative, unpersuasive allegations of fraud and inapposite legal doctrines. The prayer for relief in their complaint asked the Court to enjoin enforcement of AB 4. They then filed an application for emergency preliminary injunction on September 3 and an application for emergency temporary restraining order on September 4, again asking this Court to enjoin Defendants from mailing ballots to voters under AB 4. These requests were rebuked by this Court and the Nevada Supreme Court. At oral argument, this Court denied Plaintiffs' applications and thereafter issued a written order memorializing his decision, concluding that Plaintiffs offered only speculative claims of potential harm and were unlikely to succeed on the merits. Order Denying Plaintiffs' Motion for Preliminary Injunction ("Order") (Sept. 29, 2020), Ex. A. Apparently undeterred, Plaintiffs immediately sought relief from the Nevada Supreme Court—and were promptly denied. Order Denying Petition for Writ of Mandamus or Prohibition ("Appellate Order"), *Election Integrity Project of Nevada v. Eighth*

Judicial District Court of the State of Nevada in and for the County of Clark, No. 81847 (Nev. Sup. Ct. Oct. 07, 2020), Ex. B.

Two weeks after the election—and after Joe Biden was declared the winner of Nevada's six electoral votes—Plaintiffs submitted the present motion. Although cloaked in new allegations of fraud relating to the November 3 election, at bottom their arguments and evidence are unchanged: they have once again produced only vague, unpersuasive evidence of electoral malfeasance, coupled with causes of action that are inapplicable and unsupportable. The request for relief this time, however, is entirely different than the relief sought in their complaint—and even more dramatic: they ask this Court to throw out the legally cast ballots of over 1.3 million Nevadans.

Ultimately, Plaintiffs' latest salvo is empty political theater, part of a broader and deeply troubling national effort to use the judiciary to cast doubt on the outcome of the presidential election. Courts around the country have rejected these efforts.[1] This Court should too.

[1] *E.g.*, *Costantino v. Detroit*, No. 20-014780-AW (Mich. Cir. Ct. Nov. 13, 2020) (denying preliminary injunction against certification of election results in Wayne County based on claims of purported fraud), Ex. C; *Donald J. Trump for President, Inc. v. Benson*, Opinion & Order, No. 20-000225-MZ (Mich. Ct. Cl. Nov. 6, 2020) (denying the Trump Campaign's emergency motion to cease all counting and processing of absentee ballots and noting plaintiffs provided no admissible evidence supporting their claims), Ex. D; *Donald J. Trump for President Inc. v. Phila. Cnty. Bd. of Elections*, No. 2:20-CV-05533-PD, ECF No. 5 (E.D. Pa. Nov. 5, 2020) (denying the Trump Campaign's emergency motion to stop the Philadelphia County Board of Elections from counting ballots), Ex. E; *Kraus v. Cegavske*, Order at 9, No. 20-OC-00142 (Nev. Dist. Ct. Oct. 29, 2020) (finding Trump Campaign's allegations that observers were not able to observe the process or that Nevada's signature matching process was unreliable to be wholly without merit, and explaining "[t]here is no evidence that any vote that should lawfully not be counted has been or will be counted" and "[t]here is no evidence that any election worker did anything outside of the law, policy, or procedures"), *motion for stay denied*, No. 82018 (Nev. Nov. 3, 2020) ("[Appellants'] request for relief to this court is not supported by affidavit or record materials supporting many of the factual statements made therein . . . . It is unclear from the motion how appellants are being prevented from observing the process."), Ex. F; *Stokke v. Cegavske*, No. 2:20-CV-02046, ECF No. 27 (D. Nev. Nov. 6, 2020) (denying plaintiffs' motion for a preliminary injunction and TRO to halt ballot counting in Clark County, Nevada); *In re: Enforcement of Election Laws and Securing Ballots Cast or Received After 7:00 P.M. on Nov. 3, 2020*, No. SPCV2000982-J3 (Ga. Sup. Ct. Nov. 5, 2020) (denying the Trump Campaign's petition to segregate certain ballots and noting "there is no evidence the ballots referenced in the petition [were invalid]" and "there is no evidence that the Chatham County Board of Elections or

LEGAL STANDARD

"Permanent injunctive relief is available where there is no adequate remedy at law…, where the balance of equities favors the moving party, and where success on the merits has been demonstrated." *State Farm Mut. Auto. Ins. Co. v. Jafbros Inc.*, 109 Nev. 926, 928, 860 P.2d 176, 178 (1993) (alteration in original) (quoting 43 C.J.S. § 18 Injunctions (1978)). The reasons for the injunction must be readily apparent and sufficiently clear from the record. *See Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 118, 787 P.2d 772, 775 (1990) (overruled on other grounds) (reversing a district court's issuance of a permanent injunction as an abuse of discretion when the parties were not granted a full and fair evidentiary hearing).

ARGUMENT

I. Plaintiffs' application for permanent injunction is procedurally improper.

Plaintiffs filed their complaint to halt the conduct of the November 3 election under AB 4. Accordingly, their prayer for relief requests only that AB 4 be declared unconstitutional and that its implementation and enforcement be enjoined. Compl. Prayer for Relief ¶¶ a, c. Of course, Plaintiffs failed in that bid after this Court and the Nevada Supreme Court rejected their request for injunctive relief. Now, Plaintiffs are seeking to relitigate the same claims, already rejected, but with a new objective: to throw out unfavorable election results. But Plaintiffs have no basis for seeking relief wholly divorced from their original complaint. A prayer for relief is a necessary component of a complaint, Nev. R. Civ. P. 8(a)(3), and it defines the scope of the remedies available in a lawsuit. *See Washington ex rel. Seattle v. Pacific Telephone & Telegraph Co.*, 1 F.2d 327, 331 (W.D. Wash. 1924) (citing *Tel. & Tel. Co. v. Hickson*, 129 Ky. 220 (App. Ct. 1914)); *Appalachian Railcar Servs., Inc. v. Boatright Enterprises, Inc.*, 602 F. Supp. 2d 829, 848 (W.D. Mich. 2008) ("It is the complaint that defines the scope of the action, and it is the

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the Chatham County Board of Registrars has failed to comply with the law"), Ex. G; *Stoddard v. City Election Comm'n*, Opinion & Order at 2-3, No. 20-014604-CZ (Mich. Cir. Ct. Nov. 6, 2020) (denying the Election Integrity Fund's motion for a preliminary injunction to prohibit Detroit from certifying its results, explaining that "[b]oth Republican and Democratic inspectors were present [for the counting of absentee ballots]" and "plaintiffs do not offer any affidavits or specific eyewitness evidence to substantiate their assertions"), Ex. H.

prayer for relief which limits the grounds on which relief may be obtained."). Accordingly, Plaintiffs cannot shoehorn their newfound desire to overturn election results into their existing lawsuit seeking a prospective injunction of AB 4.

Indeed, to the extent Plaintiffs seek to overturn election results, Nevada law dictates that such a request proceed through an election contest under NRS 293.407–420, not through the vehicle of Plaintiffs' existing complaint. Election contests are permitted where "[i]llegal or improper votes were cast and counted . . . in an amount that is equal to or greater than the margin between the contestant and the defendant, or otherwise in an amount sufficient to raise reasonable doubt as to the outcome of the election." NRS 293.410(2)(c). Indeed, an election contest *has* been filed by the losing candidates for presidential elector in support of Donald J. Trump. *Law v. Whitmer*, No. 20 OC 001631B (Nev. Dist. Ct. Nov. 17, 2020). Plaintiffs' attempt to circumvent the procedures established by Nevada law demonstrates not only the impropriety of their present application for injunctive relief but also the fact that they failed to utilize an adequate remedy at law, necessitating denial of their application. *See Gaugin v. Eighth Judicial Dist. Ct.*, 93 Nev. 151, 152; 560 P.2d 1372, 1373 (1977) (holding alternative route to litigate issue, in that case by intervening in another action, was adequate remedy at law); *Sherman v. Clark*, 4 Nev. 138, 141 (1868) ("When a party has a remedy at law … he cannot come into equity, unless from circumstances not within his control he could not avail himself of his legal remedy." (citation omitted)).

Because Plaintiffs cannot obtain the injunctive relief they seek through the vehicle of their existing lawsuit, their application should be denied.

II. Plaintiffs' claims fail on the merits.

A. The prior decisions in this case resolve Plaintiffs' motion.

While the relief they request is brand new, Plaintiffs' underlying legal claim rests on the same equal protection argument as their initial motion for preliminary injunction: that vote by mail is inherently susceptible to fraud and will cause the honest votes of Plaintiffs and other Nevadans to be diluted. Not only has this argument been rejected by courts across the country on

both standing[2] and merits[3] grounds, it was already rejected by this Court and the Nevada Supreme Court. In denying their motion for preliminary injunction, this Court held that rational basis review applied to Plaintiffs' vote dilution by fraud claim. Order ¶ 17. The Court then explained the numerous legitimate government interests in holding an election by mail as outlined in AB 4, *id.* ¶¶ 17–23 including, first and foremost, the "reasonable decision" that "[g]iven the COVID-19 pandemic," "vote-by-mail processes [is] a means of enfranchising voters who might have justifiable health concerns if they vote at in-person polling locations." *Id.* ¶ 19.

The Nevada Supreme Court, reviewing the issue de novo, affirmed. Appellate Order at 5. The Court explained that because Plaintiffs "did not allege any burden … on an identifiable group's right to vote," rational basis review and not strict scrutiny was appropriate. *Id.* at 6. The Court then agreed with the district court's evaluation that the decision to implement vote-by-mail was rationally related to a legitimate government interest. *Id.* at 6. Nothing in Plaintiffs' motion for permanent injunction changes the basic contours of the legal questions presented to this Court, and so these prior decisions doom Plaintiffs' claims on the merits.

B. Plaintiffs incorrectly claim that the conduct of the November election under AB 4 violates the Equal Protection Clause.

Even if this Court were to consider Plaintiffs' claims anew, they still fail as a matter of law. The legal theory under which Plaintiffs advance their equal protection claims—that

[2] *See, e.g.*, *Bognet v. Sec'y Commonwealth of Pennsylvania*, No. 20-3214, 2020 WL 6686120, at *11–18 (3d Cir. Nov. 13, 2020) (precedential opinion); *Donald J. Trump for President, Inc. v. Way*, Civil Action No. 20-10753 (MAS) (ZNQ), 2020 WL 6204477, at *6 (D.N.J. Oct. 22, 2020); *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5997680, at *59 (W.D. Pa. Oct. 10, 2020); *Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-CV-1445 JCM (VCF), 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020); *Martel v. Condos*, No. 5:20-cv-131, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926–27 (D. Nev. 2020); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015).

[3] *See, e.g.*, *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5997680, at *76 (W.D. Pa. Oct. 10, 2020); *Donald J. Trump for President, Inc. v. Bullock*, No. CV 20-66-H-DLC, 2020 WL 5810556, at *12 (D. Mont. Sept. 30, 2020); *Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 406–07 (E.D. Pa. 2016); *see also Minn. Voters All. v. Ritchie*, 720 F.3d 1029, 1031–32 (8th Cir. 2013).

legitimate votes are diluted by allegedly fraudulent ones—constitutes a misunderstanding of the guiding principles of the Equal Protection Clause. Vote dilution is a viable basis for claims only in certain contexts, such as when laws are crafted that structurally devalue one community's votes over another's. *See, e.g.*, *Bognet v. Sec'y Commonwealth of Pennsylvania*, No. 20-3214, 2020 WL 6686120, at *11 (3d Cir. Nov. 13, 2020) ("[V]ote dilution under the Equal Protection Clause is concerned with votes being weighed differently."); *Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 406–07 (E.D. Pa. 2016). "Simply stated, an individual's right to vote for [elected officials] is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). In these cases, which are grounded in the Equal Protection Clause, plaintiffs allege that their votes are devalued—as part of, for example, an impermissible legislative map—as compared to similarly situated voters in other parts of the state. *See Reynolds*, 377 U.S. at 567–68.

Here, by contrast, Plaintiffs assert that the allegedly fraudulent votes cast under AB4 "caused the dilution of all of the ballots cast by legitimate voters." Mot. at 22; *see also id.* at 5, 9, 16, 17-19. This mischaracterizes and misapplies equal protection doctrine.[4] The "conceptualization of vote dilution—state actors counting ballots in violation of state election law—is not a concrete harm under the Equal Protection Clause of the Fourteenth Amendment." *Bognet*, 2020 WL 6686120, at *11. "[I]f dilution of lawfully cast ballots by the 'unlawful' counting of invalidly cast ballots 'were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's 'interest' in failing to do more to stop the illegal activity.'" *Id.* (quoting *Trump for President, v. Boockvar*, No. 2:20-CV-966, 2020 WL 5997680, at *46 (W.D. Pa. Oct. 10, 2020)).

[4] The protections afforded by the federal Equal Protection Clause and that of the Nevada Constitution are coextensive. *Rico v. Rodriguez*, 121 Nev. 695, 703, 120 P.3d 812, 817 (2005). Indeed, Plaintiffs cite to only federal caselaw in support of their equal protection claims. *See generally* App.

Indeed, the cases Plaintiffs cherry pick for this vote dilution proposition do not, in fact, support their theory. For example, *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), cited by Plaintiffs in their application for injunctive relief, *see* App. at 17-18, is inapplicable. In *Bush*, the U.S. Supreme Court considered "whether the use of standardless manual recounts" by some Florida counties in the aftermath of the 2000 presidential election violated the Equal Protection Clause. *Id.* at 103. In addition to being explicitly "limited to the present circumstances," the *Bush* Court addressed a situation where the counting of ballots lacked even "minimal procedural safeguards." *Id.* at 109. That is not the case here. AB4 does not disturb the many provisions of Nevada law that guard against voter fraud. *Reynolds*, *see* App. at 18, concerned vote dilution in the context of malapportionment of legislative districts, *not* unlawful voting. 377 U.S. at 567–68. The same is true of *Gray v. Sanders*, App. at 18, which addressed the use of a county unit system for the counting of votes in a statewide election. 372 U.S. 368, 378-379 (1963). ("Georgia gives every qualified voter one vote in a statewide election; but in counting those votes she employs the county unit system which in end result *weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties*.") (emphasis added). The claim of vote dilution based on fears of potential fraud, by contrast, is not only speculative but applies to all voters equally, making it an ill-fit for an equal protection challenge. *Cf. Mays v. LaRose*, 951 F.3d 775, 785 (6th Cir. 2020) ("All binding authority to consider the burdensome effects of disparate treatment on the right to vote has done so from the perspective of only affected electors—not the perspective of the electorate as a whole.").

"The Constitution is not an election fraud statute," *Minn. Voters All. v. Ritchie*, 720 F.3d 1029, 1031 (8th Cir. 2013) (quoting *Bodine v. Elkhart Cty. Election Bd.*, 788 F.2d 1270, 1271 (7th Cir. 1986)). There is no authority for transmogrifying the vote dilution line of cases discussed above into a requirement that the judiciary micromanage election procedures and, in its zeal to enforce state election statutes, disenfranchise lawful voters based on a plaintiff's (speculative) voter fraud allegations. "That is not how the Equal Protection Clause works." *Bognet*, 2020 WL 6686120, at *11; *cf. Short v. Brown*, 893 F.3d 671, 677–78 (9th Cir. 2018) ("Nor have the appellants cited any authority explaining how a law that makes it easier to vote

would violate the Constitution."). Indeed, courts have routinely rejected such efforts. *See Minn. Voters All.*, 720 F.3d at 1031–32 (affirming Rule 12(b)(6) dismissal of vote dilution claim); *see also Partido Nuevo Progresista v. Perez*, 639 F.2d 825, 827–28 (1st Cir. 1980) (per curiam) (rejecting challenge to purportedly invalid ballots because "case does not involve a state court order that *dis*enfranchises voters; rather it involves a [] decision that *en*franchises them—plaintiffs claim that votes were 'diluted' by the votes of others, not that they themselves were prevented from voting"); *Boockvar*, 2020 WL 5997680, at *67–68 (rejecting Trump Campaign's equal protection challenge to poll-watcher restrictions grounded in vote-dilution theory because restrictions did not burden fundamental right or discriminate based on suspect classification); *Cook Cnty. Republican Party v. Pritzker*, No. 20-cv-4676, 2020 WL 5573059, at *4 (N.D. Ill. Sept. 17, 2020) (denying motion to enjoin law expanding deadline to cure votes because plaintiffs did not show how alleged voter fraud would dilute their votes); *Cortés*, 218 F. Supp. 3d at 406–07 (rejecting requested expansion of poll-watcher eligibility based on premise that voter fraud would dilute plaintiffs' votes).

Because Plaintiffs have failed to articulate a cognizable legal claim, their equal protection claims fail as a matter of law.

III. The equities do not favor an injunction.

Plaintiffs have also failed to demonstrate any equitable right to relief. Their requested injunction neither protects the right to vote or to have one's vote counted, nor alleviates any injury; yet it may well "abrogate the right of millions of [Nevadans] to select their President and Vice President," a result that is both "outrageous and completely unnecessary." *Stein v. Cortés*, 223 F. Supp. 3d 423, 442–43 (E.D. Pa. 2016) (rejecting request to enjoin certification of election results on suspicion of voter fraud). As the only Nevada cases cited by Plaintiffs in support of their request for relief demonstrate, Nevada courts only interfere with the certification of an election where there is a clear statutory mechanism, usually an election contest, that grants a right to relief. *Buckner v. Lynip*, 22 Nev. 426, 41 P. 762, 763 (1895) ("This is an election contest); *LaPorta v. Broadbent*, 91 Nev. 27, 28–29 530 P.2d 1404, 1404–06 (1975) (granting mandamus under NRS 293.465, which requires a new election be called by the board of county

commissioners if an "election is prevented, where voting machine malfunction prevented voters from voting in a contest for state assembly"). Otherwise courts will only intercede where a plaintiff has met the exceptionally high bar of proving that an election was fundamentally unfair, *see Stein*, 223 F. Supp. 3d at 438 (collecting cases), a standard Plaintiffs have not even attempted to satisfy, *see González-Cancel v. Partido Nuevo Progresista*, 696 F.3d 115, 120 (1st Cir. 2012) ("Where, as here, a plaintiff is aware of, yet fails to fully use, an adequate state administrative or judicial process to address a local election dispute, a claim that the election process created fundamental unfairness to warrant federal intervention cannot survive."); *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) (noting that "even claims of official misconduct[] do not usually rise to the level of constitutional violations where adequate state corrective procedures exist").

Disenfranchising even "a single voter is a matter for grave concern," *Serv. Emps. Int'l Union, Local 1 v. Husted*, 906 F. Supp. 2d 745, 750 (S.D. Ohio 2012); yet Plaintiffs ask this Court to nullify the ballots of over a million Nevadans who voted in the November Election, on the slender reed that they believe they have identified a relatively small handful of instances where illegal voting *may* have occurred. But as one court has perceptively noted, "a preoccupation with mostly phantom election fraud leads to real incidents of disenfranchisement, which undermine rather than enhance confidence in elections." *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 903 (W.D. Wis. 2016), *aff'd in part, rev'd in part on other grounds sub nom. Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020).

Plaintiffs' request should be denied because "an injunction is an equitable remedy," and, as such, it must be deployed to achieve equitable ends, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982); *Bognet*, 2020 WL 6686120, at *17 (affirming denial of injunctive relief on the equities where voters cast their ballots in reliance on the rules that were in place when the election occurred). The mere possibility that a law has been violated, standing alone, does not compel the wholesale eradication of any county's or the State's election results. *Thorn v. Sweeney*, 12 Nev. 251, 256 (1877) ("Admitting for the sake of the argument, without deciding the point, that the act is in this respect unconstitutional, does it necessarily follow that the

injunction should not be dissolved? We think not."). Instead, Plaintiffs are required to prove that they will suffer an irreparable injury that sufficiently outweighs the negative consequences the injunction will bring to bear on the other parties and the public. *See Winter v. Nat'l Resources Defense Council*, 555 U.S. 7, 20 (2008). Plaintiffs have satisfied none of these requirements.

CONCLUSION

For these reasons, Intervenor-Defendants respectfully request that this Court deny Plaintiffs' application for a permanent injunction.

DATED this 19th day of November, 2020.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

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**Admitted pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2020, a true and correct copy of the foregoing **OPPOSITION TO APPLICATION FOR PERMANENT INJUNCTION** was served by electronically filing with the Clerk of the Court using the Odyssey eFileNV system and serving all parties with an email address on record, pursuant to Administrative Order 1402 and Rule 9 of the N.E.F.C.R.

By: */s/ Dannielle Fresquez*
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EXHIBIT A

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE ELECTION INTEGRITY PROJECT OF NEVADA, a Nevada LLC; SHARRON ANGLE, an individual,

Plaintiffs,

v.

THE STATE OF NEVADA, on relation of BARBARA CEGAVSKE, in her official capacity as Nevada Secretary of State,

Defendants,

and

INSTITUTE FOR A PROGRESSIVE NEVADA; and PROGRESSIVE LEADERSHIP ALLIANCE OF NEVADA,

Proposed Intervenor-Defendants.

CASE NO. A-20-820510-C
DEPT. NO. XXXII

HEARING DATE: September 17, 2020
HEARING TIME: 11:00 a.m.

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

On September 3, 2020, Plaintiffs the Election Integrity Project of Nevada, a Nevada limited-liability company, and Sharron Angle, an individual (Plaintiffs), by and through their counsel, Joel F. Hansen, Esq., filed an application for an emergency preliminary injunction, followed on September 4, 2020, by an application for an emergency temporary

restraining order. Plaintiffs requested an order enjoining the implementation of Assembly Bill No. 4 of the 32nd Special Session (2020) of the Nevada Legislature. *See* Act of August 3, 2020, ch. 3, 2020 Nev. Stat. 18, §§ 1–88 (AB 4). AB 4 adopts vote-by-mail election processes for the 2020 general election.

The Court held a hearing on September 17, 2020. The hearing was conducted by videoconference. Joel F. Hansen, Esq., appeared for Plaintiffs. Gregory L. Zunino, Deputy Solicitor General, appeared for Defendants State of Nevada, on relation of Barbara Cegavske, in her official capacity as Nevada Secretary of State (Defendants). Abha Khanna, Esq., with the law firm of Perkins Coie, LLP, and Bradley Schrager, Esq., and Daniel Bravo, Esq., both with the law firm of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, appeared for Proposed Intervenor-Defendants Institute for a Progressive Nevada and Progressive Leadership Alliance of Nevada. The purpose of the hearing was to address the merits of Plaintiffs' request for an emergency preliminary injunction in advance of the 2020 general election. The Court treated Plaintiffs' separate applications for injunctive relief as a single motion for a preliminary injunction. The Court heard arguments from Mr. Hansen, Mr. Zunino, and Ms. Khanna. The Court also addressed Proposed Intervenor-Defendants' motion to intervene. The Court heard arguments from Mr. Hansen and Ms. Khanna. Defendants did not object to Proposed Intervenor-Defendants' motion to intervene. Lastly, the Court addressed Ms. Khanna's motion to appear *pro hac vice*. No party objected to Ms. Khanna's motion.

Upon review of the papers and pleadings on file herein, the arguments of counsel, and good cause appearing, Ms. Khanna's motion to appear *pro hac vice* is GRANTED; Proposed Defendant-Intervenor's motion to intervene is GRANTED; and Plaintiffs' motion for a preliminary injunction is DENIED.

FINDINGS OF FACT

1. Plaintiffs filed their complaint on September 1, 2020, less than one month before the first ballots are scheduled to be mailed to voters in Douglas, Elko, Esmeralda, Lander, and Lincoln Counties. Ballots are scheduled to be mailed to the voters in Nevada's

other counties during the first two weeks in October. Plaintiffs requested an order enjoining the mailing of the ballots in advance of the November 3, 2020 general election. Plaintiffs argue that AB 4 is unconstitutional for a variety of reasons, principally because it makes Nevada's election system vulnerable to voter fraud.

2. Plaintiff Sharron Angle is a longtime Nevada resident, a Nevada registered voter, a former Nevada legislator, a former Republican Party nominee and candidate for the U.S. Senate, and the head of Plaintiff the Election Integrity Project of Nevada, a nonprofit organization which advocates for measures to protect the integrity of Nevada's elections.

3. Together, Plaintiffs challenge various provisions of AB 4 on the ground that they make Nevada's election system vulnerable to voter fraud, thus diluting the value of the "honest" votes lawfully cast by Nevada's qualified electors. Plaintiffs cite *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525 (2000) (*per curiam*), and *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964), as support for the proposition that the alleged injury of "vote dilution" suffices to establish a person's standing to bring an equal protection challenge to a state's election laws. Plaintiffs bring their challenge under Article 4, Section 21 of the Nevada Constitution. Plaintiffs acknowledge that the equal protection guarantees of the Nevada Constitution are coextensive with the guarantees of the Equal Protection Clause of the Fourteenth Amendment. Accordingly, Plaintiffs cite federal case law in support of their position that AB 4 violates the Nevada Constitution.

4. Plaintiffs represent that they are especially concerned about AB 4 because it directs local election officials to mail ballots, unsolicited, to all of Nevada's active registered voters. AB 4's directive to mail ballots to all active, registered voters is in addition to its directive to establish a specified minimum number of physical polling places in each county. Plaintiffs allege that this significantly increases the risk of voter fraud by distributing a large number of ballots to persons whose identities cannot be properly verified. According to Plaintiffs, vote-by-mail processes increase the probability that ballots will be intercepted by fraudsters.

5. Plaintiffs further allege that Defendants' alleged failure to properly conduct list maintenance exacerbates the problem. "List maintenance" refers to the process of removing the names of ineligible voters from the voter rolls. This includes removing the names of deceased persons, persons who have moved out of state, persons who have duplicated their voter registration status by filing two or more registration forms, and others who, for a variety of reasons, may be legally ineligible to vote or legally ineligible to receive an unsolicited ballot in the mail.

6. Additionally, Plaintiffs allege that certain provisions of AB 4 contribute to the disparate treatment of voters. These include provisions of AB 4 that direct local election officials to establish a minimum number of physical polling locations within each of their respective counties. *See* §§ 11 and 12. Plaintiffs argue that the minimum number of polling locations in each county is not proportional, on a per-capita basis, to the minimum number of polling locations in each of the other counties. According to Plaintiffs, this results in the disparate treatment of voters from one county to the next. Moreover, Plaintiffs argue that vote counting procedures and postmark presumptions improperly extend traditional time frames for processing and counting votes, thus increasing the probability that unlawful votes will be counted during these extended time frames. *See* §§ 20, 22–27, 39, 48–49, 69 and 79.

7. Finally, Plaintiffs allege that AB 4: (1) repealed a criminal prohibition against "ballot harvesting" and replaced it with new provisions that fail to adequately deter voter intimidation, *see* § 21; (2) is not otherwise complemented by sufficiently robust anti-fraud statutes, including signature verification requirements, *see* §§ 29, 39 and 69; and (3) operates in tandem with in-person voting provisions that are similarly vulnerable to voter fraud. These latter provisions of the statute authorize same-day voter registration, *see* NRS 293.5772–5792, and provide for "vote centers" where voters can appear in person outside of traditional precinct boundaries to cast their ballots, *see* NRS 293.3072–3075.

8. In support of their arguments, Plaintiffs rely upon anecdotes from other states and public reports purporting to identify a correlation between increased instances of voter

fraud and mail-in voting. They also rely upon public data concerning the 2020 primary election in Nevada. This data indicates that a significant percentage of mail-in ballots were returned to Nevada's local election officials as undeliverable. The largest percentage of returned ballots, roughly 17%, was attributable to Clark County, where election officials mailed ballots to both active and inactive registered voters. As AB 4 pertains to the 2020 general election, the bill directs election officials to mail ballots to active registered voters only. *See* § 15.

9. Finally, in terms of providing support for their allegations, Plaintiffs rely on a self-conducted analysis of public records indicating that voter rolls contain names that should not appear on the rolls because the named persons are deceased, "inactive" or otherwise ineligible to vote or receive an unsolicited ballot in the mail. The Secretary of State's office responds that when conducting list maintenance, it uses different records than those evaluated by Plaintiffs, and makes a diligent effort to maintain accurate voter registration lists.

10. In addition to their election-related allegations, Plaintiffs allege that AB 4 contains an "unfunded mandate" to Nevada's local governments. More specifically, Plaintiffs allege that the Nevada Legislature did not appropriate sufficient funds to cover the local costs of mailing ballots to voters. Plaintiffs allege that this violates NRS 354.599.

11. The Nevada Legislature adopted AB 4 on the basis of its finding that "[t]he State of Nevada faces a substantial and continuing danger that the occurrence or existence of an emergency or disaster in this State will adversely affect the public's health, safety and welfare and the ability of elections officials to prepare for and conduct an affected election safely and securely under such circumstances." § 2. Sections 2 to 27 of AB 4 apply to any election occurring during a declared state of emergency or disaster, including the 2020 general election. *See* §§ 5 and 8. Section 10(1) of AB 4 states that the legislation "must be liberally construed and broadly interpreted" to achieve its goal of enfranchising voters during the COVID-19 pandemic. § 10(1).

12. Proposed Intervenor-Defendants filed their motion to intervene on September 10, 2020. Proposed-Intervenor Defendants argue that they are entitled to intervene as of right pursuant to NRCP 24(a), and alternatively, request that the Court grant permissive intervention pursuant to NRCP 24(b).

13. To the extent any finding of fact is more appropriately characterized as a conclusion of law, it is incorporated as such below.

CONCLUSIONS OF LAW

A. Intervention Standard of Review

1. To intervene as of right under NRCP 24(a)(2), an applicant must meet four requirements:

> (1) that it has a sufficient interest in the litigation's subject matter, (2) that it could suffer an impairment of its ability to protect that interest if it does not intervene, (3) that its interest is not adequately represented by existing parties, and (4) that its application is timely.

Am. Home Assurance Co. v. Eighth Jud. Dist. Ct. ex rel. County of Clark, 122 Nev. 1229, 1238, 147 P.3d 1120, 1126 (2006). "In evaluating whether Rule 24(a)(2)'s requirements are met," courts "construe the Rule 'broadly in favor of proposed intervenors' . . . . because '[a] liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts.'" *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (second alteration in original) (quoting *United States v. City of Los Angeles*, 288 F.3d 391, 397–98 (9th Cir. 2002)).

2. Under NRCP 24(b), the Court may grant permissive intervention if the applicant "has a claim or defense that shares with the main action a common question of law or fact." NRCP 24(b)(1)(B). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." NRCP 24(b)(3); *accord Hairr v. First Jud. Dist. Ct.*, 132 Nev. 180, 186–88, 368 P.3d 1198, 1202–03 (2016).

3. Because NRCP 24 and Federal Rule of Civil Procedure 24 are "equivalent," *Lawler v. Ginochio*, 94 Nev. 623, 626, 584 P.2d 667, 668 (1978), "[f]ederal cases interpreting [Rule 24] 'are strong persuasive authority.'" *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (quoting *Las Vegas Novelty, Inc. v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990)).

B. Intervention as of Right

4. Proposed Intervenor-Defendants (Intervenor-Defendants) satisfy NRCP 24(a)'s requirements for intervention as a matter of right. First and second, Intervenor-Defendants have significantly protectable interests in this lawsuit that might be impaired by Plaintiffs' causes of action. "A 'significantly protectable interest' . . . is protected under the law and bears a relationship to the plaintiff's claims." *Am. Home Assurance Co.*, 122 Nev. at 1239, 147 P.3d at 1127 (quoting *Donaldson v. United States*, 400 U.S. 517, 531, 91 S. Ct. 534, 542 (1971)). In assessing whether such an interest is sufficiently "impair[ed] or impede[d]," NRCP 24(a)(2), courts "look[] to the 'practical consequences' of denying intervention." *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977) (quoting *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967)). "Once an applicant has established a significantly protectable interest in an action, courts regularly find that disposition of the case may, as a practical matter, impair an applicant's ability to protect that interest." *Venetian Casino Resort, LLC v. Enwave Las Vegas, LLC*, No. 2:19-CV-1197 JCM (DJA), 2020 WL 1539691, at *3 (D. Nev. Jan. 7, 2020) (citing *California ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006)).

5. Plaintiffs' challenge to AB 4 would impair Intervenor-Defendants' legally protected interests. If Plaintiffs succeed in their suit, then the various provisions of AB 4 designed to help Nevadans vote—such as the use of third-party ballot collection, reforms to the election code's signature matching rules, and proactive distribution of mail ballots during the November Election—will be struck down. The result would be potential disenfranchisement for those Nevada voters who are unable, due to the ongoing pandemic

and other issues, to safely cast ballots. This would implicate and impair Intervenor-Defendants' interests in improving voter turnout in Nevada.

6. Intervenor-Defendants possess organizational interests that are threatened by Plaintiffs' lawsuit. They are nonpartisan organizations dedicated to promoting civic engagement and expanding the franchise. If AB 4 were enjoined, then Intervenor-Defendants would divert resources from their other activities to remedy restricted voting opportunities.

7. Third, Intervenor-Defendants have demonstrated that they cannot rely on the parties in this case to adequately represent their interests. While the Secretary of State has an undeniable interest in defending the actions of state government, Intervenor-Defendants have a different focus: upholding the specific measures in place in AB 4, which they advocated for by testifying in support of AB 4. AB 4 furthers Intervenor-Defendants mission to ensure that every voter in Nevada has a meaningful opportunity to cast a ballot and have that ballot counted, both in November and in future elections. In other words, while the Secretary of State has an interest in defending Nevada's election laws generally, Intervenor-Defendants have a specific interest in upholding *this* newly enacted law.

8. Fourth, the motion is timely. Plaintiffs filed their complaint on September 1, 2020. Intervenor-Defendants filed their motion to intervene less than two weeks later, before any substantive activity in the case. There has therefore been no delay, and no possible risk of prejudice to the other parties.

C. Preliminary Injunction Standard of Review

9. Plaintiffs request a preliminary junction against the implementation of AB 4. Plaintiffs specifically request an injunction against AB 4's directive to local election officials that they mail ballots to all active, registered voters in the state of Nevada. *See* § 15. To obtain a preliminary injunction, Plaintiffs must show (1) a likelihood of success on the merits and (2) a reasonable probability that the alleged conduct on the part of state and county election officials, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy. *Univ. & Cmty. Coll. Sys. v. Nevadans for*

Sound Gov't, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). "In considering preliminary injunctions, courts also weigh the potential hardships to the relative parties and others, and the public interest." *Id.*, 100 P.3d at 187.

D. Standing

10. Defendants and Intervenor-Defendants argue that Plaintiffs do not have standing to bring their claims. To establish jurisdiction, generally, a party must show a personal injury and not merely a general interest that is common to all members of the public to have standing to file suit. *See Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (Nev. 2016). In the context of challenging the constitutionality of a statute, the Nevada Supreme Court has held that a party must suffer harm fairly traced to the statute that invalidating it would redress. *Elley v. Stephens*, 104 Nev. 413, 416–17, 760 P.2d 768, 770 (1988).

11. In *Schwartz*, however, the Nevada Supreme Court recognized a "public-importance" exception to the injury requirement of Nevada's standing doctrine. 132 Nev. at 743, 382 P.3d at 894. "Under this public-importance exception, [the Court] may grant standing to a Nevada citizen to raise constitutional challenges to legislative expenditures or appropriations without a showing of a special or personal injury." *Id.*, 382 P.3d at 894. To qualify for the exception, a case must involve an issue of significant public importance, it must involve a challenge to a legislative expenditure or appropriation as violating a specific provision of the Nevada Constitution, and it must be commenced by a plaintiff who is in an ideal position to bring the action and who is capable of fully advocating that position in court. *Id.*, 382 P.3d at 894–95.

12. The Court finds that Plaintiffs satisfy the first and the third parts of the three-part inquiry stated above. The topics of election integrity and voting rights are vitally important to the public, and Plaintiffs are qualified to represent the interests of voters who are concerned about the integrity of Nevada's election system. The second part of the inquiry is also satisfied. AB 4 requires an expenditure of public funds in excess of that which would ordinarily be required to conduct an election. Plaintiffs have challenged

AB 4 for that reason, among others. Therefore, the Court finds that Plaintiffs have standing to bring their challenge pursuant to the public-importance exception.

E. Speculative Injuries

13. Defendants argue that Plaintiffs' claims are not ripe for review. Nevada requires litigated matters to present an existing controversy, not merely the prospect of a future problem, for them to be ripe for judicial determination. *Resnick v. Nev. Gaming Comm'n*, 104 Nev. 60, 65–66, 752 P.2d 229, 232 (1988). To demonstrate ripeness, Plaintiffs must demonstrate that "harm is likely to occur in the future because of a deprivation of a constitutional right." *Id.* at 66, 752 P.2d at 233.

14. In a pre-election challenge to election laws, the "harm alleged by the party seeking review [must be] sufficiently concrete, rather than remote or hypothetical, to yield a justiciable controversy." *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 887, 141 P.3d 1224, 1231 (2006). "Alleged harm that is speculative or hypothetical is insufficient: an existing controversy must be present." *Id.*, 131 P.3d at 1231. Though well taken, the concerns raised by Plaintiffs here are insufficiently concrete to yield a justiciable controversy as required by Nevada's ripeness doctrine. The Court agrees with Defendants that Plaintiffs election-related claims are not ripe for review.

15. Defendants and Intervenor-Defendants argue that Plaintiffs have failed to demonstrate that AB 4 will result in irreparable harm. For the same reasons that this case is not ripe for review, Plaintiffs fail to demonstrate irreparable harm as a necessary predicate for obtaining a preliminary injunction. Plaintiffs' unfounded speculations regarding voter fraud fall short of the "substantial evidence" required to obtain injunctive relief. *Shores v. Glob. Experience Specialists, Inc.*, 134 Nev. 503, 507, 422 P.3d 1238, 1242 (2018). Although Plaintiffs argue that certain provisions of AB 4 will make Nevada's voting system susceptible to illegitimate votes, Plaintiffs present no concrete evidence that such events will occur. For example, Plaintiffs allege that Defendants' failure to properly conduct list maintenance exacerbates the problem, but cite no authority or evidence to

support their ultimate conclusion that these alleged failures will lead to voter fraud.[1] It is not enough for Plaintiffs to simply identify problems with Defendants' list maintenance; Plaintiffs bear the burden of demonstrating that these alleged problems will indeed likely lead to voter fraud.

16. The Court also finds that existing criminal prohibitions against voter fraud, voter intimidation and related offenses, *see* NRS 293.700–800, provide an adequate deterrent to election-related crime. For these reasons, Defendants have not put forth sufficient evidence to demonstrate that AB 4 will result in irreparable harm.

F. Probability of Success on the Merits

17. Just as they must show irreparable harm as a condition of obtaining a preliminary injunction, Plaintiffs must show a reasonable probability of success on the merits. As a general proposition, Plaintiffs allege that AB 4 violates the equal protection guarantees of Article 4, Section 21 of the Nevada Constitution. Plaintiffs allege that AB 4 violates equal protection because it increases the risk of voter fraud, thus diluting honest votes. The Court finds that Plaintiffs' challenge is governed by a rational basis standard of review.

18. "Under the rational basis standard, legislation will be upheld so long as it is rationally related to a legitimate governmental interest." *Williams v. State*, 118 Nev. 536, 542, 50 P.3d 1116, 1120 (2002). Applying the rational basis standard here is consistent with the federal standard governing elections: "[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 2063 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S. Ct. 1564, 1570 (1983)).

[1] In addition, the Secretary of State's office uses different records than those evaluated by Plaintiffs, calling into question the accuracy of Plaintiffs' findings.

19. Given the COVID-19 pandemic, the Nevada Legislature was faced with the daunting challenge of fully enfranchising voters while maintaining the integrity of the election process. Under current circumstances, AB 4 reflects a reasonable decision to adopt vote-by-mail processes as a means of enfranchising voters who might have justifiable health concerns if they vote at in-person polling locations. The full text of AB 4 reveals that Nevada's legislators acted reasonably and in good faith to strike an appropriate balance between election integrity concerns, public health concerns, and voter access concerns. This decision is particularly reasonable considering the record voter participation in the June 2020 primary election in Nevada, with 491,654 Nevadans participating—and 98.4 percent of those voters returning their ballots by mail.[2] At the same time, the Nevada Legislature kept in place the numerous fail-safes embedded in Nevada law to prevent and detect voter fraud and ensure the integrity of Nevada's elections. AB 4 largely incorporates and supplements the State's existing election code to safeguard the franchise in November and during future crises.

20. With respect to Plaintiffs' claims about specific provisions of AB 4, Sections 11 and 12 reasonably allocate polling locations based on each county's population. The Nevada Legislature had numerous plausible policy reasons to allocate polling places in AB 4 according to each county's total population—including long lines experienced in the State's most populous counties during the June Primary, and the fact that Nevada's same-day registration law means that polling locations serve all potential voters, not just those who are registered. *See* NRS 293.5842. Additionally, Sections 11 and 12 require only that a *minimum* number of physical polling locations be placed in each of Nevada's counties. Sections 11 and 12 do not preclude local election officials in rural or urban counties from

[2] *2020 Primary Election Turnout*, Nev. Sec'y of State, https://www.nvsos.gov/sos/home/showdocument?id=8686 (June 19, 2020). By comparison, the 2016 primary election—the last to be held in a presidential election year—saw 240,213 Nevadans participate, with just 10.5 percent of voters returning their ballots by mail. *2016 Primary Election Turnout: In Person Early Voting, Absent, and Mailing Precincts*, Nev. Sec'y of State, https://www.nvsos.gov/sos/home/showdocument?id=4310 (June 23, 2016).

establishing a greater number of physical polling places than the required minimums. Far from discriminating against the voters in any particular county, Sections 11 and 12 give local election officials the flexibility to adapt to local needs and conditions based upon historical trends and projected in-person turnout for the 2020 general election.[3] Sections 11 and 12 do not, as Plaintiffs contend, constitute "arbitrary and capricious action" on the part of the Legislature, *Reynolds*, 377 U.S. at 557, 84 S. Ct. at 1379 (quoting *Baker v. Carr*, 369 U.S. 186, 226, 82 S. Ct. 691, 715 (1962)), or fail to meet the "rudimentary requirements of equal treatment and fundamental fairness." *Bush*, 531 U.S. at 109, 121 S. Ct. at 532. Therefore, there is a rational basis for the provisions of Sections 11 and 12.

21. Likewise, there is a rational basis for Section 20(2) of AB 4. Section 20(2) establishes a presumption that a mailed ballot received within three days after the election was cast on or before the date of the election if the ballot envelope bears no postmark or an illegible postmark. Plaintiffs argue that Section 20(2) effectively pushes back the date of the election, as mandated by federal law, thus diluting timely cast votes with late-cast votes. The Court accepts Defendants' representation that the U.S. Postal Service has adopted a policy of affixing postmarks to all election-related mail, including ballots, even though it generally does not affix postmarks to prepaid mail. This makes it highly unlikely that a late-cast ballot will be counted. For a late-cast ballot to be counted, the ballot would have to be mailed on November 4 or later, and arrive by November 6 without a legible postmark, or with no postmark at all. This is highly improbable. On the other hand, it is reasonably likely that a timely mailed ballot will arrive without a legible postmark during the window of time between November 4 and November 6. Section 20(2) ensures that such votes will be counted.

[3] In fact, several smaller rural counties have already announced their plans to open additional polling places for election day. Elko County, for example, intends to provide seven polling locations on election day, while Nye County will have at least five locations open. *See 2020 General Election & Polling Locations*, Nev. Sec'y of State, https://www.nvsos.gov/sos/elections/election-day-information (last visited Sept. 21, 2020).

22. Plaintiffs are also unlikely to succeed on their challenges to the other sections of AB 4, specifically, Sections 22 through 27, 39, 48 through 49, 69, and 79 through 80. As explained, Plaintiffs have failed to provide evidence of any injury resulting from these provisions of AB 4. NRS 33.010 (injunctive relief only available when the challenged action "would produce great or irreparable injury to the plaintiff").

23. For these reasons, Plaintiffs are unlikely to prevail upon their merits of their challenge to AB 4.

G. Public Interest

24. Plaintiffs must also demonstrate that the public interest would be served if AB 4 were enjoined. "By definition, '[t]he public interest . . . favors permitting as many qualified voters to vote as possible.'" *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (alteration in original) (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012)). Nevada's Legislature enacted AB 4 to ensure that all eligible Nevadans can "safely and securely" access the franchise during the COVID-19 pandemic. § 2(1). The Court accepts Defendants' representation that the Secretary of State has already begun notifying Nevadans about how to vote in the November Election pursuant to the provisions of AB 4. Granting Plaintiffs' request to upend AB 4 at this late date would negatively impact and disrupt the election process that is already under way and would disenfranchise voters who have relied on the notices of an all-mail election.

F. Unfunded Mandate

25. Policy choices and value determinations that are constitutionally committed to other branches are political questions outside the purview of judicial review. *N. Lake Tahoe Fire Prot. Dist. v. Washoe Cnty. Bd. of Cnty. Comm'rs*, 129 Nev. 682, 687, 310 P.3d 583, 587 (2013). Plaintiffs challenge AB 4 on the ground that it contains an unfunded mandate to local governments. The challenge seeks to alter the allocation of public funds, and ultimately the cost burdens, between state and local units of governments. The manner of allocating funds and cost burdens between state and local units of government is a legislative function, not a judicial function. Therefore, the Court finds that Plaintiffs'

claim concerning the alleged unfunded mandate of AB 4 is not justiciable. For the same reason, the Court finds that NRS 354.599 does not confer a private right of action upon Plaintiffs.

26. To the extent any conclusion of law is more appropriately characterized as a finding of fact, it is incorporated as such above.

NOW THEREFORE, the Court **GRANTS** the motion to appear *pro hac vice* filed by Abha Khanna, Esq.; **GRANTS** Intervenor-Defendants' motion to intervene; and **DENIES** Plaintiffs' motion for a preliminary injunction preventing the implementation of AB 4.

DATED this 28th day of September, 2020.

DISTRICT COURT JUDGE
ROB BARE

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EXHIBIT B

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELECTION INTEGRITY PROJECT OF NEVADA, LLC; AND SHARRON ANGLE, AN INDIVIDUAL,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ROB BARE, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA ON RELATION OF BARBARA K. CEGAVSKE, IN HER OFFICIAL CAPACITY AS NEVADA SECRETARY OF STATE; INSTITUTE FOR A PROGRESSIVE NEVADA AND THE PROGRESSIVE LEADERSHIP ALLIANCE OF NEVADA,
Real Parties in Interest.

No. 81847

FILED

OCT 07 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DENYING PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

This emergency petition for a writ of mandamus or prohibition challenges a district court order denying a motion for a preliminary injunction in an action challenging the constitutionality of recently enacted Assembly Bill 4, which allows statewide voting by mail when an emergency or disaster has been declared and provides for the mailing of ballots to all active registered voters.

20-36922

Petitioners seek extraordinary relief, arguing that the law required the district court to grant a preliminary injunction to halt the implementation of Assembly Bill (AB) 4, which they assert violates the Nevada Constitution's equal protection provision, Article 4, § 21, because it allows for "standardless counting procedures," lacks minimal safeguards to evaluate ballots equally, allows ballots cast after election day to be counted, and permits various "fraudulent abuses of election procedures, resulting in dishonest and incorrect voting totals." Although writ relief ordinarily will not lie when a party has another remedy such as an appeal and orders denying preliminary injunctions are appealable under NRAP 3A(b)(3), we will entertain this petition because it was filed before entry of a written order and involves a matter of urgency given the deadlines for mailing ballots. *See Las Vegas Review-Journal v. Eighth Judicial Dist. Court*, 134 Nev. 40, 43, 412 P.3d 23, 26 (2018) (accepting a petition for writ relief, directing entry of a written order, ordering expedited briefing, and addressing the petition on its merits under similar urgent circumstances where "a later appeal would not adequately remediate the harm complained of").

Based on the nature of the relief requested and the district court's jurisdiction to consider the request for a preliminary injunction, we conclude that a petition for a writ of mandamus, rather than prohibition, is the appropriate means to challenge the district court's decision under these circumstances. *Compare* NRS 34.160 (providing that a writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station), *with* NRS 34.320 (providing that a writ of prohibition is available to restrain a tribunal's proceedings

that "are without or in excess of [its] jurisdiction"), *and Goicoechea v. Fourth Judicial Dist. Court*, 96 Nev. 287, 289, 607 P.2d 1140, 1141 (1980) (holding that a writ of prohibition "will not issue if the court sought to be restrained had jurisdiction to hear and determine the matter under consideration"). But, we are not persuaded that petitioners have met their burden of demonstrating that mandamus relief is warranted. *See Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) (observing that petitioners bear the burden to demonstrate that writ relief is warranted).

This petition was not filed with this court until September 25, 2020.[1] AB 4 was approved by the Governor on August 3, 2020. The next day, several entities filed suit in federal court to challenge various provisions of AB 4 raising many claims identical to those raised by petitioners. *Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-CV-1445 JCM (VCF), 2020 WL 5626974 (D. Nev. Sept. 18, 2020). Petitioners in this matter then waited until September 1, 2020, to file their complaint in state court, which challenges both changes to the law in AB 4 but also provisions that were already in Nevada law and could have been challenged even earlier. According to documents provided in petitioners' appendix,

[1]The appendix filed with the petition is 20 volumes and the size of each volume varies between 14 and roughly 130 pages. It lacks a comprehensive index, and some of the volumes are not individually indexed. Petitioners do not always cite to the record to support statements in their petition and when they do, they cite to exhibits attached to documents within the record without providing page numbers for the language on which they rely (e.g., Declaration of Sharron Angle attached to the complaint, Appdx. 1).

several counties planned to send mail-in ballots to active registered voters on September 24, the day before petitioners filed their petition with this court. And while we have endeavored to expedite both briefing and consideration of this matter to the extent possible, to grant the petition at this late date would inject a significant measure of confusion into an election process that is already underway. We are reluctant to do so absent a clear and compelling demonstration that the district court had a legal duty to enjoin AB 4. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("By definition, [t]he public interest . . . favors permitting as many qualified voters to vote as possible."). That showing has not been made here.

To obtain a preliminary injunction, petitioners had to show (1) a likelihood of success on the merits and (2) a reasonable probability that the conduct of mailing, verifying, and counting ballots, if allowed to continue, will cause petitioners irreparable harm. *Univ. and Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). While petitioners need not "establish certain victory on the merits, [they] must make a prima facie showing through substantial evidence that [they are] entitled to the preliminary relief requested." *Shores v. Glob. Experience Specialists, Inc.*, 134 Nev. 503, 507, 422 P.3d 1238, 1242 (2018). Relatedly, an action must be ripe for judicial review, meaning that it "present[s] an existing controversy, not merely the prospect of a future problem." *Resnick v. Nevada Gaming Commission*, 104 Nev. 60, 65-66, 752 P.2d 229, 232 (1988).

The district court determined that petitioners did not present a ripe controversy because the harm they alleged was largely hypothetical,

and regardless, AB 4 did not violate equal protection principles and the relative hardships and public interest weighed against a preliminary injunction. *See Univ. Sys.*, 120 Nev. at 721, 100 P.3d at 187 (observing that, in considering preliminary injunctions, courts also "weigh the potential hardships to the relative parties and others, and the public interest"). On this record, we agree.[2] *Excellence Cmty. Mgmt., LLC v. Gilmore*, 131 Nev. 347, 351, 351 P.3d 720, 722 (2015) (recognizing that the decision to grant a preliminary injunction is within the district court's discretion, and this court will overturn such a decision only "when the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact" (internal quotations omitted)); *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009) (observing that questions of law, including whether a statute is constitutional, are reviewed de novo and "[s]tatutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional").

We have considered each of petitioners' challenges to the various provisions of AB 4, along with the evidence petitioners presented

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[2]With the reply in support of their petition, petitioners offer evidence that was not presented to the district court, suggesting that we should consider that evidence because they could have sought extraordinary relief with this court in the first instance. Even if petitioners had proceeded directly in this court in the first instance, this court generally declines to exercise its discretion to entertain mandamus petitions unless "legal, rather than factual, issues are presented" because "an appellate court is not an appropriate forum in which to resolve disputed questions of fact." *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981). We therefore have not considered the new evidence offered by petitioners.

below to support their complaint and motion. Assuming without deciding that the district court correctly determined that petitioners had standing to challenge AB 4 under the public importance exception to the standing doctrine set forth in *Schwartz v. Lopez*, 132 Nev. 732, 382 P.3d 886 (2016), we conclude that the court properly concluded that petitioners failed to make a prima facie showing through substantial evidence that they were entitled to a preliminary injunction preventing the Secretary of State from implementing AB 4. Petitioners did not allege any burden that the challenged provisions of AB 4 impose on an identifiable group's right to vote. We therefore are not convinced that the district court was obligated to apply strict scrutiny. *See Short v. Brown*, 893 F.3d 671, 676 (9th Cir. 2018) (discussing review applied to constitutional challenges to a state election law); *see also Burdick v. Takushi*, 504 U.S. 428, 434 (1992) ("[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights."). We also are not convinced that the district court erred in concluding that petitioners did not demonstrate with substantial evidence that the challenged provisions are not rationally related to the State's interest in ensuring that all active registered voters have an opportunity to exercise their right to vote in a safe and secure manner during a pandemic. *See Burdick*, 504 U.S. at 433-34 ("When a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions" (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983))). Similarly, although petitioners argued that certain provisions of AB 4 will

make the voting system susceptible to illegitimate votes that would result in irreparable harm by diluting legitimate votes, they presented no concrete evidence that such events will occur or that the Secretary of State's maintenance of the voter rolls exacerbated any such problem. And there are provisions in AB 4, along with existing provisions of NRS Chapter 293, that provide numerous safeguards to prevent and detect voter fraud, including criminal prohibitions against voter fraud, voter intimidation, and related offenses. AB 4 §§ 21, 40, 44, 70, 75; NRS 293.700; NRS 293.710; NRS 293.775; and NRS 293.770. Consistent with the foregoing, we

ORDER the petition for extraordinary writ relief DENIED.

Pickering, C.J.

Gibbons, J.

Hardesty, J.

Parraguirre, J.

Stiglich, J.

Cadish, J.

Silver, J.

cc: Hon. Rob Bare, District Judge
Hansen & Hansen, LLC
Attorney General/Carson City
Perkins Coie, LLP/Seattle
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP/Las Vegas
Eighth District Court Clerk

EXHIBIT C

STATE OF MICHIGAN

IN THE THIRD JUDICIAL CIRCUIT COURT FOR THE COUNTY OF WAYNE

Cheryl A. Costantino and
Edward P. McCall, Jr.
Plaintiffs,

Hon. Timothy M. Kenny
Case No. 20-014780-AW

City of Detroit; Detroit Election Commission; Janice M. Winfrey, in her official capacity as the Clerk of the City of Detroit and the Chairperson and the Detroit Election Commission; Cathy Garrett, In her official capacity as the Clerk of Wayne County; and the Wayne County Board of Canvassers,
Defendants.

_____/

OPINION & ORDER

At a session of this Court
Held on: November 13, 2020
In the Coleman A. Young Municipal Center
County of Wayne, Detroit, MI

PRESENT: Honorable Timothy M. Kenny
Chief Judge
Third Judicial Circuit Court of Michigan

This matter comes before the Court on Plaintiffs' motion for preliminary injunction, protective order, and a results audit of the November 3, 2020 election. The Court having read the parties' filing and heard oral arguments, finds:

With the exception of a portion of Jessy Jacob affidavit, all alleged fraudulent claims brought by the Plaintiffs related to activity at the TCF Center. Nothing was alleged to

have occurred at the Detroit Election Headquarters on West Grand Blvd. or at any polling place on November 3, 2020.

The Defendants all contend Plaintiffs cannot meet the requirements for injunctive relief and request the Court deny the motion.

When considering a petition for injunction relief, the Court must apply the following four-pronged test:

1. The likelihood the party seeking the injunction will prevail on the merits.
2. The danger the party seeking the injunction will suffer irreparable harm if the injunction is not granted.
3. The risk the party seeking the injunction would be harmed more by the absence an injunction than the opposing party would be by the granting of the injunction.
4. The harm to the public interest if the injunction is issued. *Davis v City of Detroit Financial Review Team*, 296 Mich. App. 568, 613; 821 NW2nd 896 (2012).

In the *Davis* opinion, the Court also stated that injunctive relief "represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *Id.* at 612 fn 135 quoting *Senior Accountants, Analysts and Appraisers Association v Detroit*, 218 Mich. App. 263, 269; 553 NW2nd 679 (1996).

When deciding whether injunctive relief is appropriate MCR 3.310 (A)(4) states that the Plaintiffs bear the burden of proving the preliminary injunction should be granted. In cases of alleged fraud, the Plaintiff must state with particularity the circumstances constituting the fraud. MCR 2.112 (B) (1)

Plaintiffs must establish they will likely prevail on the merits. Plaintiffs submitted seven affidavits in support of their petition for injunctive relief claiming widespread voter

fraud took place at the TCF Center. One of the affidavits also contended that there was blatant voter fraud at one of the satellite offices of the Detroit City Clerk. An additional affidavit supplied by current Republican State Senator and former Secretary of State Ruth Johnson, expressed concern about allegations of voter fraud and urged "Court intervention", as well as an audit of the votes.

In opposition to Plaintiffs' assertion that they will prevail, Defendants offered six affidavits from individuals who spent an extensive period of time at the TCF Center. In addition to disputing claims of voter fraud, six affidavits indicated there were numerous instances of disruptive and intimidating behavior by Republican challengers. Some behavior necessitated removing Republican challengers from the TCF Center by police.

After analyzing the affidavits and briefs submitted by the parties, this Court concludes the Defendants offered a more accurate and persuasive explanation of activity within the Absent Voter Counting Board (AVCB) at the TCF Center.

Affiant Jessy Jacob asserts Michigan election laws were violated prior to November 3, 2020, when City of Detroit election workers and employees allegedly coached voters to vote for Biden and the Democratic Party. Ms. Jacob, a furloughed City worker temporarily assigned to the Clerk's Office, indicated she witnessed workers and employees encouraging voters to vote a straight Democratic ticket and also witnessed election workers and employees going over to the voting booths with voters in order to encourage as well as watch them vote. Ms. Jacob additionally indicated while she was working at the satellite location, she was specifically instructed by superiors not to ask for driver's license or any photo ID when a person was trying to vote.

The allegations made by Ms. Jacob are serious. In the affidavit, however, Ms. Jacob does not name the location of the satellite office, the September or October date these

acts of fraud took place, nor does she state the number of occasions she witnessed the alleged misconduct. Ms. Jacob in her affidavit fails to name the city employees responsible for the voter fraud and never told a supervisor about the misconduct.

Ms. Jacob's information is generalized. It asserts behavior with no date, location, frequency, or names of employees. In addition, Ms. Jacob's offers no indication of whether she took steps to address the alleged misconduct or to alter any supervisor about the alleged voter fraud. Ms. Jacob only came forward after the unofficial results of the voting indicated former Vice President Biden was the winner in the state of Michigan.

Ms. Jacob also alleges misconduct and fraud when she worked at the TCF Center. She claims supervisors directed her not to compare signatures on the ballot envelopes she was processing to determine whether or not they were eligible voters. She also states that supervisors directed her to "pre-date" absentee ballots received at the TCF Center on November 4, 2020. Ms. Jacob ascribes a sinister motive for these directives. Evidence offered by long-time State Elections Director Christopher Thomas, however, reveals there was no need for comparison of signatures at the TCF Center because eligibility had been reviewed and determined at the Detroit Election Headquarters on West Grand Blvd. Ms. Jacob was directed not to search for or compare signatures because the task had already been performed by other Detroit city clerks at a previous location in compliance with MCL 168.765a. As to the allegation of "pre-dating" ballots, Mr. Thomas explains that this action completed a data field inadvertently left blank during the initial absentee ballot verification process. Thomas Affidavit, #12. The entries reflected the date the City received the absentee ballot. *Id.*

The affidavit of current State Senator and former Secretary of State Ruth Johnson essentially focuses on the affidavits of Ms. Jacob and Zachery Larsen. Senator Johnson believed the information was concerning to the point that judicial intervention was needed and an audit of the ballots was required. Senator Johnson bases her assessment entirely on the contents of the Plaintiffs' affidavits and Mr. Thomas' affidavit. Nothing in Senator Johnson's affidavit indicates she was at the TCF Center and witnessed the established protocols and how the AVCB activity was carried out. Similarly, she offers no explanation as to her apparent dismissal of Mr. Thomas' affidavit. Senator Johnson's conclusion stands in significant contrast to the affidavit of Christopher Thomas, who was present for many hours at TCF Center on November 2, 3 and 4. In this Court's view, Mr. Thomas provided compelling evidence regarding the activity at the TCF Center's AVCB workplace. This Court found Mr. Thomas' background, expertise, role at the TCF Center during the election, and history of bipartisan work persuasive.

Affiant Andrew Sitto was a Republican challenger who did not attend the October 29th walk- through meeting provided to all challengers and organizations that would be appearing at the TCF Center on November 3 and 4, 2020. Mr. Sitto offers an affidavit indicating that he heard other challengers state that several vehicles with out-of-state license plates pulled up to the TCF Center at approximately 4:30 AM on November 4th. Mr. Sitto states that "tens of thousands of ballots" were brought in and placed on eight long tables and, unlike other ballots, they were brought in from the rear of the room. Sitto also indicated that every ballot that he saw after 4:30 AM was cast for former Vice President Biden.

Mr. Sitto's affidavit, while stating a few general facts, is rife with speculation and guess-work about sinister motives. Mr. Sitto knew little about the process of the absentee voter counting board activity. His sinister motives attributed to the City of Detroit were negated by Christopher Thomas' explanation that all ballots were delivered to the back of Hall E at the TCF Center. Thomas also indicated that the City utilized a rental truck to deliver ballots. There is no evidentiary basis to attribute any evil activity by virtue of the city using a rental truck with out-of-state license plates.

Mr. Sitto contends that tens of thousands of ballots were brought in to the TCF Center at approximately 4:30 AM on November 4, 2020. A number of ballots speculative on Mr. Sitto's part, as is his speculation that all of the ballots delivered were cast for Mr. Biden. It is not surprising that many of the votes being observed by Mr. Sitto were votes cast for Mr. Biden in light of the fact that former Vice President Biden received approximately 220,000 more votes than President Trump.

Daniel Gustafson, another affiant, offers little other than to indicate that he witnessed "large quantities of ballots" delivered to the TCF Center in containers that did not have lids were not sealed, or did not have marking indicating their source of origin. Mr. Gustafson's affidavit is another example of generalized speculation fueled by the belief that there was a Michigan legal requirement that all ballots had to be delivered in a sealed box. Plaintiffs have not supplied any statutory requirement supporting Mr. Gustafson's speculative suspicion of fraud.

Patrick Colbeck's affidavit centered around concern about whether any of the computers at the absent voter counting board were connected to the internet. The answer given by a David Nathan indicated the computers were not connected to the

internet. Mr. Colbeck implies that there was internet connectivity because of an icon that appeared on one of the computers. Christopher Thomas indicated computers were not connected for workers, only the essential tables had computer connectivity. Mr. Colbeck, in his affidavit, speculates that there was in fact Wi-Fi connection for workers use at the TCF Center. No evidence supports Mr. Colbeck's position.

This Court also reads Mr. Colbeck's affidavit in light of his pre-election day Facebook posts. In a post before the November 3, 2020 election, Mr. Colbeck stated on Facebook that the Democrats were using COVID as a cover for Election Day fraud. His predilection to believe fraud was occurring undermines his credibility as a witness.

Affiant Melissa Carone was contracted by Dominion Voting Services to do IT work at the TCF Center for the November 3, 2020 election. Ms. Carone, a Republican, indicated that she "witnessed nothing but fraudulent actions take place" during her time at the TCF Center. Offering generalized statements, Ms. Carone described illegal activity that included, untrained counter tabulating machines that would get jammed four to five times per hour, as well as alleged cover up of loss of vast amounts of data. Ms. Carone indicated she reported her observations to the FBI.

Ms. Carone's description of the events at the TCF Center does not square with any of the other affidavits. There are no other reports of lost data, or tabulating machines that jammed repeatedly every hour during the count. Neither Republican nor Democratic challengers nor city officials substantiate her version of events. The allegations simply are not credible.

Lastly, Plaintiffs rely heavily on the affidavit submitted by attorney Zachery Larsen. Mr. Larsen is a former Assistant Attorney General for the State of Michigan who alleged mistreatment by city workers at the TCF Center, as well as fraudulent activity by election workers. Mr. Larsen expressed concern that ballots were being processed without confirmation that the voter was eligible. Mr. Larsen also expressed concern that he was unable to observe the activities of election official because he was required to stand six feet away from the election workers. Additionally, he claimed as a Republican challenger, he was excluded from the TCF Center after leaving briefly to have something to eat on November 4th. He expressed his belief that he had been excluded because he was a Republican challenger.

Mr. Larsen's claim about the reason for being excluded from reentry into the absent voter counting board area is contradicted by two other individuals. Democratic challengers were also prohibited from reentering the room because the maximum occupancy of the room had taken place. Given the COVID-19 concerns, no additional individuals could be allowed into the counting area. Democratic party challenger David Jaffe and special consultant Christopher Thomas in their affidavits both attest to the fact that neither Republican nor Democratic challengers were allowed back in during the early afternoon of November 4th as efforts were made to avoid overcrowding.

Mr. Larsen's concern about verifying the eligibility of voters at the AVCB was incorrect. As stated earlier, voter eligibility was determined at the Detroit Election Headquarters by other Detroit city clerk personnel.

The claim that Mr. Larsen was prevented from viewing the work being processed at the tables is simply not correct. As seen in a City of Detroit exhibit, a large monitor was

at the table where individuals could maintain a safe distance from poll workers to see what exactly was being performed. Mr. Jaffe confirmed his experience and observation that efforts were made to ensure that all challengers could observe the process.

Despite Mr. Larsen's claimed expertise, his knowledge of the procedures at the AVCB paled in comparison to Christopher Thomas'. Mr. Thomas' detailed explanation of the procedures and processes at the TCF Center were more comprehensive than Mr. Larsen's. It is noteworthy, as well, that Mr. Larsen did not file any formal complaint as the challenger while at the AVCB. Given the concerns raised in Mr. Larsen's affidavit, one would expect an attorney would have done so. Mr. Larsen, however, only came forward to complain after the unofficial vote results indicated his candidate had lost.

In contrast to Plaintiffs' witnesses, Christopher Thomas served in the Secretary of State's Bureau of Elections for 40 years, from 1977 through 2017. In 1981, he was appointed Director of Elections and in that capacity implemented Secretary of State Election Administration Campaign Finance and Lobbyist disclosure programs. On September 3, 2020 he was appointed as Senior Advisor to Detroit City Clerk Janice Winfrey and provided advice to her and her management staff on election law procedures, implementation of recently enacted legislation, revamped absent voter counting boards, satellite offices and drop boxes. Mr. Thomas helped prepare the City of Detroit for the November 3, 2020 General Election.

As part of the City's preparation for the November 3rd election Mr. Thomas invited challenger organizations and political parties to the TCF Center on October 29, 2020 to have a walk-through of the entire absent voter counting facility and process. None of Plaintiff challenger affiants attended the session.

On November 2, 3, and 4, 2020, Mr. Thomas worked at the TCF Center absent voter counting boards primarily as a liaison with Challenger Organizations and Parties. Mr. Thomas indicated that he "provided answers to questions about processes at the counting board's resolved dispute about process and directed leadership of each organization or party to adhere to Michigan Election Law and Secretary of State procedures concerning the rights and responsibilities of challengers."

Additionally, Mr. Thomas resolved disputes about the processes and satisfactorily reduced the number of challenges raised at the TCF Center.

In determining whether injunctive relief is required, the Court must also determine whether the Plaintiffs sustained their burden of establishing they would suffer irreparable harm if an injunction were not granted. Irreparable harm does not exist if there is a legal remedy provided to Plaintiffs.

Plaintiffs contend they need injunctive relief to obtain a results audit under Michigan Constitution Article 2, § IV, Paragraph 1 (h) which states in part "the right to have the results of statewide elections audited, in such as manner as prescribed by law, to ensure the accuracy and integrity of the law of elections." Article 2, § IV, was passed by the voters of the state of Michigan in November, 2018.

A question for the Court is whether the phrase "in such as manner as prescribed by law" requires the Court to fashion a remedy by independently appointing an auditor to examine the votes from the November 3, 2020 election before any County certification of votes or whether there is another manner "as prescribed by law".

Following the adoption of the amended Article 2, § IV, the Michigan Legislature amended MCL 168.31a effective December 28, 2018. MCL 168.31a provides for the Secretary of State and appropriate county clerks to conduct a results audit of at least

one race in each audited precinct. Although Plaintiffs may not care for the wording of the current MCL 168.31a, a results audit has been approved by the Legislature. Any amendment to MCL 168.31a is a question for the voice of the people through the legislature rather than action by the Court.

It would be an unprecedented exercise of judicial activism for this Court to stop the certification process of the Wayne County Board of Canvassers. The Court cannot defy a legislatively crafted process, substitute its judgment for that of the Legislature, and appoint an independent auditor because of an unwieldy process. In addition to being an unwarranted intrusion on the authority of the Legislature, such an audit would require the rest of the County and State to wait on the results. Remedies are provided to the Plaintiffs. Any unhappiness with MCL 168.31a calls for legislative action rather than judicial intervention.

As stated above, Plaintiffs have multiple remedies at law. Plaintiffs are free to petition the Wayne County Board of Canvassers who are responsible for certifying the votes. (MCL 168.801 and 168.821 et seq.) Fraud claims can be brought to the Board of Canvassers, a panel that consists of two Republicans and two Democrats. If dissatisfied with the results, Plaintiffs also can avail themselves of the legal remedy of a recount and a Secretary of State audit pursuant to MCL 168.31a.

Plaintiff's petition for injunctive relief and for a protective order is not required at this time in light of the legal remedy found at 52 USC § 20701 and Michigan's General Schedule #23 – Election Records, Item Number 306, which imposes a statutory obligation to preserve all federal ballots for 22 months after the election.

In assessing the petition for injunctive relief, the Court must determine whether there will be harm to the Plaintiff if the injunction is not granted, as Plaintiffs' existing legal

remedies would remain in place unaltered. There would be harm, however, to the Defendants if the Court were to grant the requested injunction. This Court finds that there are legal remedies for Plaintiffs to pursue and there is no harm to Plaintiffs if the injunction is not granted. There would be harm, however, to the Defendants if the injunction is granted. Waiting for the Court to locate and appoint an independent, nonpartisan auditor to examine the votes, reach a conclusion and then finally report to the Court would involve untold delay. It would cause delay in establishing the Presidential vote tabulation, as well as all other County and State races. It would also undermine faith in the Electoral System.

Finally, the Court has to determine would there be harm to the public interest. This Court finds the answer is a resounding yes. Granting Plaintiffs' requested relief would interfere with the Michigan's selection of Presidential electors needed to vote on December 14, 2020. Delay past December 14, 2020 could disenfranchise Michigan voters from having their state electors participate in the Electoral College vote.

Conclusion

Plaintiffs rely on numerous affidavits from election challengers who paint a picture of sinister fraudulent activities occurring both openly in the TCF Center and under the cloak of darkness. The challengers' conclusions are decidedly contradicted by the highly-respected former State Elections Director Christopher Thomas who spent hours and hours at the TCF Center November 3rd and 4th explaining processes to challengers and resolving disputes. Mr. Thomas' account of the November 3rd and 4th events at the TCF Center is consistent with the affidavits of challengers David Jaffe, Donna MacKenzie and Jeffrey Zimmerman, as well as former Detroit City Election Official, now contractor, Daniel Baxter and City of Detroit Corporation Counsel Lawrence Garcia.

Perhaps if Plaintiffs' election challenger affiants had attended the October 29, 2020 walk-through of the TCF Center ballot counting location, questions and concerns could have been answered in advance of Election Day. Regrettably, they did not and, therefore, Plaintiffs' affiants did not have a full understanding of the TCF absent ballot tabulation process. No formal challenges were filed. However, sinister, fraudulent motives were ascribed to the process and the City of Detroit. Plaintiffs' interpretation of events is incorrect and not credible.

Plaintiffs are unable to meet their burden for the relief sought and for the above mentioned reasons, the Plaintiffs' petition for injunctive relief is DENIED. The Court further finds that no basis exists for the protective order for the reasons identified above. Therefore, that motion is DENIED. Finally, the Court finds that MCL 168.31a governs the audit process. The motion for an independent audit is DENIED.

It is so ordered.

This is not a final order and does not close the case.

November 13, 2020

Hon. Timothy M. Kenny
Chief Judge
Third Judicial Circuit Court of Michigan

EXHIBIT D

STATE OF MICHIGAN

COURT OF CLAIMS

DONALD J. TRUMP FOR PRESIDENT, INC. and ERIC OSTEGREN,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State,

Defendants.
_____/

OPINION AND ORDER

Case No. 20-000225-MZ

Hon. Cynthia Diane Stephens

Pending before the Court are two motions. The first is plaintiffs' November 4, 2020 emergency motion for declaratory relief under MCR 2.605(D). For the reasons stated on the record and incorporated herein, the motion is DENIED. Also pending before the Court is the motion to intervene as a plaintiff filed by the Democratic National Committee. Because the relief requested by plaintiffs in this case will not issue, the Court DENIES as moot the motion to intervene.

According to the allegations in plaintiffs' complaint, plaintiff Eric Ostegren is a credentialed election challenger under MCL 168.730. Paragraph 2 of the complaint alleges that plaintiff Ostegren was "excluded from the counting board during the absent voter ballot review process." The complaint does not specify when, where, or by whom plaintiff was excluded. Nor does the complaint provide any details about why the alleged exclusion occurred.

The complaint contains allegations concerning absent voter ballot drop-boxes. Plaintiffs allege that state law requires that ballot containers must be monitored by video surveillance. Plaintiff contends that election challengers must be given an opportunity to observe video of ballot drop-boxes with referencing the provision(s) of the statute that purportedly grant such access, . See MCL 168.761d(4)(c).

Plaintiffs' emergency motion asks the Court to order all counting and processing of absentee ballots to cease until an "election inspector" from each political party is allowed to be present at every absent voter counting board, and asks that this court require the Secretary of State to order the immediate segregation of all ballots that are not being inspected and monitored as required by law. Plaintiffs argue that the Secretary of State's failure to act has undermined the rights of all Michigan voters. While the advocate at oral argument posited the prayer for relief as one to order "meaningful access" to the ballot tabulation process, plaintiffs have asked the Court to enter a preliminary injunction to enjoin the counting of ballots. A party requesting this "extraordinary and drastic use of judicial power" must convince the Court of the necessity of the relief based on the following factors:

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Davis v Detroit Fin Review Team*, 296 Mich App 568, 613; 821 NW2d 896 (2012).]

As stated on the record at the November 5, 2020 hearing, plaintiffs are not entitled to the extraordinary form of emergency relief they have requested.

I. SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

A. OSTEGREN CLAIM

Plaintiff Ostegren avers that he was removed from an absent voter counting board. It is true that the Secretary of State has general supervisory control over the conduct of elections. See MCL 168.21; MCL 168.31. However, the day-to-day operation of an absent voter counting board is controlled by the pertinent city or township clerk. See MCL 168.764d. The complaint does not allege that the Secretary of State was a party to or had knowledge of, the alleged exclusion of plaintiff Ostegren from the unnamed absent voter counting board. Moreover, the Court notes that recent guidance from the Secretary of State, as was detailed in matter before this Court in *Carra et al v Benson et al*, Docket No. 20-000211-MZ, expressly advised local election officials to admit credentialed election challengers, provided that the challengers adhered to face-covering and social-distancing requirements. Thus, allegations regarding the purported conduct of an unknown local election official do not lend themselves to the issuance of a remedy against the Secretary of State.

B. CONNARN AFFIDAVIT

Plaintiffs have submitted what they refer to as "supplemental evidence" in support of their request for relief. The evidence consists of: (1) an affidavit from Jessica Connarn, a designated poll watcher; and (2) a photograph of a handwritten yellow sticky note. In her affidavit, Connarn avers that, when she was working as a poll watcher, she was contacted by an unnamed poll worker who was allegedly "being told by other hired poll workers at her table to change the date the ballot was received when entering ballots into the computer." She avers that this unnamed poll worker later handed her a sticky note that says "entered receive date as 11/2/20 on 11/4/20." Plaintiffs contend that this documentary evidence confirms that some unnamed persons engaged in

fraudulent activity in order to count invalid absent voter ballots that were received after election day.

This "supplemental evidence" is inadmissible as hearsay. The assertion that Connarn was informed by an unknown individual what "other hired poll workers at her table" had been told is inadmissible hearsay within hearsay, and plaintiffs have provided no hearsay exception for either level of hearsay that would warrant consideration of the evidence. See MRE 801(c). The note—which is vague and equivocal—is likewise hearsay. And again, plaintiffs have not presented an argument as to why the Court could consider the same, given the general prohibitions against hearsay evidence. See *Ykimoff v Foote Mem Hosp*, 285 Mich App 80, 105; 776 NW2d 114 (2009). Moreover, even overlooking the evidentiary issues, the Court notes that there are still no allegations implicating the Secretary of State's general supervisory control over the conduct of elections. Rather, any alleged action would have been taken by some unknown individual at a polling location.

C. BALLOT BOX VIDEOS

It should be noted at the outset that the statute providing for video surveillance of drop boxes only applies to those boxes that were installed after October 1, 2020. See MCL 168.761d(2). There is no evidence in the record whether there are any boxes subject to this requirement, how many there are, or where they are. The plaintiffs have not cited any statutory authority that requires any video to be subject to review by election challengers. They have not presented this Court with any statute making the Secretary of State responsible for maintaining a database of such boxes. The clear language of the statute directs that "[t]he city or township clerk must use video monitoring of that drop box to ensure effective monitoring of that drop box." MCL 168.761d(4)(c) Additionally, plaintiffs have not directed the Court's attention to any authority directing the

Secretary of State to segregate the ballots that come from such drop-boxes, thereby undermining plaintiffs' request to have such ballots segregated from other ballots, and rendering it impossible for the Court to grant the requested relief against this defendant. Not only can the relief requested not issue against the Secretary of State, who is the only named defendant in this action, but the factual record does not support the relief requested. As a result, plaintiffs are unable to show a likelihood of success on the merits.

II. MOOTNESS

Moreover, even if the requested relief could issue against the Secretary of State, the Court notes that the complaint and emergency motion were not filed until approximately 4:00 p.m. on November 4, 2020—despite being announced to various media outlets much earlier in the day. By the time this action was filed, the votes had largely been counted, and the counting is now complete. Accordingly, and even assuming the requested relief were available against the Secretary of State—and overlooking the problems with the factual and evidentiary record noted above—the matter is now moot, as it is impossible to issue the requested relief. See *Gleason v Kincaid*, 323 Mich App 308, 314; 917 NW2d 685 (2018)

IT IS HEREBY ORDERED that plaintiff's November 4, 2020 emergency motion for declaratory judgment is DENIED.

IT IS HEREBY FURTHER ORDERED that proposed intervenor's motion to intervene is DENIED as MOOT.

This is not a final order and it does not resolve the last pending claim or close the case.

November 6, 2020

Cynthia Diane Stephens
Judge, Court of Claims

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DONALD J. TRUMP FOR PRESIDENT, INC.	:	
Plaintiffs,	:	
	:	
v.	:	**Civ. No. 20-5533**
	:	
PHILADELPHIA COUNTY BOARD OF ELECTIONS,	:	
Defendant.	:	

O R D E R

As stated during today's Emergency Injunction Hearing, in light of the Parties' agreement, Plaintiff's Motion (Doc. No. 1) is **DENIED without prejudice.**

AND IT IS SO ORDERED.

/s/ Paul S. Diamond

Paul S. Diamond, J.

EXHIBIT F

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

-oOo-

FRED KRAUS, an individual registered to vote in Clark County, Nevada, DONALD J. TRUMP FOR PRESIDENT, INC., and the NEVADA REPUBLICAN PARTY,

Petitioners,

vs.

BARBARA CEGAVSKE, in her official capacity as Nevada Secretary of State, JOSEPH P. GLORIA, in his official capacity as Registrar of Voters for Clark County, Nevada,

Respondents.

CASE NO. 20 OC 00142 1B

DEPT. 2

ORDER DENING EMERGENCY PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF PROHIBITION

PROCEDURAL BACKGROUND

Before the Court is the Emergency Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition. The Court held an evidentiary hearing on October 28, 2020.

ISSUES

Do Petitioners have standing to bring these claims?

Has Registrar Joseph P. Gloria failed to meet his statutory duty under NRS 293B.353(1) to allow members of the general public to observe the counting of ballots?

Has Registrar Gloria unlawfully precluded Petitioners from the use and enjoyment of a right to which Petitioners are entitled?

Has Registrar Gloria exercised discretion arbitrarily or through mere caprice?

Has Registrar Gloria acted without or in excess of authorized powers?

Has Secretary of State Barbara Cegavske failed to meet any statutory duty under NRS 293B.353(1) to allow members of the general public to observe the counting of ballots?

Has Secretary of State Barbara Cegavske unlawfully precluded Petitioners from the use and enjoyment of a right to which Petitioners are entitled?

Has Secretary Cegavske exercised discretion arbitrarily or through mere caprice?

Has Secretary Cegavske acted without or in excess of authorized powers?

Has Secretary of State Cegavske unlawfully precluded Petitioners the use and/or enjoyment of a right to which Petitioners are entitled?

Have Petitioners proved they are entitled to a writ of mandamus on their equal protection claims?

FACTS

It is important to note the factual context in which this case arose. All of the states in the United States are attempting to hold elections under the health, political, social, and economic consequences of the COVID-19 pandemic. Nevada's state and county election officials had relatively little time to assess, plan, modify, and implement procedures that are quite different from the established election procedures in an effort

to provide safe, open elections that would not result in long waiting lines. The modification of procedures includes fewer polling places, a very large increase in mail-in voting, and long lines as a result of social distancing.

A second important context is that this lawsuit was filed October 23, 2020–11 days before the general election.

Every Nevada county is required to submit to the Secretary of State, by April 15, 2020, the county's plan for accommodation of members of the general public who observe the processing of ballots. NRS 293B.354(1). Registrar Gloria did not submit a plan by April 15, 2020.

Registrar Gloria submitted a plan to the Secretary of State on October 20, 2020. A copy of the plan is attached as Exhibit 1.

Historically, the Secretary of State has not sent letters or other notification to the counties approving the counties' plans.

The Secretary of State's office reviewed Registrar Gloria's plan, concluded it complied with the law, and Secretary Cegavske issued a letter to Registrar Gloria on October 22, 2020. The letter is attached as Exhibit 2. The Secretary did not write that Registrar Gloria's plan was "approved," but it is clear from the letter that the plan was approved with a suggestion to that the Registrar consider providing additional seating in public viewing areas for observers to view the signature verification process to the extent feasible while ensuring that no personally identifiable information is observable by the public.

A copy of all 17 county plans were admitted as exhibits. Clark County's plan is not substantially different from the plan of any of the other 16 counties, and none of the plans is substantially different from the plans of previous years.

Clark County uses an electronic ballot sorting system, Agilis. No other Nevada county uses Agilis. Some major metropolitan areas including Cook County, Illinois, Salt

Lake City, Utah, and Houston, Texas use Agilis. Some Nevada counties use other brands of ballot sorting systems.

Registrar Gloria decided to purchase Agilis because of the pandemic and the need to more efficiently process ballot signatures.

One of Petitioners' attorneys questioned Registrar Gloria about Agilis in earlier case, Corona v. Cegavske, but never asked Registrar Gloria to stop using Agilis.

Clark County election staff tested Agilis by manually matching signatures. Clark County election staff receives yearly training on signature matching from the Federal Bureau of Investigation. The last training was in August of this year.

For this general election Clark County is using the same they used for the June primary election. No evidence was presented that the setting used by Clark County causes or has resulted in any fraudulent ballot being validated or any valid ballot invalidated.

No evidence was presented of any Agilis errors or inaccuracies. No evidence was presented that there is any indication of any error in Clark County's Agilis signature match rate.

Registrar Gloria opined that if Clark County could not continue using Agilis the county could not meet the canvass deadline which is November 15, 2020. The Court finds that if Clark County is not allowed to continue using Agilis the county will not meet the canvass deadline.

When the envelope containing mail-in ballots are opened the ballot and envelope are separated and not kept in sequential order. Because they are not kept in sequential order it would be difficult to identify a voter by matching a ballot with its envelope.

This is the first election in Registrar Gloria's 28 years of election experience in Clark County that there are large numbers of persons wanting to observe the ballot process.

Persons that observe the ballot process sign an acknowledgment and a memo containing instructions to the observer. A copy of an acknowledgment and memo are attached as Exhibit 3.

People hired by the Registrar to manage the people wanting to observe the ballot process are called ambassadors. The observer acknowledgment states observers are prohibited from talking to staff. The memo explains the role of ambassadors and invites observers to inform their ambassador they have a question for election officials or the observer may pose a question directly to an election official.

Registrar Gloria is not aware of any observer complaints.

Several witnesses supporting Petitioners and called by Petitioners testified: they saw ballots that had been removed from the envelope left alone; runners handle ballots in different ways, including taking the ballots into an office, taking ballots into "the vault" and/or otherwise failing to follow procedure, but no procedure was identified; inability to see some tables from the observation area; inability to see into some rooms; inability to see all election staff monitors; inability to see names on monitors; saw a signatures she thought did not match but admitted she had no signature comparison training; and/or trouble getting to where they were supposed to go to observe and trouble being admitted to act as observer at the scheduled time.

No evidence was presented that any party or witness wanted to challenge a vote or voter, or had his or her vote challenged.

No evidence was presented that there was an error in matching a ballot signature, that any election staff did anything that adversely affected a valid ballot or failed to take appropriate action on an invalid ballot.

No evidence was presented that any election staff were biased or prejudiced for or against any party or candidate.

One Petitioner witness did not raise issues regarding things she observed with an ambassador but instead went to the Trump Campaign. No issue was ever raised as a result of her observations or report to the Trump Campaign.

Washoe County is using cameras to photograph or videotape the ballot process.

No Nevada county hand-counts ballots.

LEGAL PRINCIPLES

Standing

Nevada law requires an actual justiciable controversy as a predicate to judicial relief. *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986). For a controversy to exist the petitioner must have suffered a personal injury and not merely a general interest that is common to all members of the public. *Schwarz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016).

Mandamus and Prohibition

A court may issue a writ of mandamus "to compel the performance of an act which the law especially enjoins as a duty resulting from an office . . . ; or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is unlawfully precluded by such . . . person." NRS 34.160. A court may issue a writ of mandamus "when the respondent has a clear, present legal duty to act." *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603, 637 P.2d 534 (1981). The flip side of that proposition is that a court cannot mandate a person take action if the person has no clear, present legal duty to act. Generally, mandamus will lie to enforce ministerial acts or duties and to require the exercise of discretion, but it will not serve to control the discretion." *Gragson v. Toco*, 90 Nev. 131,

133 (1974). There is an exception to the general rule: when discretion "is exercised arbitrarily or through mere caprice." *Id.*

"Petitioners carry the burden of demonstrating that extraordinary relief is warranted." *Pan v. Dist. Ct.*, 120 Nev. 222, 228 (2004).

The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal . . . or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal . . . or person. NRS 34.320.

A writ of prohibition "may be issued . . . to a person, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.330.

Voting Statutes

NRS 293B.353 provides in relevant part:

> 1. The county . . . shall allow members of the general public to observe the counting of the ballots at the central counting place if those members do not interfere with the counting of the ballots.
>
> 2. The county . . . may photograph or record or cause to be photographed or recorded on audiotape or any other means of sound or video reproduction the counting of the ballots at the central counting place.
>
> 3. A registered voter may submit a written request to the county . . . clerk for any photograph or recording of the counting of the ballots prepared pursuant to subsection 2. The county . . . clerk shall, upon receipt of the request, provide the photograph or recording to the registered voter at no charge.

NRS 293B.354 provides in relevant part:

> 1. The county clerk shall, not later than April 15 of each year in which a general election is held, submit to the Secretary of State for approval a written plan for the accommodation of members of the general public who observe the delivery, counting, handling and processing of ballots at a polling place, receiving center or central counting place.
>
> . . .

3. Each plan must include:

(a) The location of the central counting place and of each polling place and receiving center;

(b) A procedure for the establishment of areas within each polling place and receiving center and the central counting place from which members of the general public may observe the activities set forth in subsections 1 and 2;

(c) The requirements concerning the conduct of the members of the general public who observe the activities set forth in subsections 1 and 2; and

(d) Any other provisions relating to the accommodation of members of the general public who observe the activities set forth in subsections 1 and 2 which the county . . . considers appropriate.

AB 4 section 22 provides in relevant part:

1. For any affected election, the county . . . clerk, shall establish procedures for the processing and counting of mail ballots.

2. The procedures established pursuant to subsection 1:

(a) May authorize mail ballots to be processed and counted by el electronic means; and

(b) Must not conflict with the provisions of sections 2 to 27, I inclusive, of this act.

AB 4 section 23 provides in relevant part:

1. . . . for any affected election, when a mail ballot is returned by or on behalf of a voter to the county . . .clerk . . . and a record of its return is made in the mail ballot record for the election, the clerk or an employee in the office of the clerk shall check the signature used for the mail ballot in accordance with the following procedure:

a. The clerk or employee shall check the signature used for the mail ballot against all signatures of the voter available in the records of the clerk.

AB 4 section 25 provides in relevant part:

1. The counting procedures must be public.

ANALYSIS

Petitioners failed to prove they have standing to bring their Agilis, observation, ballot handling or secrecy claims.

As set forth above for a justiciable controversy to exist the petitioner must have suffered a personal injury and not merely a general interest that is common to all members of the public. Petitioners provided no evidence of any injury, direct or indirect, to themselves or any other person or organization. The evidence produced by Petitioners shows concern over certain things these observers observed. There is no evidence that any vote that should lawfully be counted has or will not be counted. There is no evidence that any vote that should lawfully not be counted has been or will be counted. There is no evidence that any election worker did anything outside of the law, policy, or procedures. Petitioners do not have standing to maintain their mandamus claims.

Likewise, Petitioners provided no evidence of a personal injury and not merely a general interest that is common to all members of the public regarding the differences between the in-person and mail-in procedures. Petitioners provided no evidence of any injury, direct or indirect, to themselves or any other person or organization as a result of the different procedures. All Nevada voters have the right to choose to vote in-person or by mail-in. Voting in person and voting by mailing in the ballot are different and so the procedures differ. There is no evidence that anything the State or Clark County have done or not done creates two different classes of voters. There is no evidence that anything the State or Clark County has done values one voter's vote over another's.

There is no evidence of any debasement or dilution of any citizen's vote. Petitioners do not have standing to bring their equal protection claims.

Petitioners failed to prove Registrar Gloria failed to meet his statutory duty under NRS 293B.353(1) to allow members of the general public to observe the counting of ballots?

Petitioners argued they have a right to observers having meaningful observation under NRS 293B.353(1) and AB 4 sec. 25. NRS 293B.353(1) provides in relevant part, "[t]he county . . . shall allow members of the general public to observe the counting of the ballots . . . ." AB 4 sec. 25 provides in relevant part "[t]he counting procedure must be public." The statutes do not use the modifier "meaningful."

The Nevada Legislature codified the right of the public to observe the ballot counting procedure in NRS 293B.353 and 293B.354, and AB 4 section 25(1). NRS 293B.354(1) requires each county to annually submit a plan to the Secretary of State. NRS 293B. 354(3) states the requirements of the plan. The statutory requirements of the plan are very general. The legislature left to the election professionals, the Secretary of State and the county elections officials, wide discretion in establishing the specifics of the plan. Petitioners failed to prove either Secretary Cegavske or Registrar Gloria exercised their discretion arbitrarily or through mere caprice.

The fact that Registrar failed to timely submit a plan was remedied by submitting the plan late and the Secretary of State approving the plan.

Petitioners seem to request unlimited access to all areas of the ballot counting area and observation of all information involved in the ballot counting process so they

can verify the validity of the ballot, creating in effect a second tier of ballot counters and/or concurrent auditors of the ballot counting election workers. Petitioners failed to cite any constitutional provision, statue, rule, or case that supports such a request. The above-cited statutes created observers not counters, validators, or auditors. Allowing such access creates a host of problems. Ballots and verification tools contain confidential voter information that observers have not right to know. Creating a second tier of counters, validators, or auditors would slow a process the Petitioners failed to prove is flawed. The request if granted would result in an increase in the number of persons in the ballot processing areas at a time when social distancing is so important because of the COVID-19 pandemic.

Petitioners have failed to prove Registrar Gloria has interfered with any right they or anyone else has as an observer.

Petitioners claim a right to have mail-in ballots and the envelopes the ballots are mailed in to be kept in sequential order. Petitioners failed to cite Constitutional provision, statute, rule, or case that creates a duty for Nevada registrars to keep ballots and envelopes in sequential order. Because they failed to show a duty they cannot prevail on a mandamus claim that requires proof a duty resulting from office. Because there is no duty or right to sequential stacking the Court cannot mandate Registrar Gloria to stack ballots and envelopes sequentially.

Because there is not right to sequential stacking the Court cannot mandate the use and enjoyment of that "right."

Plaintiffs want the Court to mandate Registrar Gloria allow Petitioners to photograph of videotape the ballot counting process. The legislature provided in NRS

293B.353(2) the procedure for photographing or videotaping the counting of ballots. The county may photograph or videotape the counting and upon request provide a copy of the photographs or videotapes.

Petitioners failed to cite any constitutional provision, statute, rule, or case that gives the public the right to photograph or videotape ballot counting.

Petitioners failed to prove Secretary Cegavske or Registrar Gloria exercised her or his discretion arbitrarily or through mere caprice in any manner. Therefore, the Court cannot mandate Registrar Gloria to require sequential stacking of ballots and envelopes.

Petitioners requested the Court mandate Registrar Gloria provide additional precautions to ensure the secrecy of ballots. Petitioners failed to prove that the secrecy of any ballot was violated by anyone at any time. Petitioners failed to prove that the procedures in place are inadequate to protect the secrecy of every ballot.

Petitioners also request the Court mandate Registrar Gloria stop using the Agilis system. Petitioners failed to show any error or flaw in the Agilis results or any other reason for such a mandate. Petitioners failed to show the use of Agilis caused or resulted in any harm to any party, any voter, or any other person or organization. Petitioners failed Registrar Gloria has a duty to stop using Agilis.

AB 4 passed by the legislature in August 2020 specifically authorized county officials to process and count ballots by electronic means. AB 4, Sec. 22(2)(a). Petitioners' argument that AB 4, Sec. 23(a) requires a clerk or employee check the signature on a returned ballot means the check can only be done manually is meritless. The ballot must certainly be checked but the statute does not prohibit the use of electronic means to check the signature.

Equal Protection

There is no evidence that in-person voters are treated differently than mail-in voters. All Nevada voters have the right to choose to vote in-person or by mail-in. Voting in person and voting by mailing in the ballot are different and so the procedures differ. Nothing the State or Clark County have done creates two different classes of voters. Nothing the State or Clark County has done values one voter's vote over another's. There is no evidence of debasement or dilution of a citizen's vote.

CONCLUSIONS OF LAW

Petitioners do not have standing to bring these claims.

Registrar Joseph P. Gloria has not failed to meet his statutory duty under NRS 293B.353(1) to allow members of the general public to observe the counting of ballots.

Registrar Gloria has not precluded Petitioners from the use and enjoyment of a right to which Petitioners are entitled.

Registrar Gloria has not exercised discretion arbitrarily or through mere caprice.

Registrar Gloria has not acted without or in excess of authorized powers.

Secretary of State Barbara Cegavske has not failed to meet any statutory duty under NRS 293B.353(1) to allow members of the general public to observe the counting of ballots.

Secretary of State Barbara Cegavske has not unlawfully precluded Petitioners from the use and enjoyment of a right to which Petitioners are entitled.

Secretary Cegavske has not exercised discretion arbitrarily or through mere caprice.

Secretary Cegavske has not acted without or in excess of authorized powers.

Secretary of State Cegavske has not precluded Petitioners the use and/or enjoyment of a right to which Petitioners are entitled.

Petitioners failed to prove they are entitled to a writ of mandamus on any of their claims.

ORDER

The Petition for Writ of Mandamus or in the Alternative for Writ of Prohibition is denied.

October 29, 2020.

James E. Wilson, Jr.
District Judge

CERTIFICATE OF SERVICE

I certify that I am an employee of the First Judicial District Court of Nevada; that on the 2 day of November 2020, I served a copy of this document by placing a true copy in an envelope addressed to:

Brian R. Hardy, Esq. 10001 Park Run Drive Las Vegas, NV 89145 bhardy@maclaw.com MaryAnn Miller Office of the District Attorney Civil Division 500 S. Grand Central Parkway Las Vegas, NV 89106 Mary-Anne.Miller@clarkcountyda.com Daniel Bravo, Esq. 3556 E. Russell Road Second Floor Las Vegas, NV 89120 dbravo@wrslawyers.com	David O'Mara, Esq. 311 E. Liberty Street Reno, NV 89501 david@omaralaw.net Bradley Schrager, Esq. 3556 E. Russell Road Second Floor Las Vegas, NV 89120 Bschrager@wrs.awyers.com Gregory L. Zunino, Esq. Office of the Attorney General 100 North Carson Street Carson City, NV 89701 Gzunino@ag.nv.gov

the envelope sealed and then deposited in the Court's central mailing basket in the court clerk's office for delivery to the USPS at 1111 South Roop Street, Carson City, Nevada, for mailing.

Billie Shadron
Judicial Assistant

Election Department

965 Trade Dr • Ste A • North Las Vegas NV 89030
Voter Registration (702) 455-8683 • Fax (702) 455-2793

Joseph Paul Gloria, Registrar of Voters
Lorena Portillo, Assistant Registrar of Voters

October 20, 2020

The Honorable Barbara K. Cegavske
Secretary of State
State of Nevada
101 N. Carson St., Suite 3
Carson City, Nevada 89701-4786

Attention: Wayne Thorley
Deputy Secretary of State for Elections

RE: Accommodation of Members of the General Public at Polling Places, Mail Ballot Processing, and at the Central Counting Place

Dear Secretary Cegavske:

In accordance with NRS 293B.354, I am forwarding to you the following guidelines which are provided to our polling place team leaders and our election staff to ensure we accommodate members of the general public who wish to observe activities within a polling place and/or at the central counting facilities.

Polling Places (Early Voting and Election Day)

Designated public viewing areas are established in each polling place, both early voting and Election Day vote centers, where individuals may quietly sit or stand and observe the activities within the polling place.

Observation guidelines:

- Observers may not wear or display political campaign items
- Observers may not photograph, or record by any other means, any activity at any early voting or Election Day polling place
- Use of cell phones is prohibited in the polling place
- Observers may not disrupt the voting process
- If observers have questions, they must direct them to the polling place team leader

Mail Ballot Processing (Warehouse & Flamingo-Greystone Facility)

The general public is allowed, according to the NRS, to observe the counting of mail ballots. In addition, as a courtesy, members of the general public are also being allowed to observe our mail ballot processing procedures, which occur prior to tabulation.

Due to space limitations we are processing our mail ballots in two different facilities:

- 965 Trade Dr., North Las Vegas, NV 89030
  - AGILIS mail ballot processing
  - Signature audit team
  - Tabulation
    - Ballot duplication
- 2030 E. Flamingo Road, Las Vegas, NV 89119
  - Counting Board
    - Ballot duplication

Observation guidelines:

- Observers may not wear or display political campaign items
- Observers may not photograph, or record by any other means, any activity at any early voting or Election Day polling place
- Use of cell phones is prohibited in the polling place
- Observers may not disrupt the voting process
- If observers have questions, they must direct them to the polling place team leader

Election Night (Warehouse Tabulating)

In front of our tabulation area an area is provided for any observer who wishes to observe our counting activity. Reports are provided after each update to the general public and are also available on our website for review. The general public may access the website through our free county wi-fi access on their personal devices should they choose to do so.

The public viewing area allows the general public to view the tabulation room, where the processing of election night results may be observed through windows that provide full view of all counting activity. Observers are not allowed inside the room because of congestion and COVID restrictions.

The Registrar is available to answer questions, although it should be noted that very few

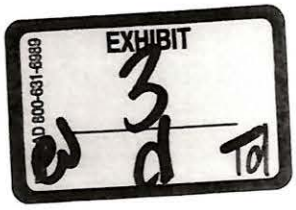
individuals from the public have been at the Election Center Warehouse on election night since 2000. This will probably be different this year due to increased interest in observing our activities.

In accordance with NRS 293B.354, at link provided here is a link to the vote center polling places that will be used in the General Election on November 3, 2020 in Clark County. https://cms8.revize.com/revize/clarknv/Election%20Department/VC-Web-20G.pdf?t=1602940110601&t=1602940110601. An electronic copy is also attached to the e-mail.

Sincerely,

Joseph P. Gloria
Registrar of Voters

Enclosures



OBSERVATION OF POLLING PLACE OR CLARK COUNTY ELECTION DEPARTMENT LOCATIONS ACKNOWLEDGEMENT

In accordance with NAC 293.245 (full text included in page 2):

I, VIRGINIA STEWART, by signing this form, hereby acknowledge that during the time I observe the conduct of voting or of any election related process, I am prohibited from the following activities:

1. Talking to voters or staff within the polling place or Election Department location;
2. Using any technical devices within the polling place or Election Department location;
3. Advocating for or against a candidate, political party or ballot question;
4. Arguing for or against or challenging any decisions of the county or city election personnel and;
5. Interfering with the conduct of voting or any election related process.

I further acknowledge that I may be removed from the polling place by the county or city clerk for violating any provisions of Title 24 of the Nevada Revised Statutes or any of the restrictions described herein.

Representing Group/Organization: Republican Party

Contact Information: 6196568405

Signature: [signature]

Print Name: VIRGINIA STEWART

Date: 10/27/20

Polling Place or Election Department Location: TRADE

October 21, 2020

Memo to Election Observers in the Greystone or County Election Department buildings:

Thank you for choosing to observe our voting process.

The department brought in additional staff to provide adequate supervision and security for observation areas. These staff, whom we call ambassadors, will accompany you while you are in our facilities.

Our ambassadors are not permanent Election Department employees and receive no training in our election processes, and so they are not able to accurately answer your questions about elections.

If you have any questions about the processes you are observing or other election-related questions, please inform the ambassador that you have a question for County Election Department officials. (The ambassador will create a list of questions from observers to relay to Election officials.) Or, you may choose to wait and pose their question to the Election official directly.

At this time, we plan to make Election Department officials available to observers around 9 a.m. and 3 p.m. daily to respond to any questions or concerns. These meetings will occur at both the Greystone and Election Department buildings

Thank you for our understanding.

Sincerely,

Joe Gloria

Clark County Registrar of Voters

BARBARA K. CEGAVSKE
Secretary of State

MARK A. WLASCHIN
Deputy Secretary for Elections

STATE OF NEVADA

OFFICE OF THE
SECRETARY OF STATE

SCOTT W. ANDERSON
Chief Deputy Secretary of State

October 22, 2020

Mr. Joe Gloria, Registrar of Voters
965 Trade Drive, Suite A
North Las Vegas, NV 89030-7802
jpg@ClarkCountyNV.gov
via Email

Re: Revision of Observation Plan

Mr. Gloria,

Over the last few days, a potential opportunity for improvement to your elections process observation plan have come to light that the Secretary of State believes to be worth considering. We have received Clark County's plan for accommodating election observers. In addition to the items detailed in your plan, we would request that you consider implementing the following:

> Provide additional seating in the public viewing area for observing the signature verification process to the extent feasible while ensuring that no Personally Identifiable Information (PII) is observable to the public. This increase in seating should ensure meaningful observation.

If you have any questions regarding this letter and my determination in this matter, please contact me at (775) 684-5709.

Respectfully,

Barbara K. Cegavske

Barbara K. Cegavske
Secretary of State

EXHIBIT G

United States District Court

District of Nevada

Notice of Electronic Filing

The following transaction was entered on 11/6/2020 at 5:29 PM PST and filed on 11/6/2020

Case Name: Stokke et al v. Cegavske et al

Case Number: 2:20-cv-02046-APG-DJA

Filer:

Document Number: 27(No document attached)

Docket Text:

MINUTES OF PROCEEDINGS - Video Motion Hearing held on 11/6/2020 before Judge Andrew P. Gordon. Crtrm Administrator: *M. Johansen*; Pla Counsel: *David OMara*; Def Counsel: *John Devaney, Mary-Anne Miller, Aaron Ford, Bradley Schrager, Craig Newby, Daniel Bravo, Gregory Louis Zunino, Jessica Adair AGO, Kyle George, Wayne Thorley*; Court Reporter: *Heather Newman*; Time of Hearing: *2:08 p.m. - 4:12 p.m.*; Courtroom: *6C*; The court makes preliminary remarks and hears arguments of counsel regarding plaintiffs' emergency motion for temporary restraining order and motion for preliminary injunction ECF No. [3]. As stated on the record, the motion for temporary restraining order and motion for preliminary injunction ECF No. [3] are denied. The motion to intervene by defendants DNC and Nevada State Democratic Party ECF No. [10] is granted. The minutes of this proceeding and the transcript will serve as the Court's official ruling. No separate order to follow. (no image attached) (Copies have been distributed pursuant to the NEF - MAJ)

EXHIBIT H

STATE OF MICHIGAN

IN THE THIRD JUDICIAL CIRCUIT COURT FOR THE COUNTY OF WAYNE

Sarah Stoddard and
Election Integrity Fund,

v

Hon. Timothy M. Kenny
Case No. 20-014604-CZ

City Election Commission of
The City of Detroit and
Janice Winfrey, in her official
Capacity as Detroit City Clerk and
Chairperson of the City Election
Commission, and
Wayne County Board of
Canvassers,
_____/

OPINION & ORDER

At a session of this Court
Held on: November 6, 2020
In the Coleman A. Young Municipal Center
County of Wayne, Detroit, MI

PRESENT: Honorable Timothy M. Kenny
Chief Judge
Third Judicial Circuit Court of Michigan

Plaintiffs Sarah Stoddard and the Election Integrity Fund petition this Court for preliminary injunctive relief seeking:

1. Defendants be required to retain all original and duplicate ballots and poll books.
2. The Wayne County Board of Canvassers not certify the election results until both Republican and Democratic party inspectors compare the duplicate ballots with original ballots.
3. The Wayne County Board of Canvassers unseal all ballot containers and remove all duplicate and original ballots for comparison purposes.
4. The Court provide expedited discovery to plaintiffs, such as limited interrogatories and depositions.

When considering a petition for injunctive relief the Court must apply the following four-prong test:

1. The likelihood the party seeking the injunction will prevail on the merits.
2. The danger the party seeking the injunction will suffer irreparable harm if the injunction is not granted.
3. The risk the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the injunction.
4. The harm to the public interest if the injunction is issued. *Davis v City of Detroit Financial Review Team*, 296 Mich. App. 568, 613; 821 NW2d 896 (2012).

In the *Davis* opinion, the Court also stated that injunctive relief "represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity" Id at 612 fn 135, quoting *Senior Accountants, Analysts & Appraisers Ass'n v. Detroit*, 218 Mich. App. 263, 269; 553 NW2d 679 (1996).

When deciding whether injunctive relief is appropriate MCR 3.310 (A)(4) indicates that the plaintiff bears the burden of proving the preliminary injunction should be granted.

Plaintiffs' pleadings do not persuade this Court that they are likely to prevail on the merits for several reasons. First, this Court believes plaintiffs misinterpret the required placement of major party inspectors at the absent voter counting board location. MCL 168.765a (10) states in part "At least one election inspector from each major political party must be present at the absent voter counting place..." While plaintiffs contends the statutory section mandates there be a Republican and Democratic inspector at each table inside the room, the statute does not identify this requirement. This Court believes the plain language of the statute requires there be election inspectors at the TCF Center facility, the site of the absentee counting effort.

Pursuant to MCL 168.73a the County chairs for Republican and Democratic parties were permitted and did submit names of absent voter counting board inspectors to the City of Detroit Clerk. Consistent with MCL 168.674, the Detroit City Clerk did make appointments of inspectors. Both Republican and Democratic inspectors were present throughout the absent voter counting board location.

An affidavit supplied by Lawrence Garcia, Corporation Counsel for the City of Detroit, indicated he was present throughout the time of the counting of absentee

ballots at the TCF Center. Mr. Garcia indicated there were always Republican and Democratic inspectors there at the location. He also indicated he was unaware of any unresolved counting activity problems.

By contrast, plaintiffs do not offer any affidavits or specific eyewitness evidence to substantiate their assertions. Plaintiffs merely assert in their verified complaint "Hundreds or thousands of ballots were duplicated solely by Democratic party inspectors and then counted." Plaintiffs' allegation is mere speculation.

Plaintiffs' pleadings do not set forth a cause of action. They seek discovery in hopes of finding facts to establish a cause of action. Since there is no cause of action, the injunctive relief remedy is unavailable. *Terlecki v Stewart*, 278 Mich. App. 644; 754 NW2d 899 (2008).

The Court must also consider whether plaintiffs will suffer irreparable harm. Irreparable harm requires "A particularized showing of concrete irreparable harm or injury in order to obtain a preliminary injunction." *Michigan Coalition of State Employee Unions v Michigan Civil Service Commission*, 465 Mich. 212, 225; 634 NW2d 692, (2001).

In *Dunlap v City of Southfield*, 54 Mich. App. 398, 403; 221 NW2d 237 (1974), the Michigan Court of Appeals stated "An injunction will not lie upon the mere apprehension of future injury or where the threatened injury is speculative or conjectural."

In the present case, Plaintiffs allege that the preparation and submission of "duplicate ballots" for "false reads" without the presence of inspectors of both parties violates both state law, MCL 168.765a (10), and the Secretary of State election manual. However, Plaintiffs fail to identify the occurrence and scope of any alleged violation The only "substantive" allegation appears in paragraph 15 of the First Amended Complaint, where Plaintiffs' allege "on information and belief" that hundreds or thousands of ballots have been impacted by this improper practice. Plaintiffs' Supplemental Motion fails to present any further specifics. In short, the motion is based upon speculation and conjecture. Absent any evidence of an improper practice, the Court cannot identify if this alleged violation occurred, and, if it did, the frequency of such violations. Consequently, Plaintiffs fail to move past mere apprehension of a future injury or to establish that a threatened injury is more than speculative or conjectural.

This Court finds that it is mere speculation by plaintiffs that hundreds or thousands of ballots have, in fact, been changed and presumably falsified. Even with this assertion, plaintiffs do have several other remedies available. Plaintiffs are entitled to bring their challenge to the Wayne County Board of Canvassers pursuant to MCL 168.801 *et seq.* and MCL 168.821 *et seq.* Additionally, plaintiffs can file for a recount of the vote if they believe the canvass of the votes suffers from fraud or mistake. MCL168.865-168.868. Thus, this Court cannot conclude that plaintiffs would experience irreparable harm if a preliminary injunction were not issued.

Additionally, this Court must consider whether plaintiffs would be harmed more by the absence of injunctive relief than the defendants would be harmed with one.

If this Court denied plaintiffs' request for injunctive relief, the statutory ability to seek relief from the Wayne County Board of Canvassers (MCL 168.801 et seq. and MCL 168.821 et seq.) and also through a recount (MCL 168.865-868) would be available. By contrast, injunctive relief granted in this case could potentially delay the counting of ballots in this County and therefore in the state. Such delays could jeopardize Detroit's, Wayne County's, and Michigan's ability to certify the election. This in turn could impede the ability of Michigan's elector's to participate in the Electoral College.

Finally, the Court must consider the harm to the public interest. A delay in counting and finalizing the votes from the City of Detroit without any evidentiary basis for doing so, engenders a lack of confidence in the City of Detroit to conduct full and fair elections. The City of Detroit should not be harmed when there is no evidence to support accusations of voter fraud.

Clearly, every legitimate vote should be counted. Plaintiffs contend this has not been done in the 2020 Presidential election. However, plaintiffs have made only a claim but have offered no evidence to support their assertions. Plaintiffs are unable to meet their burden for the relief sought and for the above-mentioned reasons, the plaintiffs' petition for injunctive relief is denied.

It is so ordered.

November 6, 2020
Date

Hon. Timothy M. Kenny
Chief Judge
Third Judicial Circuit Court of Michigan