In the Supreme Court of the State of Nevada

JESSE LAW, an individual; MICHAEL MCDONALD, an individual; JAMES DEGRAFFENREID III, an individual; DURWARD JAMES HINDLE III, an individual; EILEEN RICE, an individual; SHAWN MEEHAN, an individual, as candidates for presidential electors on behalf of Donald J. Trump,

Contestants-Appellants,

vs.

JUDITH WHITMER, an individual; SARAH MAHLER, an individual; JOSEPH THRONEBERRY, an individual; ARTEMISA BLANCO, an individual; GABRIELLE D'AYR, an individual; and YVANNA CANCELA, an individual, as candidates for presidential electors on behalf of Joseph R. Biden, Jr.,

Defendants-Respondents.

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Case No. 82178

First Judicial District Court Case No.: 20 OC 00163 1B

DEFENDANTS-RESPONDENTS' SUPPLEMENTAL BRIEF

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RULE 26.1 DISCLOSURE

Pursuant to Nevada Rule of Appellate Procedure ("NRAP") 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed.

DATED this 8th day of December, 2020.

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INTRODUCTION

"Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here." *Donald J. Trump for President, Inc. v. Sec'y of Commonwealth*, No. 20-3371, 2020 WL 7012522, at *1 (3d Cir. Nov. 27, 2020).

Indeed, "[o]ne might expect," when asking the district court and this Court to overturn the results of a presidential election, that Contestants-Appellants ("Contestants")—Republican Party presidential elector candidates—"would come formidably armed with compelling legal arguments and factual proof of rampant corruption, such that this Court would have no option but to regrettably grant the proposed [] relief despite the impact it would have on such a large group of citizens." *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078, 2020 WL 6821992, at *1 (M.D. Pa. Nov. 21, 2020). They have not. As the district court correctly concluded after weighing the parties' evidence and arguments, Contestants have failed to prove their grounds for contest under *any* standard of proof, let alone with the clear and convincing evidence required for an extraordinary judicial intervention into the democratic process. This conclusion was consistent with both the law and the facts, and this Court should affirm the district court's dismissal of Contestants' suit.

"Voters, not lawyers, choose the President. Ballots, not briefs, decide elections." *Sec'y of Commonwealth*, 2020 WL 7012522, at *9. The people of Nevada cast their ballots and chose President-elect Biden by a margin of more than 33,000 votes. Nothing Contestants have produced gives any reason to even question this result, let alone reverse it. The results of the November 3, 2020 general election should not be disturbed, and this matter should come to an end.

BACKGROUND

I. Procedural History

Defendants-Respondents ("Defendants") are the presidential electors chosen by the people of Nevada to cast their votes in favor of President-elect Joe Biden and Vice President-elect Kamala Harris at the December 14 meeting of the electoral college. *See* Nevada Revised Statutes ("NRS") 298.065(1); 3 U.S.C. § 7. Defendants received 703,486 votes to Contestants' 669,890 votes—a margin of 33,596 votes. *See* Order Granting Mot. to Dismiss Statement of Contest ("Order") ¶ 1. Those results were certified by this Court, the Governor of Nevada, and the Secretary of State of Nevada (the "Secretary").

Wielding farfetched claims of fraud—unsupported by even a shred of credible evidence—Contestants seek to have themselves installed in Defendants' place. Contestants filed their woefully deficient statement of contest on the last possible day to do so: November 17, 2020. *See* Order 1; NRS 293.413(1). The

statement of contest put forward four grounds: (1) that the Agilis Ballot Sorting System (the "Agilis machine") used to process ballots in Clark County and the electronic voting machines used throughout the State malfunctioned; (2) that Clark County election officials engaged in malfeasance on various grounds, including by using the Agilis machine and denying public observation of the tabulation process; (3) that Defendants and the Biden-Harris campaign manipulated or altered the outcome of the election through a vote-buying scheme; and (4) that illegal votes were cast and counted. *See* Statement of Contest of the Nov. 3, 2020 Presidential Election ("Statement").

Defendants moved to dismiss the statement of contest because its central contention—that Clark County somehow acted unlawfully or improperly when it used the Agilis machine to verify signatures on ballots—was barred by issue preclusion and laches, and because all of the grounds for contest were insufficiently pleaded and noncognizable as a matter of law. *See* Defs.' Mot. to Dismiss Statement of Contest of the Nov. 3, 2020 Presidential Election. Despite the fatal deficiencies in the statement of contest, the district court permitted Contestants to proceed with discovery. They were given the opportunity to depose witnesses, including state and county election officials, subpoena documents, inspect sealed election materials and equipment, and ultimately put on their evidence of fraud and electoral malfeasance. Contestants made limited use of these

opportunities, waiting ten days after filing their statement of contest to issue their first subpoenas and only using eight of the 15 depositions allotted Contestants by the district court. *See* Order 1–2.

Contestants submitted to the district court the testimony by deposition of these eight witnesses, including three purported "experts," along with numerous declarations, affidavits, and other documents. *See id.* at 2, ¶¶ 55–66. Defendants in turn submitted the testimony by deposition of its four witnesses: Joseph P. Gloria, the Registrar of Voters for Clark County; Wayne Thorley, Nevada's former Deputy Secretary of State for Elections; Jeff Ellington, the President and COO of Runbeck Election Services ("Runbeck"), the manufacturer of the Agilis machine; and Dr. Michael Herron, the William Clinton Story Remsen 1943 Professor of Government at Dartmouth College and an expert in election administration and statistical analysis. *Id.* ¶¶ 67–71. Each party also submitted a trial brief, and the district court held a hearing on Wednesday, November 3. *Id.* at 2.

The district court reviewed each piece of evidence submitted by Contestants, including hearsay declarations and expert evidence that failed to meet the requirements of NRS 50.275, *see id.* at 2, ¶¶ 58–59, 120, and ultimately issued an order rejecting Contestants' claims in their entirety. The district court held not only that Contestants failed to prove each and every ground for contest asserted, but also that they failed to establish *any* elements of these grounds, as a matter of fact

or law, under any applicable burden of proof. The district court passed judgment on the credibility of the parties' witnesses. In contrast to its skepticism regarding the value and probity of Contestants' evidence, it found that Defendants' fact witnesses were credible because of their experience, lack of bias, and firsthand knowledge, *see id.* ¶¶ 67–69, and that Defendants' expert—who has been credited as an expert on election administration and voter fraud by several courts, holds advanced degrees in statistics and political science, and has published on relevant topics in peer-reviewed journals—was credible because his methodology and offered reliable conclusions, *id.* ¶¶ 70–71.

Despite the soundness of the district court's factual findings and legal conclusions, and the utter paucity of compelling evidence they have amassed to support their implausible claims, Contestants press on with this appeal—a decision that can only be considered frivolous in light of the thoroughness of their defeat and the extraordinarily high bar they must satisfy to overturn the district court's fact-bound determinations.

II. Factual Background

Defendants incorporate by reference the thorough and accurate factual findings made by the district court, all of which were amply supported by the record. *See id.* ¶¶ 1–118. Defendants add that their expert Dr. Herron testified in both his report and deposition that the relevant literature suggests that the rates of

voter fraud in U.S. elections are vanishingly low, *see* Deposition of Michael Charles Herron 15:18–13:19; Expert Report of Dr. Michael C. Herron 1–2, 9–21, and that there is no evidence that voter fraud rates associated with mail voting are systematically higher than voter fraud rates associated with other forms of voting. *See* Order ¶¶ 72–73. Nothing indicates that Nevada's rate of fraud—historically or in the November 2020 election—is an outlier. *See* Order ¶¶ 74-79.[1]

SUMMARY OF ARGUMENT

Contestants' appeal is frivolous. After being given every opportunity to develop their case, Defendants failed to produce even a shred of compelling evidence to support the grounds for contest alleged in their statement or otherwise justify the extraordinary relief that they seek through this action. Accordingly, the district court correctly held that Contestants failed to prove not only any ground for

[1] In their trial brief before the district court, Contestants quoted Mr. Gloria—without citing the evidentiary record—as "acknowledg[ing] to the Clark County Commission that his staff 'discovered discrepancies that we cannot explain' and cannot be remedied without a recount." Contestants' Trial Statement & Response to Defs.' Mot. to Dismiss 2. Contestants ignore, however, that Mr. Gloria reportedly made these comments in the context of the race for the Clark County Commission District C, where the candidates were separated *by only ten votes*. *See Clark County Commission Certifies Election Results, Except District C Race; 6 Vote Twice*, KLAS (Nov. 16, 2020), http://southwest.8newsnow.com/news/2585412-clark-county-commission-certifies-election-results-except-district-c-race-6-vote-twice. And at any rate, a handful of discrepancies in an election is not, Contestants' assertions to the contrary notwithstanding, indicative of administrative failings or widespread fraud.

their contest, and not only any element of any ground, but also *any* facts they alleged. The district court properly rejected Contestants' claims first and foremost as a matter of fact—not only under the clear and convincing evidence standard that applies to Contestants' claims, but under any possible standard of review—and alternatively as a matter of law. And even though much of Contestants' evidence constituted inadmissible hearsay or improper expert evidence, the district court considered it nevertheless to ensure that Contestants were given every opportunity to make their case.

Accordingly, to succeed on appeal, Contestants would have to prove that the district court's factual findings were clearly erroneous. This is an impossible task, as even a cursory review of the district court's order shows that it is grounded in the record and based on credibility determinations that will not be revisited on appeal. Contestants have thus far identified no legal error committed by the district court and instead offer an improper invitation to this Court to invade the factfinding ambit of the district court, reweigh the evidence, and ignore the conspicuous logical and evidentiary gaps littered throughout the record. This Court should decline the invitation and affirm the thorough, considered judgment of the district court.

ARGUMENT

I. The district court appropriately required Contestants to prove their claims by clear and convincing evidence.

A. Clear and convincing evidence applies to election contests.

The district court appropriately held that Contestants were required to prove their case by clear and convincing evidence. *See* Order ¶¶ 135–138. In applying a clear and convincing evidence standard, the district court cited the consistent practice of other courts in other states with analogous contest procedures. *See id.* ¶ 135 (citing cases).[2] As the district court explained, this higher standard of proof is appropriate in election contests because it "adequately balances the conflicting interests in preserving the integrity of the election and avoiding unnecessary disenfranchisement of qualified absentee voters." Order ¶ 136 (quoting *Bazydlo v. Volant*, 647 N.E.2d 273, 276 (Ill. 1995)); *see also Sadler v. Connolly*, 575 P.2d 51,

[2] S*ee also, e.g., Jenkins v. Hale*, 190 P.3d 173, 176–77 (Ariz. 2008) (applying clear and convincing evidence standard to challenges to candidate petitions); *Allen v. D.C. Bd. of Elections & Ethics*, 663 A.2d 489, 495–96 (D.C. 1995) (emphasizing that "it is the duty of the court to validate the election if possible" and that "the election must be held valid unless plainly illegal," and that election fraud "must be proved by clear and convincing evidence" (quoting *Wilks v. Mouton*, 722 P.2d 187, 189 (Cal. 1986) (per curiam))); *Overbaugh v. Benoit*, 99 N.Y.S.3d 512, 514 (N.Y. App. Div. 2019) (per curiam) (party challenging candidate's designating petition "must demonstrate [] fraud by clear and convincing evidence"); *In re Pet. to Contest Gen. Election for Dist. Just. in Jud. Dist. 36-3-03 Nunc Pro Tunc*, 695 A.2d 476, 481 (Pa. Commw. Ct. 1997) (applying clear and convincing evidence standard to tabulation of fraudulently altered ballots).

55 (Mont. 1978) ("The underlying basis for [the clear and convincing evidence] standard is that an election contest . . . . , if successful, has the serious effect of disenfranchisement of the voters." (citing *Thornton v. Johnson*, 453 P.2d 178, 182 (Or. 1969) (per curiam))). Moreover, "[i]n Nevada, a plaintiff must prove a general civil fraud claim, which requires intent to defraud, with clear and convincing evidence." Order ¶ 137 (quoting *Nellis Motors v. State*, 124 Nev. 1263, 1267, 197 P.3d 1061, 1064 (2008)).

B. The district court properly rejected Contestants' claims under any standard of review.

In their opposition to summary affirmance, Contestants argue that the district court misapplied the relevant standard of review, and this failure was not "cure[d]" by a "casual comment" stating that Contestants' failed to prove their claims by a preponderance of the evidence. Contestants' Opp. 8–9. This argument grossly mischaracterizes' the district court's opinion. Not only does the district court expressly hold that Contestants' claims fail under a preponderance standard, Order ¶ 139, but the district court explained *repeatedly* that Contestants' failed to prove each element of their case "under any standard of proof." Order ¶¶ 142-44, 147-56, 161-64, 167-70, 172-76.

C. No matter what standard applied in the district court, Contestants cannot succeed on appeal.

The district court's determination that Contestants' did not prove their case

by clear and convincing evidence is reviewed by this Court for an abuse of discretion. *See Shapiro v. Welt*, 133 Nev. 35, 37, 389 P.3d 262, 266 (2017); *Coker v. Sassone*, 135 Nev. 8, 10, 432 P.3d 746, 748 (2019). But even under de novo review of the legal determinations, Contestants' cannot succeed. The district court repeatedly explained that Contestants failed to prove their claims as a factual matter, ultimately concluding that they "failed to meet their burden to provide credible and relevant evidence to substantiate any of the grounds set forth in NRS 293.410." Order ¶ 177. In order to disturb the district court's fact-bound holdings, Contestants must demonstrate that its factual findings were clearly erroneous. *See Trident Constr. Corp. v. W. Elec., Inc.*, 105 Nev. 423, 426, 776 P.2d 1239, 1241 (1989) ("This court has held numerous times that findings of fact and conclusions of law must be upheld if supported by substantial evidence, and may not be set aside unless clearly erroneous."). Notably, in evaluating whether the district court committed clear error, this Court should not revisit credibility determinations. *See Krause Inc. v. Little*, 117 Nev. 929, 933, 34 P.3d 566, 569 (2001) ("This court has repeatedly stated that it will not weigh the credibility of witnesses because that duty rests with the trier of fact.").

There is no evidence in the record that could accomplish this fete, and not one of the district court's determinations rests on a legal basis alone. Accordingly, under any standard of proof and any standard of review, the district court's opinion

cannot be disturbed.

II. The district court properly applied the contest grounds enumerated in NRS 293.410(2)(c).

The district court properly found that "Contestants' evidence does not establish by clear and convincing proof, or under any standard of evidence, that '[i]llegal or improper votes were cast and counted,' and/or '[l]egal and proper votes were not 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.'" Order ¶ 145 (alterations in original) (NRS 293.410(2)(c)). To succeed on this ground, Contestants were required to prove two things: (1) that illegal votes were both cast and counted, and (2) that (a) the number of illegal votes cast and counted equals or exceeds the margin of victory or (b) otherwise raises a reasonable doubt as to the outcome of the election. Contestants urge that the district court improperly applied the statute because it did not consider whether there were illegal votes that raised a "reasonable doubt as to the outcome of the election," instead requiring Contestants' to prove that there were 33,596 illegal votes counted. Appellants' Opposition to Defendants-Appellees' Mot. for Summary Affirmance by December 8, 2020 ("Contestants' Opp.") at 6–7.

Once again, Contestants' misstate the district court's holding. Instead, the district court repeatedly held that Contestants' failed to prove their claims that

illegal votes were even cast in the first place, *see* Order ¶¶ 89, 93-95, 103, and further rejected their claims that any such ballots were improperly counted, *see id.* ¶¶ 81, 84, 86-87, 91, 96-97, 105, 147-56. These conclusions were based on the district court's proper weighing of Contestants' paltry and unpersuasive evidence; it rejected Contestants' claims both because their witnesses did not and could not establish that any supposedly illegal votes were counted, *see id.* ¶¶ 81, 84, 88–89, 94, 96, 103, 107, and because it found that their witnesses were not credible, either because their accounts were "self-serving," *id.* ¶ 58, or because they lacked corroboration or other evidence supporting their conclusions, *id.* ¶¶ 87, 89, 95, 103, 108, 117.

III. The district court did not err when it concluded that the doctrine of issue preclusion bars Contestants' challenge to the Agilis machine.

Contestants have suggested that the district court erred in its application of issue preclusion. *See* Contestants' Opp. 7. This is incorrect; the district court correctly concluded that two of Contestants' grounds for contest—Clark County's use of the Agilis machine and its alleged failure to allow meaningful observation—are barred by the doctrine of issue preclusion because the issues were previously litigated and resolved in *Kraus v. Cegavske*, No. 20 OC 00142 1B, slip op. (Nev. 1st Jud. Dist. Ct. Oct. 29, 2020). *See* Order ¶¶ 127–34; *see also, e.g.*, *In re Coday*, 130 P.3d 809, 816–17 (Wash. 2006) (dismissing election contest on res judicata grounds).

Under Nevada law, issue preclusion applies when (1) the issue decided in the prior litigation is identical to the issue in the current action; (2) the initial ruling was on the merits and has become final; (3) the party against whom the judgment is asserted was a party or in privity with a party to the prior litigation; and (4) the issue was necessarily and actually litigated. *Five Star Cap. Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008). Each of these four factors is satisfied for these two grounds for contest. In *Kraus*, Donald J. Trump for President, Inc. (the "Trump Campaign"), the Nevada Republican Party, and an individual voter challenged Clark County's use of the Agilis machine and the County's purported failure to allow meaningful observation of its tabulation process. District Judge James E. Wilson, Jr. rejected these claims on the merits, which binds Contestants and precludes them from raising these same issues as grounds to contest the general election results.

First, Contestants' challenges to Clark County's use of the Agilis machine and its observation policies are identical to issues raised by the *Kraus* petitioners. In this matter, Contestants raise four challenges to the Agilis machine: (1) its use is prohibited by Nevada election law; (2) its use violated the equal protection rights of Nevadans; (3) the Clark County election board is guilty of malfeasance under NRS 293.410(2)(a) due to its use; and (4) the Agilis machine malfunctioned, raising reasonable doubt as to the outcome of the election. *See* Statement ¶¶ 32–50.

The first two challenges are identical to claims raised in *Kraus* and rejected by the court. *See* slip op. at 12–13 (concluding that AB 4 does not prohibit use of Agilis machine and that *Kraus* petitioners failed to establish equal protection clause claims). And although Contestants' third and fourth challenges to the Agilis were not raised in this precise form in *Kraus*, identical facts underlie these challenges and the *Kraus* claims. "Issue preclusion may apply 'even though the causes of action are substantially different, if the same fact issue is presented.'" *LaForge v. State, Univ. & Cmty. Coll. Sys.*, 116 Nev. 415, 420, 997 P.2d 130, 134 (2000) (quoting *Clark v. Clark*, 80 Nev. 52, 56, 389 P.2d 69, 71 (1964)). Contestants' assertions that the election board committed malfeasance and that the Agilis machine malfunctioned are moored in two factual allegations that were litigated in *Kraus*: that Clark County did not operate the Agilis machine according to manufacturer suggestions because it lowered the "tolerance level" to 40 percent, Statement ¶¶ 35–41, 48(b), 50; and that Clark County fed the Agilis machine low-quality signatures from the DMV to match against voter signatures, *id.* ¶ 37; *see also* Transcript of Video-Recorded Hearing 19–20, 36–37, 47–56, 70–74, 76–78, 240–43, *Kraus v. Cegavske*, No. 20 OC 00142 1B (Nev. 1st Jud. Dist. Ct. Oct. 28, 2020). Because the "common issue" in both suits are factually identical, Contestants' challenges regarding the Agilis machine are identical to the issues raised by the *Kraus* petitioners. *LaForge*, 116 Nev. at 420, 997 P.2d at 133.

Contestants' challenge to an alleged lack of meaningful observation was also raised and addressed in *Kraus*. Although Contestants assert that "the County Registrars failed and refused to grant meaningful observation and opportunities to the general public with respect to mail in ballots," Statement ¶ 83, their statement articulates specific allegations related to Clark County only. Accordingly, all of Contestants' arguments regarding any purported lack of "meaningful observation" were already raised and rejected in *Kraus*, where Judge Wilson concluded that Clark County met its statutory obligations. *See* slip op. at 13 (concluding that Gloria and Secretary met their statutory duties to "allow members of the general public to observe the counting of ballots"). Notably, Judge Wilson held that although the *Kraus* petitioners claimed a right to "meaningful observation," the word "meaningful" does not appear in the relevant statutes, and the "[p]etitioners failed to cite any constitutional provision, [statute], rule, or case that supports such a request." *Id.* at 10–11.

Second, Judge Wilson issued an opinion in *Kraus* denying the petitioners mandamus relief, which constituted a final decision on the merits. Nevada law takes a functional approach to finality, inquiring as to whether a prior "judgment" is "sufficiently firm"—which is to say, neither tentative nor subject to further determination by the court. *Kirsch v. Traber*, 134 Nev. 163, 166–67, 414 P.3d 818, 821–22 (2018) (quoting Restatement (Second) of Judgments § 13 (Am. L. Inst.

1982)). Given that Judge Wilson's denial of the emergency petition for writ of mandamus was non-tentative, not open to further consideration or proceedings, supported by a reasoned opinion following over 250 pages of briefing and a day-long evidentiary hearing, and subject to appeal (and, indeed, was appealed), it constituted a final decision for purposes of issue preclusion.

Third, as Trump electors, Contestants are in privity with the *Kraus* petitioners—specifically, the Trump Campaign and Nevada Republican Party. This Court has recognized that "determining privity for preclusion purposes requires a close examination of the facts and circumstances of each case." *Mendenhall v. Tassinari*, 133 Nev. 614, 618–19, 403 P.3d 364, 369 (2017) ("[C]ontemporary courts . . . have broadly construed the concept of privity, far beyond its literal and historic meaning, to include any situation in which the relationship between the parties is sufficiently close to supply preclusion." (citation omitted). Here, the "facts and circumstances" show that Contestants are in privity with the Nevada Republican Party and the Trump Campaign—both petitioners in *Kraus*. Contestants are electors who were specifically "nomin[ated]" and "select[ed]" to serve as electors by the Nevada Republican Party. NRS 298.035(1). In this capacity, Contestants are mere functionaries of the Trump Campaign; as electors, casting a ballot for the Republican nominee is their raison d'être. Indeed, had President Trump prevailed in Nevada, Contestants would have become presidential

electors and, had they *not* cast their ballots for him, been replaced *as a matter of law*. *See* NRS 298.065; NRS 298.075; *see also Chiafalo v. Washington*, 140 S. Ct. 2316, 2322 (2020). In other words, Contestants were selected to perform a ministerial duty on behalf of the Trump Campaign and Nevada Republican Party and cannot credibly dispute their extraordinarily close connection to both. Indeed, Contestants' counsel, Jesse Binnall, argued on behalf of the *Kraus* petitioners during that case's day-long mandamus hearing. And given that this is a contest of the election of the President of the United States—which Nevada law specifically contemplates will be brought by "elector[s]," *see* NRS 293.407(2)—it simply beggars belief that Contestants are not sufficiently linked to President Trump, his party, and his campaign. *Cf. Coday*, 130 P.3d at 817 (finding preclusion applied where contestant was not party to prior litigation but had "identical interests" with prior litigants (quoting *In re Pearsall-Stipek*, 961 P.2d 343, 346 (Wash. 1998))).

Fourth, the issues relating to the Agilis machine and meaningful observation of tabulation were necessarily and actually litigated in *Kraus*. "When an issue is properly raised . . . and is submitted for determination, . . . the issue is actually litigated." *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 262, 321 P.3d 912, 918 (2014) (quoting *Frei ex rel. Frei v. Goodsell*, 129 Nev. 403, 407, 305 P.3d 70, 72 (2013)). In *Kraus*, Judge Wilson reviewed four substantive briefs, conducted a full-day evidentiary hearing, and prepared a reasoned,

considered order rejecting the petitioners' claims. These issues were therefore properly raised and submitted and were thus actually litigated.[3]

IV. Clark County's signature verification complied with Nevada law.

Contestants have argued that both the Agilis machine and Clark County's election personnel violated Nevada law by "comparing [some] signature[s] to only one signature on file, rather than 'all signatures of the voter in the records of the clerk.'" Contestants' Opp. 8 (quoting NRS 293.8873(1)(a)). There are several problems with this argument.

First, Contestants did not raise this argument before the district court, and it is therefore an improper ground for appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

Second, a plain reading of the signature verification statute indicates that the purpose of the "all signatures" requirement is to protect voters from improper *rejection*, not improper *verification*. *See* NRS 293.8874(1)(b), (2) (immediately following "all signatures" requirement with rejection and cure provisions). Contestants suggestion that Clark County violated this statute when the Agilis

[3] In any event, even if the district court's determination of issue preclusion was in error, it provided only an "*alternative* grounds to dispose" of the claims related to the Agilis machine and observation policies; the district court nevertheless "reache[d] and rule[d] on the merits of *all* of Contestants' claims." Order ¶ 134 (emphasis added). Accordingly, no part of the district court's ultimate determination turned on its conclusions as to issue preclusion.

machine and personnel *approved* signatures by comparing them to only a single comparator has no basis in either the clear purpose of the statute or even common sense.

Third, even if Clark County arguably violated the statute, that alone is not a cognizable ground for contest. Contestants would need to prove either that a sufficient number of illegal votes were cast as a result, *see* NRS 293.410(2)(c), or that election officials acted with malfeasance by knowingly or intentionally violating the law, *see* NRS 293.410(2)(a). As both the record and the district court's order make abundantly clear, however, Contestants have failed to establish either ground. Consequently, this is not a sound basis to reverse the district court's order and overturn the results of this election.

V. The district court did not ignore relevant and admissible evidence.

The district court did not ignore Contestants' experts Scott Gessler, Jesse Kamzol, and Michael Bacelice. Quite the opposite—the district court considered Contestants' experts' proffered opinions carefully, decided that their opinions lacked rigor to such an extent that they could be excluded, and yet considered them anyway. Order ¶¶ 55–66, 119–26.

A. Scott Gessler

The district court properly discounted the testimony of Scott Gessler. Mr. Gessler is the former Republican Secretary of State of Colorado. Deposition of

Scott Gessler ("Gessler Dep.") 10:4–5 ("I was known as a pretty staunch, conservative republican."). He served a single term in that position ending in 2015. *Id.* at 8:14–17. Contestants offered him as an expert to offer general criticisms of Nevada's administration of the election, to opine that Nevada's signature match rejection rate was too low, and to criticize Nevada's maintenance of its voter rolls.

Mr. Gessler admitted that he conducted no independent analysis, did not independently review any articles or data, and did not even verify any of the facts asserted by Contestants and their declarants, *see id.* at 44:2–14, 48:11–25, 50:8–22, 65:2–25. Instead, he admitted that he assumed that all of the facts asserted by the attorneys he spoke to were correct, despite agreeing that their affiliation with the Trump Campaign undermined the veracity of those facts. *See id.* at 51:9–14. The district court held that it "could have" excluded Gessler's testimony but considered it anyway giving it "very little weight." Order ¶¶ 120, 125–26. Specifically, the court correctly found that his "methodology [was] unsound because he based nearly all of his opinions on a handful of affidavits that he took no steps to corroborate through independent investigation." *Id.* ¶ 66.

B. Jesse Kamzol

The district court properly discounted the testimony of Jesse Kamzol. Mr. Kamzol is the former Chief Data Officer for the Republican National Committee, Deposition of Jesse Kamzol ("Kamzol Dep.") 51:5–80, offered by Contestants as

an expert to opine that significant illegal voting occurred during the November election. His report, however, does not include the names of *any* of the voters whom he believes cast fraudulent ballots. *Id.* at 68:20–25. And it does not specify how many of the purportedly unlawful votes he identifies were actually counted, or whether those ballots were cast for President Trump or President-elect Biden. *Id.* at 69:20–70:14. Moreover, Mr. Kamzol rests his conclusions on an analysis of various data sources, including an "enhanced statewide voter file" from the Nevada Republican Party, and he states that his conclusions were to a "reasonable degree of statistical certainty." Report of Jesse Kamzol 1, 3-4; Kamzol Dep. at 58:6–11. But he has no specialized training in statistics, election administration, or any other field to his analysis. Kamzol Dep. 45:18-24, 46:1–4, 10-12, 23–25; 47:1–10; 48:11–14; 60:23–61:2. At his deposition, he could not define what a reasonable degree of certainty meant, see *id.* 56:1–57:23 (explaining that the margin of error was "in [his] mind"); could not explain how his analysis could be replicated, *id.* at 69:3–4 ("You can compile all the data yourself, if you want to"); and did not know where the data on which he relied came from or how it was matched, *id.* at 58:6-11, 58:15-17, 59:6-10. This last point, in particular, concerned the court "because he had little to no information about or supervision over the origins of his data, the manner in which it had been matched, and what the rate of false positives would be." Order. ¶ 63.

C. Michael Baselice

Finally, the district court properly discounted Mr. Baselice's testimony. Mr. Baselice is not only unqualified to provide expert opinion in this case—he admits to having neither training nor credible experience in the fields of statistics or data analysis, *see* Deposition of Michael Baselice 14–16—but his report is similarly unreliable. Although he commissioned a survey of 655,527 voters in the state of Nevada who participated in the November election to determine whether they had voted, he could not identify the source of his data. *See id.* at 5, 34–35. Mr. Baselice also testified that he simply relied on the responses he received over the phone and did not validate his survey results, failing to follow up with the voters in case of confusion, misunderstanding, or loss of memory. *See id.* at 29–30. Mr. Baselice also engaged in improper rounding; for example, although his survey found four people who were unsure of whether they voted, he rounded this number to zero. *See* Herron Dep. at 57–67.

CONCLUSION

The district court correctly concluded—and certainly did not abuse its discretion in finding—that Contestants do not have a viable case. Their statement of contest was insufficient as a matter of law, replete with vague allegations and sweeping generalizations that failed to plead with sufficient certainty the claims against Defendants. And the evidence Contestants subsequently provided did

nothing to salvage their farfetched claims. They failed to prove *any* ground for contest cognizable under the statute and fell far short of the considerable showing required to secure an extraordinary ruling from the district court reversing the outcome of the presidential election in Nevada. For these reasons and those articulated in the district court's opinion, this Court should affirm.

DATED this 8th day of December, 2020.

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CERTIFICATE OF COMPLIANCE

1. I certify that this Supplemental Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally-spaced typeface, size 14, Times New Roman.

2. I further certify that this Supplemental Brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the Petition exempted by NRAP 32(a)(7)(C), it contains 5,791 words.

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

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Rules of Appellate Procedure.

DATED this 8th day of December, 2020.

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