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

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DEFENDANTS-RESPONDENTS' RESPONSE TO CONTESTANTS-APPELLANTS' EMERGENCY MOTION UNDER NRAP 27(e) TO EXPEDITE APPEAL

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Defendants-Respondents ("Defendants") are Nevada's duly certified presidential electors: they received the highest number of votes in the November 3, 2020 general election; Governor Steve Sisolak and Secretary of State Barbara Cegavske issued their certificate of ascertainment, *see* Ex. 1; and the election contest filed by Contestants-Appellants ("Contestants") was resolved in Defendants' favor. *See* Nevada Revised Statutes ("NRS") 298.065(1) ("[T]he nominees for presidential elector whose candidates for President and Vice President receive the highest number of votes in this State at the general election are the presidential electors."). Under both federal and Nevada law, electors issued a certificate of ascertainment by the executive of their state—here, Defendants—are not only authorized but *required* to cast their ballots in the electoral college on the date set by federal law—this year, December 14. *See* 3 U.S.C. § 7; NRS 298.065(1), 298.075(1). As the basis for their "emergency" motion, Contestants suggest otherwise. They contend that "no slate of presidential electors will be eligible to take their oaths or cast their ballots until this Contest is resolved here." Emergency Mot. Under NRAP 27(e) to Expedite Appeal ("Mot.") at 3. That is simply false. It is Contestants—and Contestants *only*—who are running out of time.

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While the basis for Contestants' motion is wrong as a matter of law, Defendants agree that this appeal should be resolved on an expedited basis. Indeed,

Contestants' reckless assertion in their motion—that the people of Nevada could be disenfranchised merely by Contestants' filing of a frivolous appeal of their thoroughly rejected election contest—constitutes the very reason Defendants requested that their motion for summary affirmance be granted on an expedited basis. While lacking any legal basis, Contestants' suggestion that Defendants are not authorized to cast their ballots as presidential electors—and their continued attacks on the legitimacy of this election—nonetheless threaten to work real-world harm. Accordingly, this Court should act today, before Congress's "safe harbor" date, *see* 3 U.S.C. § 5, to foreclose Contestants' further attempts to hijack the democratic process with their baseless arguments and unsubstantiated accusations.

Contestants' motion contends (without citation) that they "presented substantial evidence that tens of thousands of illegal or improper ballots were cast and counted in the Election," and that the district court "erred" in dismissing their contest and "us[ing] judicial gloss to increase the burden Contestants were required to meet." Mot. at 2. These assertions are wholly divorced from the district court's order and the record on which it was based. 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* Order Granting Mot. to Dismiss Statement of Contest ("Order") 2, ¶¶ 58–59, 120—and found that evidence entirely lacking. *See, e.g.*, *id.* ¶ 156 (finding "Contestants did not prove

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under any standard of proof that any illegal votes were cast and counted . . . for any [] improper or illegal reason," let alone "in an amount equal to or greater than 33,596, or otherwise in an amount sufficient to raise reasonable doubt as to the outcome of the election"). The district court passed judgment on the credibility of the parties' witnesses, findings that will not be revisited on appeal. *See Krause Inc. v. Little*, 117 Nev. 929, 934, 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"). 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, let alone with the clear and convincing evidence required for an extraordinary judicial intervention into the democratic process. Indeed, despite the soundness of the district court's factual findings and legal conclusions, and the utter paucity of compelling evidence Contestants have amassed to support their implausible claims, Contestants press on with this appeal—a decision that can 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.

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Contestants' motion is the latest installment in a series of emergencies of their own making. They waited until the last possible day to file their election

contest. They waited another week to serve their first subpoenas. And they waited until Monday afternoon to file this motion rather than expediting the proceedings by filing a merits brief. The time for foot-dragging is over. After weeks of frivolous lawsuits to undo the expressed will of the people, *see* Order ¶¶ 41–54, Nevadans deserve finality and assurance that neither Contestants nor anyone else—including the candidate they represent—can threaten their wholesale disenfranchisement in this or any other forum.

"Voters, not lawyers, choose the President. Ballots, not briefs, decide elections." *Donald J. Trump for President, Inc. v. Sec'y of Commonwealth*, No. 20-3371, 2020 WL 7012522, at *9 (3d Cir. Nov. 27, 2020). The people of Nevada cast their ballots and chose President-elect Joe Biden by a margin of more than 33,000 votes. Nothing Contestants produced below or can offer here gives any reason to even question this outcome, 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. Accordingly, Defendants respectfully request that the Court resolve this appeal on their motion for summary affirmance, and do so today.

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In the alternative, if the Court is inclined to grant Contestants' request for an expedited briefing schedule, Defendants request that the Court order simultaneous briefing by 2:00 p.m. today, December 8, and render its decision the same day.

DATED this 8th day of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2020, a true and correct copy of the **DEFENDANTS-RESPONDENTS' RESPONSE TO CONTESTANTS-APPELLANTS' EMERGENCY MOTION UNDER NRAP 27(e) TO EXPEDITE APPEAL** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

By: */s/ Dannielle Fresquez*
Dannielle Fresquez, an Employee of
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