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22 *Attorneys for Proposed Intervenor-*
23 *Defendant Progressive Leadership*
24 *Alliance of Nevada*

25 **SECOND JUDICIAL DISTRICT COURT**
26 **IN AND FOR THE COUNTY OF WASHOE**

27 ROBERT BEADLES, an individual;
28 RICHARD H. LEE, an individual; JEFF
LOFY, an individual; CAROLYN
SULLIVAN, an individual; PAMELA JO
SORENSEN, an individual; BETTY
THIESSEN, an individual; MICHAEL KICH,
an individual; DAVID CHAMBERLAIN, an
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LOUISA CRAVIOTTO, an individual;
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individual; GALIN BROOKS, an individual;
THOMAS HUFFORD, an individual; DELIA
WHITE, an individual; JASON RAND
LOWE, an individual; RICHARD SANDOZ,
an individual; VALERIE WHARTON, an

Case No. CV22-00661
Dept. No.: 4

**MOTION TO INTERVENE AS
DEFENDANT**

1 individual,

2 Plaintiffs,

3 v.

4 BARBARA CEGAVSKE, in her official capacity as
5 Nevada Secretary of State; DEANNA SPIKULA, in
6 her official capacity as Registrar of Voters for
7 Washoe County, Nevada; DOES I-X, inclusive; and
8 ROE CORPORATIONS I-X, inclusive,

9 Defendants,

10 and

11 PROGRESSIVE LEADERSHIP ALLIANCE
12 OF NEVADA,

13 Proposed Intervenor-Defendant.

14 Pursuant to Nevada Rule of Civil Procedure 24, Proposed Intervenor-Defendant
15 Progressive Leadership Alliance of Nevada (“PLAN”) moves to intervene as a defendant in the
16 above-titled action.

17 This Motion is based on the Memorandum of Points and Authorities below, any affidavits
18 and exhibits attached hereto, all papers and pleadings on file, and any oral argument this Court
19 sees fit to allow at the hearing on this matter.

20 DATED this 2nd day of May, 2022.

21 By: /s/ Bradley Schrager

22 Bradley Schrager, Esq.

23 Daniel Bravo, Esq.

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25 **SCHULMAN & RABKIN, LLP**

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Progressive Leadership Alliance of Nevada*

*Pro hac vice forthcoming

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Proposed Intervenor-Defendant Progressive Leadership Alliance of Nevada (“PLAN”)
3 moves to intervene as a defendant in this lawsuit under Nevada Rule of Civil Procedure 24.
4 Plaintiffs’ lawsuit aims to upend election processes in Washoe County in ways that threaten to
5 interfere with an orderly election based on nothing more than disproven allegations and conspiracy
6 theories. If the Court grants the detailed relief Plaintiffs seek, many individuals and entities—
7 including PLAN, an organization dedicated to ensuring that every voter in Nevada has a
8 meaningful opportunity to cast a ballot and have that ballot counted—will be harmed.

9 For the reasons set forth below, PLAN is entitled to intervene in this case as a matter of
10 right under Rule 24(a)(2). Such intervention is needed to protect PLAN’s substantial and distinct
11 legal interests, which will otherwise be inadequately represented in this litigation. In the
12 alternative, the Court should allow PLAN to permissively intervene pursuant to Rule 24(b). In
13 accordance with Rule 24(c), PLAN’s proposed answer is attached as **Exhibit 1**.

14 **BACKGROUND**

15 For many years, Nevada law has allowed members of the public to observe certain election
16 processes, with the important limitation that the observer “does not interfere with” the process
17 being observed. *See* N.R.S. §§ 293B.330, .335, .353. During and immediately after the 2020
18 presidential election, voters affiliated with the Republican Party and the campaign of former
19 president Donald J. Trump sought to weaponize those longstanding observation provisions in an
20 unprecedented way, claiming a right to “*meaningful* observation,” which they contended entitled
21 them to “unlimited access to all areas of the ballot counting area and observation of all information
22 involved in the ballot counting process, so they can verify the validity of the ballot, creating in
23 effect a second tier of ballot counters and/or concurrent auditors of the ballot counting election
24 workers.” *Kraus v. Cegavske*, No. 20-OC-00142, 2020 WL 8340238 at *5 (Nev. Dist. Ct. 1st Dist.
25 Oct. 29, 2020) (emphasis added), *stay pending appeal denied*, No. 82018, 2020 WL 6483971 (Nev.
26 Nov. 3, 2020). Courts uniformly rejected these arguments, explaining that “the statutes do not use
27 the word ‘meaningful,’” that there was no “constitutional provision, statute, rule, or case that
28 supports such a request,” and that “[a]llowing such access creates a host of problems,” including

1 revealing “confidential voter information that voters have no[] right to know” and “slow[ing] a
2 process the Petitioners failed to prove is flawed.” *Id.*; *see also Kraus*, 2020 WL 6483971 (Nev.
3 Nov. 3, 2020) (denying a stay pending appeal because “Appellants’ motion, on its face, does not
4 identify any mandatory statutory duty that respondents appear to have ignored”); Tr. of
5 Proceedings at 79:9–11, *Stokke v. Cegavske*, No. 2:20-cv-02046 (D.N.V. Nov. 6, 2020) (denying
6 TRO motion after finding no “likelihood of success in showing that [plaintiff] was denied public
7 access to observe the procedures as required under the statute”), attached as **Exhibit 2**.

8 Plaintiffs’ complaint is a continuation of this failed effort to transform a limited right for
9 “any member of the general public” to “observe” certain election activities “if he or she does not
10 interfere with” them into something far more intrusive that appears nowhere in Nevada law. *See*
11 N.R.S. §§ 293B.330, .335, .353. Plaintiffs seek a preliminary injunction that would, among much
12 else, mandate an entirely new process that would now require elections officials to: (1) allow
13 members of the general public to “visually inspect each ballot” and personally confirm that
14 signatures match and the ballot is filled out properly, (2) permit observers to demand a stop to the
15 processing of ballots, (3) require video surveillance in a form that is agreeable to all political
16 parties, and (4) require the maintenance of additional paper records. Compl. pp. 9–10. None of
17 those requirements appear anywhere in Nevada law, none are remotely necessary for any
18 legitimate purpose, and, as the courts recognized the last time a similar effort was mounted, all
19 carry with them substantial risks of impeding and threatening the crucial process of counting
20 ballots, risking significant irreparable injury to Nevada’s election processes, and the rights of the
21 voters who participate in the state’s elections. *See* N.R.S. §§ 293B.330, .335, .353.

22 PLAN is a non-profit organization that was founded in 1994 to bring together diverse and
23 potentially competing organizations into one cohesive force for social and environmental justice
24 in Nevada. As part of its mission, PLAN emphasizes civic engagement, combats voter suppression,
25 and seeks to ensure that all Nevada eligible voters have their votes counted. PLAN is particularly
26 focused on empowering and ensuring that the right to vote of Nevada’s historically marginalized
27 voters, including voters of color and young voters, are not denied that fundamental right. Those
28 voters, unfortunately, have historically been those most likely to be the target of voter suppression

1 efforts, including harassment and voter intimidation. Thus, as part of its efforts to further its
2 mission of encouraging, facilitating, and supporting civic engagement in Nevada, PLAN regularly
3 engages in election observation as permitted by Nevada law, including in Washoe County, to help
4 ensure the integrity of the process, including by conducting observation intended to guard against
5 the risk that ballots of lawful voters are improperly rejected. PLAN intends to continue its
6 observation activities, together with its other mission-critical civic engagement activities, during
7 the 2022 elections.

8 STANDARD OF LAW

9 Nevada Rule of Civil Procedure 24 governs intervention in Nevada court actions. Because
10 Rule 24 and Federal Rule of Civil Procedure 24 are “equivalent,” *Lawler v. Ginocchio*, 94 Nev.
11 623, 626, 584 P.2d 667, 668 (1978), “[f]ederal cases interpreting [Rule 24] ‘are strong persuasive
12 authority.’” *Exec. Mgmt., Ltd. V. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P. 3d 872, 876 (2002)
13 (quoting *Las Vegas Novelty, Inc. v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990)).

14 To intervene as of right under Rule 24(a)(2),
15 an applicant must meet four requirements: (1) that it has sufficient interest in the
16 litigation’s subject matter, (2) that it could suffer an impairment of its ability to
17 *Am. Home Assurance Co. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 122 Nev. 1229,
18 1238, 147 P.3d 1120, 1126 (2006). “In evaluating whether Rule 24(a)(2)’s requirements are met,”
19 courts “construe the Rule ‘broadly in favor of proposed intervenors’ . . . because ‘[a] liberal
20 policy in favor of intervention serves both efficient resolution of issues and broadened access
21 courts.’” *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (second
22 alteration in original) (quoting *United States v. City of Los Angeles*, 288 F.3d 391, 397–98 (9th
23 Cir. 2002)).

24 Under Rule 24(b), an applicant may permissively intervene if it “has a claim or defense
25 that shares with the main action a common question of law or fact.” Rule 24(b)(1)(B). “In
26 exercising its discretion, the court must consider whether the intervention will unduly delay or
27 prejudice the adjudication of the original parties’ rights.” Rule 24(b)(3); accord *Hairr v. First*
28 *Judicial Dist. Court*, 132 Nev. 180, 186–88, 368 P.3d 1198, 1202–03 (2016).

1 **ARGUMENT**

2 **I. PLAN satisfies Rule 24(a)'s requirements for intervention as a matter of right.**

3 PLAN satisfies each of the four requirements of NRCP 24(a).

4 PLAN satisfies the first and second requirements for intervention as a matter of right,
5 because it (1) has significantly protectable interests in this lawsuit (2) that may be impaired by
6 Plaintiffs' claims. "A 'significantly protectable interest' . . . [is] one that is protected under the law
7 and bears a relationship to the plaintiff's claims." *Am. Home Assurance Co.*, 122 Nev. at 1239,
8 147 P.3d at 1127 (quoting *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002)). PLAN's
9 interest is twofold. PLAN has a statutory right to observe certain aspects of the election process
10 without interfering with them. The Plaintiffs' lawsuit targets those very rights, seeking to revise
11 them beyond recognition, and in ways that would directly threaten the integrity of the process, and
12 the vulnerable voters whose empowerment is central to PLAN's mission. Separately, PLAN has a
13 significantly protectable interest in this litigation grounded in its own and its members continuing
14 exercise of their First Amendment rights by promoting voting by all eligible Nevada citizens,
15 including marginalized groups.

16 In assessing whether an interest is sufficiently "impair[ed] or impede[d]" to justify
17 intervention, Rule 24(a)(2), courts "look[] to the 'practical consequences' of denying
18 intervention." *NRDC v. Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977) (quoting *Nuesse v. Camp*, 385
19 F.2d 694, 702 (D.C. Cir. 1967)). "Once an applicant has established a significantly protectable
20 interest in an action, courts regularly find that disposition of the case may, as a practical matter,
21 impair an applicant's ability to protect that interest." *Venetian Casino Resort, LLC v. Enwave Las*
22 *Vegas, LLC*, No. 2:19-CV-1197 JCM (DJA), 2020 WL 1539691, at *3 (D. Nev. Jan. 7, 2020)
23 (citing *California ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006)). Plaintiffs'
24 lawsuit seeks to impose a "right" to observe election processes that would go far further than mere
25 observation, converting it in ways that would impede and threaten the very integrity of the process.
26 That effort threatens PLAN's ability to continue to observe elections processes in a non-disruptive
27 manner, as PLAN has done in the past and intends to do in the future. In addition, the relief
28 Plaintiffs seek would severely disrupt election administration and threaten voter privacy,

1 interfering with PLAN’s mission of promoting voting by all eligible Nevada citizens, including
2 marginalized groups. If Plaintiffs succeed in their efforts through this litigation to disrupt the
3 election processes, PLAN’s mission to empower voters to make their voices heard through the
4 electoral process will be undercut.

5 PLAN satisfies the third requirement for intervention as of right, because it cannot rely on
6 the parties in this case to adequately represent its interests. “[T]he burden on proposed intervenors
7 in showing inadequate representation is minimal, and would be satisfied if they could demonstrate
8 that representation of their interests ‘may be’ inadequate.” *Hairr*, 132 Nev. at 185, 368 P.3d at
9 1201 (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)). Among the factors that
10 “dictate whether an intervenor’s interest is represented by existing parties” are “whether the party
11 will make the same arguments the intervenor would make, the party is capable and willing to make
12 those arguments, and the party’s argument would neglect an important issue that the intervenor
13 would not have neglected.” *In re Guardianship of A.M.*, No. 59116, 2013 WL 3278878, at *2
14 (Nev. May 24, 2013) (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983)).
15 Considering those factors, courts have “often concluded that governmental entities do not
16 adequately represent the interests of aspiring intervenors.” *Fund for Animals, Inc. v. Norton*, 322
17 F.3d 728, 736 (D.C. Cir. 2003); accord *Citizens for Balanced Use v. Mont. Wilderness Ass’n*, 647
18 F.3d 893, 899 (9th Cir. 2011) (“[T]he government’s representation of the public interest may not
19 be ‘identical to the individual parochial interest’ of a particular group just because ‘both entities
20 occupy the same posture in the litigation.’” (quoting *WildEarth Guardians v. U.S. Forest Serv.*,
21 573 F.3d 992, 996 (10th Cir. 2009)).

22 While the Secretary of State and Washoe County Registrar of Voters have an undeniable
23 interest in defending their actions and protecting elections administration, PLAN has a different
24 focus: ensuring that every eligible voter in Nevada has a meaningful opportunity to cast a ballot
25 and have that ballot counted, both in the upcoming primary election and in future elections, and
26 that non-disruptive election observation remains possible as PLAN has conducted it in the past.
27 Moreover, PLAN has specific interests and concerns—in particular, the proper allocation of their
28 limited resources to maximize voter turnout and promote civic engagement—that neither the

1 Defendants nor any other party in this lawsuit shares. Should Plaintiffs be successful, PLAN will
2 have to divert resources to help protect the process against Plaintiffs’ disruptive efforts, rendering
3 those resources unavailable for PLAN’s other mission-critical work. Accordingly, this is not a case
4 where “there is an ‘assumption of adequacy [because] the government is acting on behalf of a
5 constituency it represents,’” since such an assumption only arises “when the applicant shares the
6 same interest.” *Hairr*, 132 Nev. at 185, 368 P.3d at 1201 (emphasis added) (quoting *Arakaki*, 324
7 F.3d at 1086); *see also id.*, 368 P.3d at 1201 (noting that “when the [applicant’s] interest or ultimate
8 objective in the litigation is the same as the [existing party]’s interest or subsumed within [that
9 existing party’s] objective, the . . . representation should generally be adequate” (alterations in
10 original) (emphasis added) (quoting *Am. Home Assurance Co.*, 122 Nev. at 1241, 147 P.3d at
11 1128)). Rather, this is an instance where,

12 Although Defendants and the Proposed Intervenors fall on the same side of the
13 dispute, Defendants’ interests in the implementation of the [challenged law] differ
14 from those of the Proposed Intervenors. While Defendants’ arguments turn on their
15 inherent authority as [government officials] and their responsibility to properly
16 administer election laws, the Proposed Intervenors are concerned with ensuring . .
17 . the voters they represent have the opportunity to vote in the upcoming federal
18 election . . . and allocating their limited resources to inform voters about the election
19 procedures. As a result, the parties’ interests are neither “identical” nor “the same.”

20 *Issa v. Newsom*, No. 2:20-cv-01044-MCE-CKD, 2020 WL 3074351, at *3 (E.D. Cal. June 10,
21 2020) (citation omitted).

22 Thus, while Defendants are responsible for administering elections and designating
23 procedures for observers, they cannot be relied upon to fully protect PLAN’s broader interest in
24 the rights of election observers and of voters more broadly. *See Guardianship of A.M.*, 2013 WL
25 3278878, at *2 (affirming intervention as of right where present parties’ “testimony could not and
26 did not encompass all of [intervenor’s] arguments or interests”); *Kleissler v. U.S. Forest Serv.*, 157
27 F.3d 964, 974 (3d Cir. 1998) (granting motion to intervene as of right where private parties’
28 interests diverged from government’s interest in representation, and where “[t]he early presence
of intervenors may serve to prevent errors from creeping into the proceedings, clarify some issues,
and perhaps contribute to an amicable settlement”); *Ohio River Valley Envtl. Coal., Inc. v. Salazar*,
No. 3:09-0149, 2009 WL 1734420, at *1 (S.D.W. Va. June 18, 2009) (granting motion to intervene

1 as of right where defendant and proposed intervenor had identical goals but “difference in degree
2 of interest could motivate the [intervenor] to mount a more vigorous defense” and “[t]he possibility
3 that this difference in vigor could unearth a meritorious argument overlooked by the current
4 Defendant justifies the potential burden on having an additional party in litigation”). Because their
5 interests are not shared by the current parties to the litigation, PLAN cannot rely on Defendants or
6 anyone else to provide adequate representation. PLAN has thus satisfied the third requirement for
7 intervention as of right.

8 Finally, the motion is timely. Plaintiffs filed their complaint on April 26, 2022; this motion
9 follows less than a week later and before any substantive activity in the case. There has therefore
10 been no delay, and no possible risk of prejudice to the other parties. *See Guardianship of A.M.*,
11 2013 WL 3278878, at *3; *Lawler*, 94 Nev. at 626, 584 P.2d at 669; *see also, e.g., Nevada v. United*
12 *States*, No. 3:18-cv-569-MMD-CBC, 2019 WL 718825, at *2 (D. Nev. Jan. 14, 2019) (granting
13 motion to intervene filed several weeks after action commenced); *W. Expl. LLC v. U.S. Dep’t of*
14 *Interior*, No. 3:15-cv-00491-MMD-VPC, 2016 WL 355122, at *2 (D. Nev. Jan. 28, 2016)
15 (granting motion to intervene filed nearly two months after action commenced).

16 **II. Alternatively, PLAN satisfies Rule 24(b)’s requirements for permissive intervention.**

17 Rule 24(b) grants courts broad discretion to permit intervention where an applicant’s
18 claim or defense and the main action have a question of law or fact in common and intervention
19 will not unduly delay or prejudice the adjudication of the rights of the original parties. *See Hairr*,
20 132 Nev. at 187, 368 P.3d at 1202.

21 For the reasons discussed in Part I *supra*, PLAN’s motion is timely, and PLAN cannot rely
22 on the Secretary to adequately protect its interests. PLAN also has defenses to Plaintiffs’ claims
23 that share common questions of law and fact—for example, whether Plaintiffs have stated a claim
24 for which relief may be granted, or have satisfied the criteria for a temporary restraining order.

25 Significantly, intervention will result in neither prejudice nor undue delay. PLAN has an
26 undeniable interest in a swift resolution of this action to ensure that observation of elections and
27 ballot processing remain workable and fair. Indeed, PLAN contends that this action itself threatens
28 to cause harmful delays that could stymie the State’s efforts to hold a successful primary election.

1 PLAN therefore has a strong interest opposing Plaintiffs' lawsuit, while simultaneously avoiding
2 any unnecessary delay. PLAN is confident that its intervention in this case, and the filings that will
3 follow, will result in expeditious resolution of this litigation.

4 **CONCLUSION**

5 For the reasons stated above, PLAN respectfully requests that the Court grant its motion to
6 intervene as a matter of right under Rule 24(a)(2) or, in the alternative, permit PLAN to intervene
7 under Rule 24(b).¹

8 **AFFIRMATION**

9 The undersigned hereby affirm that the foregoing document does not contain the social
10 security number of any person.

11 DATED this 2nd day of May, 2022.

12 By: /s/ Bradley Schrager

13 Bradley Schrager

14 Daniel Bravo

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22 *Attorneys for Proposed Intervenor-Defendant
Progressive Leadership Alliance of Nevada*

23 *Pro hac vice forthcoming
24
25
26

27 _____
28 ¹ Alternatively, Proposed Intervenor requests permission from the Court "to submit briefs on
determinative issues as amici curiae." *Hairr*, 132 Nev. at 188, 368 P.3d at 1203.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 2nd day of May, 2022, a true and correct copy of the **MOTION**
3 **TO INTERVENE AS DEFENDANT** was served via the Washoe County E-Flex Filing System
4 on all parties or persons requesting notice.

5
6 By: /s/ Danielle Fresquez
7 Danielle Fresquez, an employee of
8 WOLF, RIFKIN, SHAPIRO, SCHULMAN &
9 RABKIN, LLP
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EXHIBIT 1

Proposed Answer

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EXHIBIT 1

1 UZOMA NKWONTA (D.C. Bar No. 975323) (pro hac vice forthcoming)
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13 *Progressive Leadership Alliance of Nevada*

14 **SECOND JUDICIAL DISTRICT COURT**
15 **IN AND FOR THE COUNTY OF WASHOE**

16 ROBERT BEADLES, an individual;
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an individual; VALERIE WHARTON, an

Case No. CV22-00661
Dept. No.: 4

**[PROPOSED] ANSWER TO
COMPLAINT FOR DECLARATORY
& INJUNCTIVE RELIEF**

1 individual,

2 Plaintiffs,

3 v.

4 BARBARA CEGAVSKE, in her official capacity as
5 Nevada Secretary of State; DEANNA SPIKULA, in
6 her official capacity as Registrar of Voters for
7 Washoe County, Nevada; DOES I-X, inclusive; and
8 ROE CORPORATIONS I-X, inclusive,

9 Defendants,

10 and

11 PROGRESSIVE LEADERSHIP ALLIANCE
12 OF NEVADA,

13 Proposed Intervenor-
14 Defendant.

15 Proposed Intervenor Progressive Leadership Alliance of Nevada (“Proposed Intervenor”),
16 by and through its attorneys, submits the following Answer to Plaintiffs’ Complaint for
17 Declaratory and Injunctive Relief (the “Complaint”). Proposed Intervenor responds to the
18 allegations in the Complaint as follows:

19 **PARTIES, JURISDICTION & VENUE**

20 1. Proposed Intervenor is without sufficient information or knowledge with which to
21 form a belief as to the truth or falsity of the allegations in Paragraph 1 and therefore denies the
22 same.

23 2. Proposed Intervenor admits the allegations in Paragraph 2.

24 3. Proposed Intervenor admits the allegations in Paragraph 3.

25 4. Paragraph 4 contains mere characterizations, legal contentions, and conclusions to
26 which no response is required. To the extent a response is required, Proposed Intervenor denies
27 the allegations.

28 **GENERAL ALLEGATIONS**

5. Proposed Intervenor incorporates its responses to the allegations in the preceding
paragraphs as though fully set forth herein.

1 6. Proposed Intervenor admits that November 3, 2020 was Election Day for the 2020
2 presidential election. The remaining allegations in Paragraph 6 contain mere characterizations,
3 legal contentions, and conclusions to which no response is required. To the extent a response is
4 required, Proposed Intervenor admits the allegations.

5 7. Proposed Intervenor admits that cases were filed in some states after the 2020
6 presidential election challenging the conduct or results of that election. Proposed Intervenor denies
7 that those cases had merit. The remaining allegations in Paragraph 7 contain mere
8 characterizations, legal contentions, and conclusions to which no response is required. To the
9 extent a response is required, Proposed Intervenor denies the allegations.

10 8. Proposed Intervenor admits that some states conducted recounts after the 2020
11 presidential election. The remaining allegations in Paragraph 8 contain mere characterizations,
12 legal contentions, and conclusions to which no response is required. To the extent a response is
13 required, Proposed Intervenor denies the allegations.

14 9. Proposed Intervenor admits that allegations were made in some states of
15 improprieties in connection with the 2020 presidential election. Proposed Intervenor denies that
16 those allegations had merit. The remaining allegations in Paragraph 9 contain mere
17 characterizations, legal contentions, and conclusions to which no response is required. To the
18 extent a response is required, Proposed Intervenor denies the allegations.

19 10. Proposed Intervenor admits that election observers are an important part of the
20 election process under Nevada law. The remaining allegations in Paragraph 10 contain mere
21 characterizations, legal contentions, and conclusions to which no response is required. To the
22 extent a response is required, Proposed Intervenor denies the allegations.

23 11. Proposed Intervenor is without sufficient information or knowledge with which to
24 form a belief as to the truth or falsity of the allegations in Paragraph 11 and therefore denies the
25 same.

26 12. Paragraph 12 contains mere characterizations, legal contentions, and conclusions
27 to which no response is required. To the extent a response is required, Proposed Intervenor denies
28 the allegations.

1 25. Paragraph 25 contains mere characterizations, legal contentions, and conclusions
2 to which no response is required. To the extent a response is required, Proposed Intervenor denies
3 the allegations.

4 26. Paragraph 26 contains mere characterizations, legal contentions, and conclusions
5 to which no response is required. To the extent a response is required, Proposed Intervenor denies
6 the allegations.

7 27. Paragraph 27 contains mere characterizations, legal contentions, and conclusions
8 to which no response is required. To the extent a response is required, Proposed Intervenor denies
9 the allegations.

10 **SECOND CLAIM FOR RELIEF**

11 **(Injunctive Relief)**

12 28. Proposed Intervenor incorporates its responses to the allegations in the preceding
13 paragraphs as though fully set forth herein.

14 29. Paragraph 29 contains mere characterizations, legal contentions, and conclusions
15 to which no response is required. To the extent a response is required, Proposed Intervenor denies
16 the allegations.

17 30. Paragraph 30 contains mere characterizations, legal contentions, and conclusions
18 to which no response is required. To the extent a response is required, Proposed Intervenor denies
19 the allegations.

20 31. Paragraph 31 contains mere characterizations, legal contentions, and conclusions
21 to which no response is required. To the extent a response is required, Proposed Intervenor denies
22 the allegations.

23 32. Paragraph 32 contains mere characterizations, legal contentions, and conclusions
24 to which no response is required. To the extent a response is required, Proposed Intervenor denies
25 the allegations.

26 33. Paragraph 33 contains mere characterizations, legal contentions, and conclusions
27 to which no response is required. To the extent a response is required, Proposed Intervenor denies
28 the allegations.

1 34. Paragraph 34 contains mere characterizations, legal contentions, and conclusions
2 to which no response is required. To the extent a response is required, Proposed Intervenor denies
3 the allegations.

4 **AFFIRMATIVE DEFENSES**

5 1. Proposed Intervenor sets forth its affirmative defenses without assuming the burden
6 of proving any fact, issue, or element of a cause of action where such burden properly belongs to
7 Plaintiff. Moreover, nothing stated here is intended or shall be construed as an admission that any
8 particular issue or subject matter is relevant to the allegations in the Complaint. Proposed
9 Intervenor reserves the right to amend or supplement its affirmative defenses as additional facts
10 concerning defenses become known.

11 2. Proposed Intervenor alleges as follows:

12 3. Plaintiffs fail to state a claim upon which relief can be granted.

13 4. Plaintiffs lack standing.

14 5. There is no ripe controversy between the parties.

15 6. Plaintiffs' claims are barred by the doctrine of laches.

16 **PRAAYER FOR RELIEF**

17 WHEREFORE, Proposed Intervenor respectfully requests that this Court:

18 A. Deny that Plaintiffs are entitled to any relief;

19 B. Dismiss the Complaint in its entirety, with prejudice; and

20 C. Grant such other and further relief as the Court may deem just and proper.

21 **AFFIRMATION**

22 The undersigned hereby affirm that the foregoing document does not contain the social
23 security number of any person.

24 DATED this 2nd day of May, 2022.

25 **WOLF, RIFKIN, SHAPIRO, SCHULMAN &
26 RABKIN, LLP**

27 By: */s/ Bradley S. Schrager*

Bradley S. Schrager, SBN 10217

Daniel Bravo, SBN 13078

3773 Howard Hughes Parkway, Suite 590 South
28 Las Vegas, Nevada 89169

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Uzoma Nkwonta*
David R. Fox*
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10 G Street NE, Suite 600
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Tel: (202) 968-4490

*Attorneys for Proposed Intervenor-Defendant
Progressive Leadership Alliance of Nevada*

**Pro hac vice forthcoming*

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 2nd day of May, 2022, a true and correct copy of this
3 **PROPOSED ANSWER** was served via the Washoe County E-Flex Filing System on all parties
4 or persons requesting notice.

5
6 By: /s/ Danielle Fresquez
7 Danielle Fresquez, an employee of
8 WOLF, RIFKIN, SHAPIRO, SCHULMAN &
9 RABKIN, LLP
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EXHIBIT 2

Transcript of Proceedings

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EXHIBIT 2

2:20-cv-2046-APG-DJA - November 6, 2020

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JILL STOKKE; CHRIS PRUDHOME; MERCHANT for CONGRESS; and RODIMER for CONGRESS,)	
)	Case No. 2:20-cv-2046-APG-DJA
)	Las Vegas, Nevada
Plaintiffs,)	Friday, November 6, 2020
)	2:08 p.m.
vs.)	
)	EMERGENCY MOTION FOR
)	PRELIMINARY INJUNCTION VIA
BARBARA K. CEGAVSKE, Secretary of State, in her official capacity;)	VIDEOCONFERENCE
JOSEPH P. GLORIA, Clark County Registrar of Voters, in his official capacity, et al.,)	
)	
Defendants.)	
)	<u>C E R T I F I E D C O P Y</u>

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REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ANDREW P. GORDON,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

(Appearances on Page 2)

COURT REPORTER:

Heather K. Newman, RPR, CRR, CCR #774
United States District Court
333 Las Vegas Boulevard South, Room 1334
Las Vegas, Nevada 89101
(702) 471-0002 or HN@nvd.uscourts.gov

Proceedings reported by machine shorthand; transcript produced by computer-aided transcription.

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1 APPEARANCES:

2 For the Plaintiffs:

3 THE O'MARA LAW FIRM, P.C.
4 BY: DAVID C. O'MARA, ESQ.
5 311 East Liberty Street
6 Reno, NV 89501
7 (775) 323-1321

8 For the Defendant Barbara K. Cegavske:

9 OFFICE OF THE ATTORNEY GENERAL
10 BY: CRAIG A. NEWBY, ESQ.
11 GREGORY LOUIS ZUNINO, ESQ.
12 100 North Carson Street
13 Carson City, NV 89701
14 (775) 684-1206

15 For the Defendant Joseph P. Gloria:

16 CLARK COUNTY DISTRICT ATTORNEY'S OFFICE, CIVIL DIVISION
17 BY: MARY-ANNE M. MILLER, ADA
18 500 South Grand Central Parkway, 5th Floor
19 P.O. Box 552215
20 Las Vegas, NV 89155
21 (702) 455-4761

22 For the Intervenor Defendants Democratic National Committee and
23 Nevada State Democratic Party:

24 WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
25 BY: DANIEL BRAVO, ESQ.
BRADLEY SCOTT SCHRAGER, ESQ.
3556 East Russell Road
Las Vegas, NV 89120
(702) 341-5200

PERKINS COIE LLP
BY: JOHN M. DEVANEY, ESQ.
700 Thirteenth Street NW, Suite 600
Washington, DC 20005

Also present:

Barbara Cegavske, Secretary of State
Aaron Ford, Attorney General
Wayne Thorley, Deputy Secretary of State for Elections

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1 LAS, NEVADA; FRIDAY, NOVEMBER 6, 2020; 2:08 P.M.

2 --oOo--

3 P R O C E E D I N G S

4 COURTROOM ADMINISTRATOR: Jill Stokke, et al. vs.
5 Barbara K. Cegavske, et al., 2:20-cv-2046-APG-DJA.

6 Counsel, will you please make your appearances,
7 starting with the plaintiff?

8 MR. O'MARA: Yes, good afternoon, Your Honor,
9 David O'Mara on behalf of plaintiff.

10 THE COURT: Good afternoon.
11 Anyone else for the plaintiff?

12 MR. O'MARA: Just me --

13 THE COURT: I'm sorry, just Mr. O'Mara?

14 MR. O'MARA: That's correct.

15 THE COURT: Thank you.

16 Anyone for the -- who's on for the defendants?

17 MR. NEWBY: Good afternoon, Your Honor, Craig Newby,
18 Deputy Solicitor General for the State of Nevada, representing
19 Secretary of State Barbara Cegavske. Also, present virtually,
20 per me looking at the Zoom, is Attorney General Ford and
21 Mr. Craig Zunino from my office. Also present for the client
22 is Deputy Secretary of State for Elections, Wayne Thorley.

23 MS. CEGAVSKE: And this is Barbara Cegavske, Secretary
24 of State, I'm also on the line.

25 THE COURT: Thank you, Secretary of State Cegavske.

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1 All right. I'm going to have all the cameras turned
2 off.

3 MR. BRAVO: Your Honor, good afternoon, this is
4 Daniel Bravo, from the law firm of Wolf Rifkin on behalf of
5 proposed intervenor the Democratic National Committee and the
6 Nevada State Democratic Party. Along with me virtually is my
7 colleague, Brad Schragger, from the law firm of Wolf Rifkin as
8 well as Mr. John Devaney from the law firm of Perkins Coie, who
9 we submitted a verified petition for pro hac vice.

10 THE COURT: Thank you -- thank you, Mr. Bravo. I
11 forgot to mention that as well, that we've allowed you to
12 participate.

13 All right. So I'm going to --

14 MS. MILLER: Your Honor, this is Mary-Anne Miller from
15 the Clark County District Attorney's Office on behalf of
16 defendant Joseph Gloria.

17 THE COURT: Thank you, Ms. Miller. I appreciate you
18 making your appearance. I apologize for leaving you out of
19 that. I guess -- is there anybody else that I've missed, any
20 of the lawyers or parties on the line that I need to be aware
21 of?

22 Going once. . . going twice. . . All right. Thank
23 you all.

24 Like I said, I'm going to have the video shut down.
25 We're just going to do this by audio.

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1 Let me note first for the record that Federal Rule of
2 Civil Procedure Number 1 counsels courts to secure the just,
3 speedy and inexpensive determination of every action and
4 proceeding. Due to the COVID-19 pandemic and consistent with
5 Rule 1 and with this Court's General Orders, this emergency
6 hearing is being conducted telephonically by audio only.
7 Information on how to access this public hearing has been
8 prominently posted on the court's website to allow full access
9 to this hearing by the public, the media, and the participants,
10 and we also issued a Minute Order with the dial-in information
11 so folks could join on the phone if they wanted to hear.

12 To ensure that the parties have a full and fair day
13 here in court, all attendees to this telephonic hearing will be
14 muted and only I and counsel who are arguing will have their
15 microphones activated. That should cut down on the background
16 noise and interference and hopefully allow the parties to focus
17 in on the arguments.

18 Let me put everyone on notice that recording -- and
19 this includes the folks on the phone as well -- recording,
20 taping, streaming, or otherwise broadcasting district court
21 hearings is expressly prohibited by this court's General Order
22 2017-02 and the policies of the judicial conference. So,
23 recording, taping, streaming or otherwise broadcasting the
24 audio, or any photograph or video of this hearing, is
25 prohibited. If you're doing so, stop.

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1 Let me next offer a personal word of thanks to the
2 many judicial clerks in my chambers and some of my fellow
3 judge's chambers who have helped me get up to speed really
4 quickly on this case given that it was filed late yesterday
5 afternoon and the motion was filed last night. We had
6 contributions from many of our court staff, chambers staff, and
7 a special thanks to our court administrative staff and
8 courtroom deputy for helping me put together the technology to
9 allow us to do this hearing this afternoon. We're all keeping
10 our fingers crossed that the technology works and we're able to
11 continue with this hearing.

12 I'm first going to address the Motion to Intervene
13 that was filed by I'm just going to call it the DNC and the
14 Nevada Democratic National Party. Let me ask Mr. O'Mara, does
15 your client -- clients, plural -- oppose the Motion to
16 Intervene?

17 MR. O'MARA: No, Your Honor, neither do we oppose the
18 pro hac vice application.

19 THE COURT: All right. Mr. Newby, if you're going to
20 argue, or is Mr. Zunino for the defense, do you have any
21 objection to the DNC intervention?

22 MR. BRAVO: Your Honor, Craig Newby will be doing the
23 argument today. We have no objection to either --

24 (Court reporter clarification).

25 THE COURT: Thank you.

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1 That was my court reporter Heather Newman who's --
2 like she said, we don't have the audio -- the video, so please
3 identify yourselves before speaking.

4 I think that was Mr. Newby speaking.

5 MR. NEWBY: It was, Your Honor, Craig Newby, again,
6 for defendant Cegavske. I will be doing the argument this
7 afternoon on the merits. Secretary has no objection to the
8 Motion to Intervene or the Motion for pro hac vice admission.

9 THE COURT: Ms. Miller, on behalf of Mr. Gloria, do
10 you have any objection to the Motion to Intervene?

11 MS. MILLER: No, Your Honor.

12 THE COURT: All right. I will grant the Motion to
13 Intervene. I'll do a separate order on the pro hac vice
14 application. I haven't reviewed it yet, so I just want to make
15 sure it's all satisfied -- complies with our local rules.
16 Presuming it does, I will conditionally allow it for at least
17 purposes of the argument today.

18 So, we now turn to the motion for Temporary
19 Restraining Order and Motion for Preliminary Injunction.
20 Before we dig into it, let me again remind everyone that my
21 court reporter is listening in on audio like everyone else.
22 Please state your name before speaking so that we get it
23 accurate in the record. Please don't speak over each other.
24 Pause to make sure the speaker is finished before jumping in
25 because sometimes the audio cuts out if everyone's speaking at

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1 once.

2 I have read the papers that were filed, the complaint,
3 the motion for TRO, obviously, the motion for expedited hearing
4 which I granted, received the numerous -- I shouldn't say
5 numerous, but the responses that were filed by the
6 defendants -- I should say at least defendant Cegavske. I have
7 reviewed the proposed intervention by the DNC. So, I think I'm
8 pretty up to speed, factually, and on the arguments. I have
9 some specific questions to ask each of you as we go forward,
10 but I will allow you to start with an argument if you want to
11 make it. Just please don't repeat everything in your papers
12 because we don't want to be here all night, and I have read
13 those.

14 So, Mr. O'Mara, it's your motion, you get to go first.

15 MR. O'MARA: Thank you, Your Honor. And I echo your
16 comments in regards to the court staff and, also, I also want
17 to acknowledge counsel for all this -- all the parties who
18 continue to work very well together to make sure that when
19 something is filed, they get it to the opposing party as soon
20 as possible, so if I were here as an adversarial --
21 (unintelligible) counsel these cases have been very active with
22 each other and that is --

23 THE COURT: Okay. And let me interrupt, I apologize,
24 Mr. O'Mara, I meant to ask you a question at the very
25 beginning. I understand from the latest filings that came down

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1 this afternoon that the state court case that was pending up in
2 Carson City and up in the Nevada Supreme Court, that that has
3 been settled, and is it now dismissed? Is that case over?

4 MR. O'MARA: I do not know the answer to that
5 question, Your Honor. There was a stipulation in -- the last I
6 had heard and maybe I'm just not up to date, is that there had
7 not been a completed stipulation in that case. However, I
8 don't believe that that case is relevant to my state claims
9 here today because they are separate people, separate claims
10 and they have separate harms, remedies by the court.

11 THE COURT: Okay. All right. Thank you. I didn't
12 mean to interrupt. Go -- I did mean to interrupt, but thank
13 you for addressing that. Now go ahead with your argument.

14 MR. O'MARA: Great. Thank you.

15 Your Honor, I understand you have read the briefs and
16 I just want to go into the two issues: One issue is whether or
17 not the Registrar of Voters of Clark County should be able to
18 preclude the public from actually having the -- an opportunity
19 to view and monitor and observe county procedures which are to
20 be made public. And, so, you know, there's -- there's
21 basically two statutes that we cited. We cited both statutes,
22 N.R.S. 293.8881 specifically says the county procedure must be
23 public. The second statute is N.R.S. 293.363. That also says
24 when the polls have closed, county procedure must be public.

25 Now, Mr. Prudhome went there and attempted to view the

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1 county process and he, as my declaration says, and his said as
2 well, claims that he's not getting adequate public viewing of
3 the procedure.

4 Now, what we have to look at is we're here today at a
5 public hearing. And the way the registrar of voters has it set
6 up is that the public viewing is allowed to watch through a
7 glass partition to see where they are. They're not within a
8 reasonable viewing distance. They're about 10 feet away. They
9 have a partition. They can't see what's going on, and most
10 importantly they can't hear what's going on. And, so, that's
11 not a public procedure that is open to the public. You may be
12 able to look and say, oh, I wonder what they're doing today,
13 but you don't understand what they're doing, you can't see what
14 they're doing, and most importantly you can't hear what they're
15 doing. And that's important because here we are today and if
16 we were in your courtroom, all of these people on the phone
17 would have been able to walk into your courtroom, they would
18 have sat in the gallery, they would have been able to listen,
19 they would have been able to see what their lawyers were doing,
20 but what -- what the registrar is doing is -- if we were in a
21 court, would put a glass partition between the bar and the
22 gallery and the people would not be able to see or not be able
23 to hear what was going on, they would just be able to see some
24 actions about the lawyers. And we have it here today on Zoom
25 and the new technology. It would be akin to you -- the Court

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1 having a public hearing as you are now but putting everybody on
2 the telephone on mute, or if they were on Zoom, on mute to
3 where all they would be able to do is see what the lawyers were
4 doing. That's not open to the public. That's not sufficient.

5 And there isn't a --

6 (Court reporter admonishment).

7 MR. O'MARA: So, Your Honor, what we're here about is
8 there has to be a meaningful observation of the public to view
9 the counting of the ballots.

10 Now, there is an opportunity to be able to be 6 feet
11 away if that's the requirement in regards to Nevada. You could
12 probably be closer, but 6 feet away, they can watch, they can
13 hear, they can actually publicly observe the counting of the
14 ballots. So, what we're asking for is for them -- for the
15 registrar to comply with the statutory provisions for counting
16 to the public. It has to be a public that -- where the public,
17 just like any hearing or any public open meeting where you get
18 the opportunity to see what's going on and what is -- what you
19 can hear. And if you're not within 10 -- 6 feet and able to
20 see or actually see the devices in which the machines are being
21 used, then that is not open to the public, it's just basically
22 nothing. You get nothing out of it, and it basically makes
23 that statute a nullity. It nullifies the legislative intent
24 that we are entitled, or this -- my client is entitled, as well
25 as any other public official or public citizen, to go in and

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1 have the counting open to the public.

2 THE COURT: All right. Let me -- let me interrupt,
3 Mr. O'Mara, and ask you this, because your motion simply asks
4 that the defendants should be required to allow meaningful
5 access to the ballot-counting process.

6 MR. O'MARA: That's right.

7 THE COURT: What are you asking for?

8 MR. O'MARA: Yeah. So, Your Honor, I'm asking for
9 them to be within a -- at least a 6-foot area where they can
10 see and hear the actual counting and what has been said in
11 regards to the ballot counting.

12 THE COURT: What if we have -- well --

13 MR. O'MARA: Well, let me -- let me just say something
14 to Your Honor. There -- there was an issue up in Washoe County
15 and what happened was is the balloting procedure -- or the
16 watching of the polls was being really kind of difficult
17 because Washoe County was only allowing three -- or two people
18 to view in a location for 1 hour, and that was causing a lot of
19 problems because some were getting to the polling location and
20 they would get kicked out in an hour. We would have people
21 that would come in with their friends and then they would be
22 maybe, probably, from the same political party, or they
23 wouldn't and, so, they worked with them. And what they did was
24 is they had a system, three chairs: You had a Republican
25 chair, a Democrat chair and an Independent chair. Those chairs

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1 are specifically for those three options and if someone was to
2 leave and there was no -- say, no Democrat viewer, then anybody
3 would be able to come in and watch, if there was no Republican,
4 then a Democrat would be able to come in and watch until one of
5 them was able to be able to do this.

6 Now, I -- I don't think that, you know, in a normal
7 situation, that that is adequate because the public should be
8 able to do it, but everybody keeps on saying this is COVID
9 times and we have to make COVID -- we have to make COVID
10 provisions. And, so, in order to do that you have three major
11 entities, you have a -- two major political parties and
12 everybody else and, so, I think that in order to draft an
13 injunction, to allow for a remedy that will benefit everyone,
14 is to have such observation and have a system where if no one's
15 there, then another person can come in, or you have it to where
16 the interested party -- especially in this case, you have two
17 interested parties, you have the campaigns and you have -- you
18 have the Democratic party and the state party. So, you can
19 draft the injunctive relief to say we're going to have three
20 people -- up to three people for 6 -- no farther than 6 feet
21 that allows them to monitor and hear the counting and the
22 actual counting of the ballots.

23 THE COURT: Mr. O'Mara, isn't that the legislature's
24 job, not mine?

25 MR. O'MARA: Well, Your Honor, your job is to make

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1 sure that the statutes are implemented in a way that allows for
2 them to be viewed. And, so, the Court is being asked to step
3 in and tell our voters, you are not -- this is not open. It
4 happens all the time where the courts look at, is this a public
5 hearing, was it open, was it -- and that court allowed us to
6 look at it and say, no, you have to make it open to the public.
7 And case law shows that open to the public means you have to
8 have meaningful observation where you can hear and partici- --
9 mostly in campaigns, the case law says you can participate, and
10 we don't have that here, so you have the other three, which is
11 to hear and to understand and to see what is going on so that
12 later on you can participate and find out what -- what
13 happened. I mean, if you don't have an avenue for a public
14 meeting or a public observation and the person is just standing
15 out watching nothing, then they have no opportunity to actually
16 be a part of the public viewing because they can't --
17 whatsoever afterwards to say, I saw something, it wasn't right,
18 this is what happened. And, so, that basically means that that
19 statute's a nullity if the registered voters aren't allowed to
20 continue on with this process.

21 THE COURT: Let me ask you to respond to
22 Justice Kavanaugh's concurrence in the case of *Democratic*
23 *National Committee vs. Wisconsin State Legislature* that was
24 decided about a week or so ago, on October 26th, where Justice
25 Kavanaugh, in his concurrence, said that "even seemingly

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1 innocuous, late-in-the-day judicial alterations to state
2 election laws can interfere with administration of an election
3 and cause unanticipated consequences." He went on to say that
4 "it's one thing for the state legislature to alter their own
5 election rules in the late innings, but it's quite another for
6 a federal district court to swoop in and alter carefully
7 considered and democratically enacted state election rules when
8 an election is imminent." I'll add to that, when it's already
9 undergone and the counting's going on.

10 Why should I -- you're asking me, it seems, to ignore
11 Justice Kavanaugh's direction -- yes, it was only a
12 concurrence -- but isn't that a good counsel to a judge like me
13 to not step in and interfere with these administrative
14 proceedings that you're telling me to do?

15 MR. O'MARA: Well, I don't -- there is no -- you're
16 not stepping in and involving yourself in the administrative
17 proceedings. You're not causing the administrative proceedings
18 to be changed. What you're doing is allowing for the
19 administrations to be conducted in the method in which the
20 state law requires, which is to be open to the public. We're
21 not asking you to change anything, Your Honor; we're asking you
22 to be able to say you need -- as the registrar, need to follow
23 the state law so that the administration of the election is
24 actually moving forward under the law, instead of an arbitrary
25 decision by the Registrar of Voters to keep people away from

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1 the public -- the public away from viewing a publicly open
2 ballot counting, which is what is happening. So we're not
3 asking you to change the law, Your Honor; we're asking you to
4 tell the Registrar of Voters, you need to make a meaningful
5 policy -- a meaningful enforcement of the actual election laws
6 in which you are going to do.

7 I mean --

8 THE COURT: Okay. Let me follow up -- let me follow
9 up --

10 (Simultaneous cross-talk).

11 MR. O'MARA: -- the Court to be aware of. Sorry.
12 I'll hold that back. I'm sorry.

13 THE COURT: Thank you. Let me -- let me -- I need to
14 do two things: One, let me -- I need to ask everyone on the
15 phone to please mute your phones and your microphones. We're
16 getting interference and noise in the background, so anyone,
17 public, media, parties, whoever else is not speaking, that is
18 the lawyer, please mute your phones and microphones so that we
19 can -- I can hear the lawyers.

20 Mr. O'Mara, I want to get to a practical standpoint
21 because you're asking me to impose some new standards or
22 strictures or guidelines that -- that the defendants would have
23 to follow. And you want to be able to see and to hear what
24 they're talking about. So, hypothetically, if I have, or if
25 the defendants have someone who is counting the ballot who is

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1 very soft-voiced, or is whispering, or is hoarse, do we have to
2 provide them microphones? Do we have to say, hey, you need to
3 speak up so everybody can hear them? I mean, at what point
4 does this get to the ridiculous?

5 MR. O'MARA: Your Honor, I -- I -- I mean, you can
6 come up with a lot of things in regards to that, but if the --
7 if the person is talking softly and the other election
8 officials can hear them, then they would be able to be heard.
9 I mean, the problem is, is that if you don't allow for a
10 viewing, then it makes the statute a nullity and it makes it to
11 where why even have the statute? I mean, the --

12 THE COURT: Okay. But -- okay. But, your client --
13 your client did view -- I'm reading his affidavit. He was
14 allowed to view. He didn't like where he was put, but he was
15 put, at least in Paragraph 5 of his declaration, said that
16 "they directed me to another area of the location where I would
17 not be able to fully observe. My understanding was that was
18 for people who were only media." So he was placed, apparently,
19 by his own statement, in the media area. Then he says, in
20 Paragraph 6, that "regardless, they did not accept my media
21 credentials. I remained in the observer area as an observer."
22 So he's been in the media area; he's been in the observer area.
23 I -- he's viewing.

24 MR. O'MARA: But he's -- Your Honor, it's -- it says
25 that. . . it says that "directed me to the area where I would

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1 not be able to fully observe." So, if I keep on moving him
2 back and forth to one specific area where he apparently can
3 observe maybe (unintelligible) that way and then he cannot
4 fully observe, there -- it is not open to the public. There is
5 different people that get to see things and different people
6 that don't get to see. And that --

7 THE COURT: So I -- so we need to open it to anybody
8 in the world that wants to come?

9 MR. O'MARA: No, Your Honor, and that's why -- I mean,
10 I -- I mean, the statute is put into place that counting must
11 be open to the public. And, you know, and what I was telling
12 you about is that the argument is always going to be that COVID
13 does not allow for the general public to be able to come in in
14 mass numbers or in relatively larger numbers and therefore it's
15 got to be a smaller amount of area for them to view and it's
16 got to be farther away from the location of where the ballots
17 are being counted. And, so, you have to -- it's -- you can't
18 let COVID run everything and allow the -- the statute to be
19 nullified when you can -- you can move the parties that are
20 interested in watching the count to be able to see and hear and
21 be a part of the public viewing of the counting.

22 THE COURT: And what in your client's affidavit or
23 declaration says that he could not observe?

24 MR. O'MARA: Well, it says, "They directed me to
25 another area where I would not be able to fully observe."

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1 THE COURT: And then he apparently was moved to a
2 different area, the observer area. Doesn't say he couldn't
3 fully observe there.

4 MR. O'MARA: But he --

5 THE COURT: What specifically did your client not get
6 to see? What specifically does your client want me to let him
7 see that he hasn't been already? I -- you're asking for
8 extraordinary injunctive relief.

9 MR. O'MARA: Right.

10 THE COURT: It needs to be narrowly tailored and what
11 I'm not hearing is any narrow tailoring of what you want me to
12 do. I can speak in great platitudes, yes, it should be open to
13 the public. That doesn't help us with an injunction.

14 MR. O'MARA: Right, and as I was talking about
15 earlier, and you talked about how -- the administration effects
16 and things of that nature. What -- we would like an injunctive
17 relief to require the Registrar of Voters to place my client,
18 and anyone in a similar situation, to be able to monitor the
19 election, counting, within a 6-foot, no longer -- no farther
20 than 6 feet where he can see and hear the actual counting of
21 the ballots. It's a very specific, less than 6 feet -- I mean,
22 if they can put him 4 feet and that is available, then we would
23 like 4 feet. If it's 6 feet, that would be the location where
24 we believe that he would be able to hear and see the actual
25 counting of the ballots.

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1 THE COURT: And if I don't put specific measurements
2 in there, I just say it's got to be where he can see and hear,
3 isn't that exactly the problem we're in right now with the
4 statute that says meaningful review or whatever it is,
5 meaningful view?

6 MR. O'MARA: The statute says -- (unintelligible). If
7 you -- you want it to be narrowly tailored so that the remedy
8 actually, you know, provides for a remedy that will be
9 sufficient to satisfy the statute, which is, you know, what we
10 believe is 6 feet.

11 THE COURT: All right. And who is similarly situated
12 to your client? Since you want that in the order, who is
13 similarly situated?

14 MR. O'MARA: Well, it's open to the public,
15 Your Honor, so that's why I was talking to you earlier about,
16 you know, in regards to what the registrar or what I believe
17 maybe the registrar may argue, the Secretary of State may argue
18 is that, look, we're in a COVID situation, we don't want to
19 have, you know, 10 or 15 people watching the counting of the
20 ballots and that's therefore I was talking about how
21 Washoe County utilizes a system where they would allow for the
22 monitoring of the polls and then they would. . . I'm sorry,
23 Your Honor. They would monitor the polls and they would allow
24 for a specific party to have a chair and then an Independent
25 party to have a chair and things of that nature. We have two

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1 parties that are -- well, we have two campaigns and a party
2 that are involved in these cases and therefore you can -- you
3 can generally look at there's two sides of the aisle and then
4 you put in a third. It would work in order to narrowly tailor
5 something to where the viewing location would be.

6 THE COURT: Why is that your client? Why does he get
7 one of those chairs?

8 MR. O'MARA: Well, he would get one of those chairs
9 because he's bringing this action. He's the one that wants to
10 view it. He's the one that wants to have this open for the
11 public. But if you -- they -- if the Registrar of Voters
12 wanted to have it to where I was just talking about where the
13 viewer has to designate an interested party, which is a
14 Democrat party, a Republican party, and a non-party, he would
15 have to designate himself to what that would be, and maybe
16 that's, you know, a media access where one media person -- and
17 you'd have four chairs that would allow for it to be close
18 enough in that regard.

19 THE COURT: And then -- and then someone comes up and
20 says, I want to be the Democrat, or I want to be the Republican
21 or I want to be the Independent, your client gets to kick them
22 out?

23 MR. O'MARA: You would -- well, no, you would not kick
24 that person out, but you could move them and rotate them in on
25 a basis that would allow for a public viewing.

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1 Look, I mean, we're -- I would -- I would love to tell
2 you and I would -- I would make the argument today that it has
3 to be open to the public and that the Registrar of Voters has
4 to make accommodations so that it is open to the public so that
5 anyone that comes in can do that, but I acknowledge that
6 there's going to be an argument probably that says we cannot do
7 that because of the COVID restrictions put in place and then
8 based on --

9 THE COURT: I don't mean to be facetious, but you're
10 asking me for extraordinary injunctive relief that has to be
11 narrowly tailored and as we're walking through this, it occurs
12 to me that you're forcing me to get way down deep in the weeds
13 and then we're going to be right back here if I put something
14 in place when two other people claim they're the public and
15 they want to watch and all of a sudden we've got them on a --
16 you know, I've got to alter it again and again and again. I --
17 anyhow, we're getting far afield on that.

18 Turn to the issue of Ms. Stokke -- I don't know if I
19 mispronounced her name, how do you pronounce it, Stokke or
20 Stokke?

21 MR. O'MARA: Yes.

22 You want me to start, Your Honor.

23 THE COURT: Well, yeah, I guess the question is, I
24 want to make sure we're clear, you're not asking me to stop the
25 defendants from counting ballots --

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1 MR. O'MARA: That's correct.

2 THE COURT: -- right?

3 MR. O'MARA: We're not asking you to stop the
4 Registrar of Voters to count ballots. What we're asking you to
5 do today is to stop them from using the Agilis machine to
6 verify the signatures during that process. So, as -- as the
7 Secretary of State put in her declaration, they're saying that
8 70 percent of them are already going to have to go through the
9 process anyway, so there's only 30 percent. So, we're only
10 asking you to set aside -- well, to make sure that -- that the
11 Agilis machine is not used any further as we move forward, to
12 just keep the status quo of making sure the statute is
13 enforced. And, so --

14 THE COURT: Okay. So let me ask -- you're fine, and
15 again, I apologize for interrupting, and my court reporter is
16 going to hate me, but I have to -- I want to keep this going
17 forward.

18 I want to make sure factually we're all on the same
19 page. Your complaint says that Ms. Stokke tried to vote on
20 November 3rd. Her affidavit says she tried to vote on
21 October 28th. Which is the correct date? Which am I to
22 believe.

23 MR. O'MARA: I would believe the declaration,
24 Your Honor.

25 THE COURT: Okay. So if she tried to vote on

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1 October 28th, why did she wait 8 days, until November 5th, to
2 do something about it? Why isn't that claim barred by laches
3 or something else?

4 MR. O'MARA: Yeah. So, well -- okay. So, as the
5 declaration says, Your Honor, on October 28th is when she found
6 out. She was told by the county clerk's office, or the county
7 registrar's office that they would get back to her in regards
8 to her ballot. They did not, so she drove back down there and
9 that's when Gloria went back in -- Mr. Gloria was there
10 involved in the (unintelligible).

11 To say that she is going to be barred by laches, an
12 elderly woman who has had her vote taken from her because of a
13 5-day period or even more, for laches, is a little bit
14 unreasonable.

15 THE COURT: Okay. But why -- why did she wait 7 days?

16 MR. O'MARA: I don't know the answer to that question,
17 but she -- obviously, she didn't wait to try to get her vote.
18 What happened was is on the 28th she wanted to vote. She tried
19 to go in and vote. They told her no. On the 29th she went
20 back in then because the Registrar of Voters did not go forward
21 with that. You have her on the 29th, which is a Thursday, you
22 have a holiday Friday, Saturday, Sunday, and then you have
23 what's going on. It takes a little while to get things going
24 and figuring out that what has happened to her was wrong. She
25 can't -- you can't say to an 80-year- -- or I don't know, I

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1 can't say what her name -- age is, but an elderly woman that,
2 you know, you tried everything you could, you went to the
3 registrar's office, you demanded that they give you the vote,
4 you didn't get the relief you want, you try to find out what's
5 happening, you finally get someone that's going to help you and
6 you come in 7 days later and the Court says, sorry, you know,
7 your vote doesn't mean anything to where we're going to allow
8 you to make the argument and laches applies. No --

9 THE COURT: Okay. Listen, and -- laches may be
10 overstating. I don't dispute that, but -- but the delay --
11 often in a TRO situation, when someone delays seeking relief,
12 that sort of factors into my consideration of immediate and
13 irreparable harm, if not the balance of hardships and equities.
14 So should I just ignore that 7-day delay?

15 MR. O'MARA: Well, I mean, I -- obviously, you can't
16 ignore any facts, I'm not asking the Court to do that, but you
17 have to take that into context of what we have here. We have a
18 citizen of Nevada who has put her trust in a system that has
19 been enforced, or that she believes is being run properly by
20 the Secretary of State's Office and the Registrar of Voters
21 Office and she -- she believes that they are following the law,
22 that they're requiring the proper (unintelligible). And then
23 she goes in and she finds out that her vote is not counted.
24 And then she finds out that there is something wrong with the
25 system. I mean, they're going to make an argument that she

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1 doesn't even know about the fact that there's an argument about
2 the Agilis machine, she probably doesn't even know that the
3 Agilis machine is being used instead of what we believe to be
4 the right method. She has her faith in the elections officials
5 and the -- what those elections officials do, they don't do
6 anything for her except for tell her that's -- you're not going
7 to be able to vote because someone else did it for you. And,
8 so --

9 THE COURT: Well, that's -- that's not what the
10 affidavit that the -- the defendants filed an affidavit -- or
11 the report says that they offered her, if she would fill out an
12 affidavit basically saying, you know, this isn't my original --
13 that vote wasn't mine and they would let her do a provisional
14 ballot and she said no.

15 MR. O'MARA: The provisional ballot does not include
16 every single election. The provisional ballot is basically --
17 that still takes away her First Amendment right, or her right
18 to vote. The provisional ballot is only used when -- when you
19 don't have the proper mechanisms in place for your
20 registration. She registered, she went to go vote, and she was
21 denied the right to vote for every candidate that she is
22 entitled to under the ballot. So to --

23 THE COURT: But if -- if it was determined that her
24 signature on the original ballot was improper, then they would
25 have counted the provisional ballot; correct?

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1 MR. O'MARA: I'm sorry, Your Honor, I did not hear
2 your question.

3 THE COURT: I'm sorry. I'm concerned about the
4 provisional ballot here. What I understood the situation to be
5 was she raised the issue with Mr. Gloria saying, hey, somebody
6 used my name or signature. Mr. Gloria said fill out,
7 basically, this affidavit saying that that original ballot was
8 not your signature, we'll let you cast a provisional ballot and
9 in the event it turns out you're right, somebody forged your
10 name, we will then count your provisional ballot. Why is that
11 not an adequate remedy?

12 MR. O'MARA: Because the provisional -- first of all,
13 if you look at her declaration, it says that they said that she
14 had to attest that her roommate possibly stole the ballot,
15 which she has no -- she can't do and, so, she felt very
16 pressured by Mr. Gloria to sign that. Second, a provisional
17 ballot is not a ballot. The ballot has been taken from her.
18 She doesn't get to vote her ballot. The provisional ballot
19 would only allow her for some, but not all, and many --
20 basically not the majority of the elections that she wanted to
21 vote for. It's not an adequate remedy. The adequate remedy
22 would have been -- instead of having the Agilis machine move
23 forward, it would have been to have the actual clerk or the
24 employee of the clerk check the signature in the first place
25 and then go through the proper procedures, but that didn't

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1 happen.

2 THE COURT: All right. So, what in her affidavit says
3 that her problem was caused by the Agilis machine? And I know
4 the answer is nothing because it's not there.

5 MR. O'MARA: Right.

6 THE COURT: And I get it, maybe she doesn't know.
7 What evidence do you have that the Agilis machine caused this
8 problem that's in front of me?

9 MR. O'MARA: Well, I don't believe we have any
10 evidence to show that her machine went through the proper
11 procedures.

12 THE COURT: Then -- then why do I grant extraordinary
13 relief if you don't have evidence to support a likelihood of
14 success on the merits?

15 MR. O'MARA: Because the likelihood of success on the
16 merits is to show that the Agilis machine was not to be used at
17 all, and they weren't, and it was used and, so, therefore our
18 allegation was is that it did go through the Agilis machine.
19 And I think it's based upon. . . I -- I -- you know, I can't
20 say that, Your Honor, because my understanding was is that she
21 was told that they looked at the machine, the signature, and
22 the printout, which I believe there is a printout of the Agilis
23 machine signature that they would be able to compare and show
24 that that's why it went through, but I --

25 THE COURT: So -- so somebody -- so somebody, after

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1 she points out the error, somebody compared that signature to
2 hers, and it was identical. That's the human interaction
3 you're requested. So that happened, so regardless of --

4 MR. O'MARA: After. After.

5 THE COURT: Okay. But cured it on the back end.
6 What's there to fix now? It was cured on the back end and she
7 was given the chance to do a provisional ballot. Isn't the
8 system working the way you want it to when --

9 MR. O'MARA: No.

10 THE COURT: -- when you want human inter- -- you
11 wanted human interaction, you got it. They compared it, it was
12 identical. You may disagree with that, but if the Agilis
13 machine didn't exist, you'd still have somebody comparing the
14 signature and coming to the same conclusion.

15 MR. O'MARA: No, because her ballot has already been
16 stolen because it was allowed to be counted improperly because
17 (unintelligible).

18 THE COURT: Excuse me. Is there a remedy for that.

19 MR. O'MARA: If I could step back for just a second,
20 Your Honor, and try to frame it for you so that we're not going
21 down a rabbit hole.

22 The method in which the Agilis machine is used, okay,
23 is that the machine pumps everything through and if it doesn't
24 match, it pumps it out, but 30 percent of those get forwarded.
25 And our allegation is that her ballot went through, okay, and

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1 it -- through the Agilis machine and it was not flagged. Okay?
2 It was then counted, and then her ballot was taken from her.
3 Because of the improper use of the Agilis machine, we have a
4 vote and a disenfranchisement of my client. That's -- point
5 blank right there that is a problem with the Agilis machine and
6 the ability of having people's votes taken in her case. To
7 connect --

8 THE COURT: Okay. Now you --

9 MR. O'MARA: Then to come back and, say, oh, we came
10 back and we looked at it but we're going to cure you by giving
11 you a provisional but we still have to show that, you know,
12 your ballot wasn't counted, doesn't get to the remedy of what
13 happened by using an improper machine and therefore --

14 THE COURT: Okay. All right. So if there was no
15 Agilis machine, a human being would have taken the signature on
16 the ballot, compared it to the signature on the paper and come
17 up with the same conclusion that they have right now.

18 MR. O'MARA: Well, we don't know that.

19 THE COURT: How would -- you had a human being look at
20 it and they said it looks to be the same thing, at least that's
21 the report from the defendants. It says we went back and
22 looked and it -- compared and it was identical.

23 MR. O'MARA: Okay. And did they -- did they
24 produce -- I don't believe that that was produced, the
25 signatures were produced. Were they not?

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1 THE COURT: I don't recall seeing them right now,
2 but. . . I just got to deal with the information and evidence I
3 have in front of me and that's their response.

4 MR. O'MARA: I -- I understand. And I -- is this the
5 Secretary of State's response, Your Honor?

6 THE COURT: I believe so. We'll get to them in a few
7 minutes and see.

8 (Brief pause in proceedings).

9 THE COURT: Yeah, in the -- actually, I'm looking at
10 the Memorandum of Interview, this is ECF Number 19 at Page 52.

11 MR. O'MARA: I'm not sure if I have that yet, so let
12 me just please go -- give me a second and I can bring that up.

13 THE COURT: Sure. She -- she apparently told the
14 Secretary of State's investigator that she went to the
15 elections headquarters to address the matter, spoke directly to
16 Joe Gloria. Gloria told her the signature on the ballot
17 received on October 14th, 2020, matched the signature she had
18 on file with the registrar's office. My recollection is, and
19 maybe this was -- well, I don't know.

20 MR. O'MARA: That is made by the declaration of the
21 Secretary of State's Office, Your Honor, and, so, I don't
22 understand where that would -- if the clerk and the -- or the
23 employee needs to be able to be the one to look at it. So.
24 There's nothing in there to say it wasn't matched up with the
25 signature based on the Agilis machine.

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1 THE COURT: Okay. I cut you off. Anything else?

2 MR. O'MARA: Well, you know, Your Honor, I think that
3 I want to address the one thing in regards to the Democratic
4 party claim that the machine is allowed under the statute.

5 Interestingly, the Democratic party only puts in
6 partial statutory language in regards to the use of the
7 machine. As the Court will see from N.R.- -- in the N.R.S.
8 statute allows for procedures and policies to be put into
9 place. It also restricts and precludes the Registrar of Voters
10 from putting in any policy or procedure that conflicts with
11 other statutory alignment. And it's interesting that the
12 Democratic party doesn't put that in there where it says
13 it's -- precludes any conflict -- they can't be in conflict
14 with any other provision. And when you look at the statute, it
15 specifically says "shall." It specifically says that the
16 registrar, in this case what he considers the clerk, or his
17 employee, must check the ballot and the signature -- I'm sorry,
18 must check the signature. When the Agilis machine gets put
19 through and there's not a -- when there's not a determination
20 by the clerk or the Registrar of Voters or some employee, then
21 it's not following the standards and therefore not only is my
22 client, Ms. Stokke, harmed, but so is my client Merchant for
23 Congress and Rodimer for Congress who they have an interest in
24 this to make sure that the election is properly set forth.
25 There's no policies and procedures that are written that I am

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1 aware of in regards to how the machine is going to be used,
2 whether or not it -- how it is checking it, whether it's being
3 used based upon the manufacture's suggested usage or if it's
4 been monitored or if it's been changed or if it's been changed
5 throughout the election. We don't run elections in Nevada, and
6 we have historically had it to where Nevada law has
7 specifically said, in regulations, that have to be promulgated
8 by the Nevada Secretary of State. In this case, we don't have
9 any written policies or procedures for the public to know or
10 anybody to understand, and if you don't allow everybody to
11 understand what the rules of the election are and then you just
12 implement something that is not entitled under the law, such as
13 the Agilis machine, then the act of using the machine is a
14 futile act that is not authorized by law. It cannot occur to
15 happen. And, so, therefore, that's why we're here today to ask
16 you to push pause, let us -- enter a Temporary Restraining
17 Order to say you don't have to stop counting, but you need to
18 stop using the Agilis machine, start verifying through the
19 proper procedure under the statute, which is N.R.S. 293.8874,
20 and the procedure is that the clerk or employee shall check the
21 signature and if the clerk and signature, then they go to
22 whether two employees [sic]. That's a human interaction that
23 has to go before the vote is actually counted. That's the
24 processing of the votes. So --

25 THE COURT: Let me -- let me interrupt and ask you

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1 this: My understanding is that state district Judge James
2 Wilson, in Carson City, had an Evidentiary Hearing on this
3 issue, not necessarily your client's, but looked at the Agilis
4 system and made a determination that if it was not used and
5 they had to look at each one of these by hand or by eyeball,
6 that it could not be completed by -- a canvass could not be
7 completed in the statute time frame. So what you're asking me
8 to do is to do something that Judge Wilson has already found
9 can't be done under the statutory time frame.

10 MR. O'MARA: Well, in order --

11 THE COURT: Tell me, why isn't that a hardship that
12 favors the state more than your client?

13 MR. O'MARA: Okay. So, Your Honor, to answer that
14 question, it is my understanding that while Mr. Gloria
15 testified that he could not get it done, he then published and
16 provided information of when he was going to actually do the
17 verification and provided a mere approximately 8 hours over the
18 next period of time to actually do the signature verifications.
19 So, it wasn't that they couldn't get it done, they just weren't
20 going to spend time on it throughout the process. It would
21 only allow for 8 hours over the next approximate 2-week period
22 to do verifications, or -- or at least a minimum of 8 hours
23 from the time of the hearing to the Election Day. So -- so to
24 say that there is going to be a harm, they can get it done.
25 We're asking them to segregate the ballots in regards to the

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1 ones that have already ran through the Agilis machine and have
2 not been viewed by a member of his staff or him in the first
3 place, and then the ones that he's processing, which I believe
4 would only be an additional 30 percent of what they have left,
5 will then -- if they choose to, they can run it, you know,
6 through the -- well, they will -- they will then be able to use
7 the human aspect as required by the statute to verify
8 signatures and keep the vote going.

9 THE COURT: So, just so I'm clear, does -- I wasn't
10 quite sure I followed. You're suggesting that Mr. Gloria said
11 they could get this all done in 8 hours?

12 MR. O'MARA: No. No. He said that they couldn't get
13 it done but then told -- then provided information to the
14 public that said he was only going to allow for an 8-hour
15 period over in the next -- I -- I -- I said 2 weeks,
16 Your Honor, and I can't make -- then I corrected myself because
17 I cannot make that assertion, but I believe it was either that,
18 or it was over a period of the next period of days before the
19 election that they were going to --

20 THE COURT: So let me ask it a different way. What do
21 you believe -- how long do you think it will take for them to
22 finish the task if I tell them you have to review all these by
23 eyeball?

24 MR. O'MARA: Well, it's my understanding that they
25 would be able to be done by tomorrow -- or Saturday. And, so,

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1 if they have an additional 30 percent out of the hundred that
2 they have to do, then they're only looking at maybe Sunday or
3 early Monday at the latest.

4 THE COURT: So you're saying I should order them to
5 review -- whatever remaining ballots there are, review those by
6 eyeball and not use the Agilis machine?

7 MR. O'MARA: Right. What I'm asking you to do is to
8 have them follow the statutory provisions that require the
9 clerk to first verify -- to require the clerk, or his employee,
10 to check the signature used on the ballot against the signature
11 of the voter and go through the proper process set forth in
12 293.8874, and then I would like you to have that -- in regards
13 to the other ones that have not been -- that have gone through
14 the Agilis machine already, because they -- we believe that
15 those are also invalid in regards to not going through the
16 system properly. Those should just be segregated, and then we
17 can come back Monday or Tuesday and have an Evidentiary Hearing
18 to determine what to do with those ballots because they have
19 been processed without the clerk or the employee checking the
20 signature.

21 THE COURT: How long is it going to take, in your
22 estimation, for the defendants to eyeball all of the remaining
23 ballots?

24 MR. O'MARA: So, I -- it's my understanding that
25 they -- that the Registrar of Voters believes that he will be

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1 done counting by tomorrow afternoon. So if you take 30 percent
2 additional, then -- from today, then there's less than
3 36 hours, so it would be, like, Sunday or Monday morning.

4 THE COURT: Okay. If we require them to go back and
5 eyeball all of them that you're requesting, next week, how long
6 is that going to take?

7 MR. O'MARA: Well, that would take significantly a lot
8 more time, Your Honor. And there's 30 percent, so you would
9 have to take into consideration how much time they spent in
10 regards to counting those ballots, and I don't know the answer
11 to that.

12 THE COURT: And -- and do you have any reason to think
13 that would not take it beyond the statutory canvass period?

14 MR. O'MARA: I don't have any -- I believe that if
15 they were to sit down and do the 30 percent of the ones that
16 have not been through the Agilis machine, and we don't -- we're
17 only talking about mail ballots, we're not talking about
18 ballots that were --

19 THE COURT: That's not what I'm asking because you
20 asked -- you said you want them to go back and do the eyeball
21 of all of them that went through -- the 30 percent of all of
22 them that went through the Agilis machine next week after the
23 Evidentiary Hearing --

24 MR. O'MARA: Right.

25 THE COURT: -- that process would take beyond the

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1 statutory mandatory canvass period; right?

2 MR. O'MARA: I don't know that to be true, Your Honor,
3 but I would imagine that that's what the Registrar of Voters is
4 going to argue but if they are -- if they finish counting and
5 they have the staff, they should immediately go to close that.
6 But you can't state to the American people, well, really, the
7 Nevada citizens that we are not going to go back because of the
8 time frame and try to make sure that this election was actually
9 conducted under the statutes implemented by AB 4 and then
10 codified in the statutes that specifically say that a clerk or
11 employee shall check the signatures. It is imperative that
12 Nevadans know that it was not a deal between the Secretary of
13 State's Office and Clark County that has a different system for
14 Clark County to verify signatures than any other county, that
15 it's not within the statutory provision and then, say, well,
16 sorry, because we did this wrong and we ran out of time, we're
17 not going to try to redo it properly. Nevadans deserve to have
18 their elections conducted under the law. The law
19 specifically states --

20 THE COURT: I understand.

21 MR. O'MARA: -- clerk or employee.

22 THE COURT: I understand. All right. I -- anything
23 further before I turn to the plaintiff -- or to the defendants?

24 MR. O'MARA: No -- I mean, Your Honor, I would make
25 other arguments but if you have other questions, then I can

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1 respond to their arguments after that.

2 THE COURT: Yeah, that's got most of them. Let me
3 give them a chance to speak and then we'll come back to you.

4 MR. O'MARA: Thank you, Your Honor.

5 THE COURT: All right. You're welcome.

6 Mr. Newby or Ms. Miller, I don't know who's going to
7 go first. Mr. Newby I'll turn to you to see if you want to go
8 first.

9 MR. NEWBY: I'm happy to go first, Your Honor. Again,
10 for the record, Craig Newby, Deputy Solicitor General for the
11 State of Nevada representing Secretary Cegavske.

12 We're here before this court on an emergency basis
13 this afternoon as ballots are being counted in Clark County
14 without evidence justifying any, any supportable argument that
15 this lawsuit could succeed on the merits.

16 And I'm going to try to go in the order that
17 plaintiffs addressed their argument. And what we have first
18 with regards to the -- the public access to vote counting is an
19 issue where one of the plaintiffs, interpreting his declaration
20 in the guise most favorable to him, was denied potentially --
21 it's uncertain whether he was denied less than 90 minutes of
22 observation of ballot counting between the early
23 morning/evening hours of November 4th. According to his
24 declaration, everyone was told to leave. And on that basis,
25 plaintiffs seek to impose a nebulous, undefined,

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1 no-further-than-6-feet-away distance, ignoring commonly known
2 CDC requirements on social distancing that we've all been
3 forced to live with, including today in terms of arguing this
4 hearing virtually rather than in person before this Court,
5 without any sort of identification of what the limits are or
6 aren't such that this Court would not be placed in the
7 situation should, hypothetically speaking, Mr. -- plaintiffs'
8 relief and an Evidentiary Hearing is granted and Nevada becomes
9 the epicenter of the universe and we do a re-examination of
10 personal signatures of ballots on mail ballots, over the next
11 week, 2 weeks, 3 weeks, I can't speak to how long, I would have
12 to defer to Clark County and a registrar for precise
13 information on how long that would take, we have daily or
14 perhaps hourly appearances before this Court to resolve can
15 this person stand here, can this person stand there, can
16 that -- does that person (unintelligible) that does this person
17 not require --

18 THE COURT: I'm not anxious to go back to the days of
19 the hanging chad, if that's what you're getting to.

20 MR. NEWBY: No, I'm not. I wasn't going to bring up
21 the hanging chad, but I think what Justice Kavanaugh's
22 concurrence that was referred to during the beginning of this
23 argument, and more generally to the Supreme Court's principle
24 in *Purcell*, expressed in *Purcell* in terms of whether federal
25 district courts should step in and create 11th hour changes to

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1 procedures warrants consideration, and that can be more true, I
2 think, in this -- in the context of both the public access
3 issue and this case overall given that right now, following a
4 day-long Evidentiary Hearing that included this plaintiff's
5 counsel, included parties who are equally positioned in terms
6 of their views in terms of how they feel about access for
7 counting, how they feel regarding Clark County's Agilis
8 machine, and all the other issues that are raised in this case
9 before this Court, was adjudicated in a day-long Evidentiary
10 Hearing up in Carson City before Judge Wilson and is currently
11 pending on an expedited basis before the Nevada Supreme Court.

12 THE COURT: And was that case resolved? Because you
13 submitted a stipulation, has that been resolved and dismissed
14 or is that still going on?

15 MR. NEWBY: I'm going to defer to the DNC on that one.
16 I know DNC is a party to that case as an intervenor, and it is
17 my understanding that their position is that they will not sign
18 that stipulation.

19 So I can't speak for them directly. From what I've
20 heard, they haven't signed it yet and in light of the same case
21 being brought in federal court, I don't know why the Nevada
22 Supreme Court would enforce such a stipulation. I would think
23 they would want to -- to the extent these Nevada statutory
24 questions need to be adjudicated with regards to the 2020
25 election, I would argue, and I think the Nevada Supreme Court

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1 would agree, that they are in the best position and the final
2 authority on what Nevada state law is rather than this court,
3 respectfully. So that's -- I mean, that's a general issue in
4 terms of where we are in terms of this public access. Nothing
5 defined about it. And it's not -- it's not the secretary's
6 burden, and it's certainly not Clark County's burden at this
7 hearing to prove -- to disprove the appropriateness of
8 injunctive relief here. That's plaintiffs' burden. They have
9 been aware of these issues. (Unintelligible) regarding these
10 issues. Yet, here we are with the evidence before this Court,
11 and I submit it's not that much.

12 And, so, I don't have anything further I want to
13 address with regards to the public observation questions other
14 than to note that opposing counsel keeps using the word
15 meaningful. And it -- I haven't seen a citation to statute
16 that quotes meaningful. I haven't seen it. It's not there.
17 And it's asking this Court to write what the statute should
18 mean, to write whether it should be 4 feet away, 6 feet away.
19 Three people in musical chairs, or five people in chairs, or
20 this world during COVID, or not during COVID, and that's --
21 that's the legislature's job and they undertook it when they
22 passed Assembly Bill 4 in the context of COVID this summer. So
23 if there's no questions on the public observation, I would move
24 on to the -- I guess the Agilis machine arguments pertaining to
25 Ms. Stokke and overall.

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1 THE COURT: Okay.

2 MR. NEWBY: Okay. And I don't want to overdo this,
3 but with regards to the Agilis machine, the issue has been out
4 there for several months. It has not been a secret. It is my
5 understanding from the legislative record that's available on
6 videotape that it's no surprise that Clark County, as a large,
7 urban county within Nevada, would use a different system to
8 attempt to verify signatures on mail ballots than one of our
9 more rural counties. That is part of federalism and being
10 logical and there's a rational basis for that, obviously,
11 because there's a lot more people in Clark County. And I think
12 this Court -- plaintiffs attempt to address this in part by
13 responding to the DNC argument, but they don't respond to what
14 is set forth in our briefing here today, which, on Page 4,
15 starting at Line 14, which I'm sure the Court has read,
16 there -- there are two adjacent sections of Assembly Bill 4,
17 Section 22(2)(a), which specifically allows a county registrar,
18 such as Clark County, to authorize "mail ballots to be
19 processed and counted by electronic means" followed by Section
20 23, which does not specify that the clerk must do this by hand,
21 that the clerk must do this by his own eyeball, or that the
22 clerk must do this by standing adjacent to a machine, or that
23 the clerk is prohibited from using a machine. It says nothing
24 of that sort. It says a fair reading of the adjacent sections
25 of the statute, a plain reading of that, a reasonable reading

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1 of that under these circumstances is, of course a county, if
2 they make that decision, is entitled to do so. And I'm not
3 going to attempt to revisit on this emergency basis what was
4 addressed by a full-day Evidentiary Hearing in state court in
5 terms of assessing the merits that -- the alleged merits of the
6 Agilis system, Clark County's best positioned to that, but it
7 is a valid system, there is nothing under statute that
8 prohibits it, and there's been nothing proffered here by
9 plaintiffs seeking extraordinary relief demonstrate --
10 providing facts to this Court that the Agilis machine is
11 unreliable. Instead, what we have is the declaration of
12 Ms. Stokke, who -- who had a mail ballot voted. It was
13 determined by Mr. Gloria that it was his [sic] signature. That
14 was the representation of that conversation made by Ms. Stokke.
15 As the Court noted, that was on Page 52 of the declaration that
16 was filed before this. It was made to an investigator. It was
17 made -- it was made by a party opponent in this case. It's an
18 admission by Ms. Stokke that that's -- that's what she was told
19 by Mr. Gloria, that she -- that the signature on file matched.
20 I will leave it to Clark County to determine whether Mr. Gloria
21 actually looked at the signature before telling her it was her
22 signature, but I strongly suspect that is the case.

23 And then her declaration ignores what the Secretary of
24 State's investigator did independently, which is asking for
25 information, asking for something to be declared, and offering

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1 to follow -- follow up with questions and then it was left
2 behind and we get a week later here. And while I appreciate
3 plaintiffs' effort to disentangle Ms. Stokke's role in
4 justification of timing from their justification for the
5 motion, but if she decided she wasn't going to do something
6 about this and this Agilis machine issue was known and
7 available, then there's no reason in the world why they
8 couldn't have proceeded sooner. And there's no evidence that
9 there's a missing signature or that the Agilis system failed,
10 and on that basis -- on that non-existent, factual basis they
11 want to shut down the Clark County continued counting the
12 election timely. It's untimely. There's no basis for that and
13 there's certainly no basis in fact or evidence or whatever it
14 is that's being discussed about reviewing the other signatures
15 sometime next week. There's just no basis for it. There's no
16 one that has asserted standing in this case. And the standing
17 argument's addressed in more detail by the DNC in their
18 briefing and I'll defer to them on that argument, but the state
19 would certainly submit there's no standing from anyone in this
20 case regarding that -- regarding the Agilis machine and. . .
21 In short, this is their burden. This is -- this is a
22 serious -- this is a serious matter. We're talking about the
23 integrity of Nevada's elections and -- and a lawsuit is
24 required in obtaining extraordinary relief, like what's being
25 asked of this Court requires evidence, not just talking points,

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1 or allegations. It requires facts, and we don't have any here.
2 And that alone means I should stop, address any questions that
3 the Court has, and if there are none, the Court should deny the
4 motion.

5 Thank you.

6 THE COURT: I'm just checking my notes to see if
7 you've covered all the questions I had. Bear with me for just
8 a minute.

9 (Brief pause in proceedings).

10 THE COURT: Is -- and I don't know if I should address
11 the question to you or Ms. Miller on behalf of Mr. Gloria, this
12 is more of a technical question on the Agilis system, whether
13 -- what's the procedure for verifying a signature with the
14 system and if the system -- if Agilis says it doesn't match, is
15 there a human confirmation of that, how does that all work. Is
16 that something you can address or is that something for
17 Ms. Miller?

18 MR. NEWBY: That is something that would be best
19 addressed by Ms. Miller on behalf of Clark County.

20 THE COURT: All right. She can thank you for throwing
21 her under the bus on that one.

22 MR. NEWBY: Not that I'm. . .

23 THE COURT: All right. Thank you, Mr. Newby.

24 Ms. Miller.

25 MS. MILLER: Thank you, Your Honor.

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1 I first have to apologize. The county isn't open on
2 Fridays for COVID reasons and I was having technical
3 difficulties this morning and it was all I could do to get my
4 Notice of Appearance entered and I consider that a moral
5 victory, but I'm sorry I don't have a formal document on file.
6 If I had more time and this goes to a Preliminary Hearing, I
7 would proffer that this is what are the facts:

8 The statute, N.R.S. 293.- -- 293B.353 says that the
9 Clark County clerk shall -- or the Clark County clerk shall
10 allow members of the public to observe the counting of the
11 ballots as long as they don't interfere with the counting --
12 the counting process. And in Clark County, we've had that
13 setup for years. The tabulation room is a big glass enclosed
14 room with plenty of room outside for observers. They're not
15 6 feet next to them because they'd have to be inside that glass
16 enclosure and cheek by jowl with the tabulation machine
17 operators and that just won't work, even in a non-COVID era,
18 but there's plenty of room outside the windows, and as of
19 2:30 p.m. today, we have not had to turn away any observers for
20 lack of room. There's easily room for 30, 35 observers. And
21 they've been there every day that we've been tabulating and no
22 one has complained.

23 What happened with Mr. Prudhome is a little bit
24 different. He showed up in the middle of the night. No
25 problem there. We were tabulating. Went into the observer's

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1 area. Wanted to record, and he was told he couldn't record,
2 that was against the statute, only the media were. He didn't
3 provide his media credentials, but he was shown to the media
4 area, which is not as close as the observers area. So he went
5 back to the observers area with his recording device and quite
6 frankly the observers weren't having it. They were getting on
7 his case for trying to game the system and it got contentious
8 and Mr. Prudhome was asked to leave, really, for his own
9 safety. He is more than welcome back as an observer at any
10 time if he doesn't disrupt the system.

11 With respect to Ms. Stokke, regardless of whether
12 her -- the initial mailed-in ballot in question was read by the
13 Agilis machine, it was her signature, and the signature on the
14 ballot envelope was manually reviewed by Mr. Gloria and two
15 trained supervisors, and in their trained opinion, they believe
16 it to be a match with her signatures on file. Regardless, if
17 she had been willing to sign an affidavit that she did not vote
18 that ballot and that was not her signature, she would have been
19 given a full provisional ballot, and she chose not to do that.
20 So, the Agilis machine did not have any -- any involvement in
21 what happened to Ms. -- Ms. Stokke at all because she -- she
22 did get her ballot envelope signature reviewed by three trained
23 supervisors, and it more that meets with the statutory
24 requirements for met -- for reviewing signatures.

25 I would point out that AB 4 does not require a manual

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1 review of the signatures. It does say that the Registrar of
2 Voters shall review the signatures, but it doesn't say it can't
3 be done electronically, and, in fact, AB 4 says it -- ballots
4 can be processed and counted electronically. What the Agilis
5 machine does, in Clark County, are three different actions:

6 First, the ballot envelopes are run through there.
7 The signatures are captured electronically and put into the
8 Clark County system, and there's a tracking device so that we
9 can acknowledge and track that we've got this ballot in our --
10 in our office as in it's been read by the Agilis machine.

11 It goes through a second time to see if the quality of
12 the signature in our database provides a match to the signature
13 on the envelope, and that happens about 30 percent of the time.
14 And if it doesn't match by the Agilis machine, those are all
15 reviewed by non- -- bipartisan panel's signature verifiers
16 manually looking at the ballot envelopes to the ballot
17 signatures that we have on file. So that's a more
18 time-consuming process just because you have to pull up all the
19 files.

20 And then the third -- and then the ballot envelopes
21 are run through the Agilis machine a third time to make sure
22 that they've been accurately numbered and tracked and those
23 signatures -- those ballot envelopes are tracked through our
24 system until the envelopes are separated from the ballots.

25 So I just --

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1 THE COURT: Hang on. Let me ask you to pause there
2 for a second.

3 MS. MILLER: Sure.

4 THE COURT: I want to make sure my notes are accurate
5 on what you've just described. Give me a second here.

6 (Brief pause in proceedings).

7 THE COURT: So, on this sort of second phase, you're
8 running through a second time to see if the quality of the
9 signature in your database matches the signature on the
10 envelope and you said that happens about 30 percent of the
11 time. What happens 30 percent of the time, 30 percent of them
12 are run through that test or it says 30 percent of them don't
13 work --

14 MS. MILLER: No.

15 THE COURT: -- don't match?

16 MS. MILLER: 30 percent of them are a match, the
17 quality of the signature on the envelope and the quality of the
18 signature in our database match up so that this -- this
19 machine, which is similar to machines that are used in banks to
20 verify signatures, say that the signature on the envelope and
21 the signature in our ballot -- in our database matches.

22 THE COURT: Okay. So, if the 70 percent then don't
23 match, those 70 percent then are hand reviewed?

24 MS. MILLER: That's correct.

25 THE COURT: Okay. I'm with you. I apologize for

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1 interrupting you. Go ahead now. Thank you.

2 MS. MILLER: I just don't see, given those facts --
3 and those facts were all put into evidence at the earlier
4 hearing about the Agilis machine -- that these plaintiffs have
5 shown that they have had any harm related to the Registrar of
6 Voters viewing policy at the tabulation center or the use of
7 the Agilis machine. They just haven't established a harm to
8 them, and certainly not the candidates who are plaintiffs.

9 THE COURT: All right. Anything further?

10 MS. MILLER: I just would join into the responses of
11 both the Secretary of State and the intervenors for the record.

12 THE COURT: Okay. Let me ask you a factual question,
13 if I can. Bear with me here.

14 (Brief pause in proceedings).

15 THE COURT: I apologize. Just bear with me here. I'm
16 looking at my notes and some papers.

17 (Brief pause in proceedings).

18 THE COURT: Okay. Yeah. I'm looking at state
19 district George -- I'm sorry, state district Judge Wilson's
20 findings and conclusions in the *Kraus vs. Cegavske* case dated
21 October 29th, on Page 4, he said that Registrar Gloria opined
22 in that case that if Clark County could not continue using
23 Agilis, the county could not meet the canvass deadline which is
24 November 15th, and Judge Wilson found that if Clark County's
25 not allowed to continue using it, the county will not meet the

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1 canvass deadline.

2 Do you agree with that finding by Judge Wilson?

3 MS. MILLER: That was an accurate finding based on the
4 information he was given then in testimony last week.

5 Obviously, a lot of those ballot envelopes have been read
6 between last Wednesday and today, but we still do have 63,000
7 that we're processing. 241 more ballots came in the mail
8 today. They have a few more days to get ballots -- ballots to
9 come in the mail, so the effect -- to be frank with the Court
10 as I have a duty to, the effect wouldn't be as catastrophic if
11 you entered it today, but it would still delay our processing.

12 THE COURT: So you said you still have, you believe,
13 approximately 67- -- 63,000 ballots that still have to be
14 counted in Clark County?

15 MS. MILLER: That still have to be processed before
16 they can be counted, yes.

17 THE COURT: Oh, okay.

18 MS. MILLER: Those are mail ballots. There's some
19 other electronic ballots, but I think we're only talking about
20 mail ballots for this purpose.

21 THE COURT: Okay.

22 All right. Thank you, Ms. Miller. I interrupted you.
23 Anything further?

24 MS. MILLER: No -- no, Your Honor.

25 THE COURT: Thank you.

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1 Let me turn to Mr. Bravo or one of your co-counsel on
2 behalf of the DNC.

3 MR. DEVANEY: Your Honor, this is John Devaney, I'll
4 be speaking for the DNC with the Court's permission.

5 THE COURT: Absolutely.

6 MR. DEVANEY: Thank you, Your Honor. I think I'll
7 begin by answering the question that you posed and I've been
8 reluctant to jump in and interfere, but the state court action
9 is continuing, so just to be very clear about that. It's still
10 pending in the Supreme Court of Nevada. The
11 plaintiffs/appellants in that case just yesterday requested for
12 a briefing schedule, a postponement for the briefing schedule
13 that has briefs due approximately a week from now, and the case
14 is not resolved. We expect that that case will proceed and
15 those state law issues remain before the Supreme Court of
16 Nevada.

17 THE COURT: So I've got this stip- -- I've got the
18 stipulation and order for dismissal that's signed at least by
19 Ms. Miller and the attorney for the petitioners in that case,
20 obviously your client hasn't signed off on it and I don't see
21 Secretary of State's Cegavske's signature on it. Are you
22 saying that stipulation didn't go forward?

23 MS. MILLER: It did not include a signature from our
24 client, the DNC, or the Nevada Democratic state party and, so,
25 as of this juncture it remains pending and our expectation is

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1 that we'll go ahead and brief that appeal and present those
2 issues of state law to the Supreme Court.

3 THE COURT: Okay. Go ahead. I interrupted you.

4 MR. DEVANEY: And, Your Honor, of course that has a
5 direct bearing on the issues before you. I'm sure the Court is
6 well aware of the Truman Doctrine and Pullman abstention and
7 that doctrine, of course, establishes that when resolution of a
8 question of state law by a state court will resolve a matter
9 pending before a federal court, the federal court should
10 abstain. And the issues teed up in the Supreme Court
11 proceeding bear directly on the issues before Your Honor. They
12 involve, one's the lawfulness of using Agilis and the
13 discretion of the registrar to use that machine, and two, the
14 extent to which a county, in this case Clark County, is
15 required to provide public observation of the counting of
16 ballots. And those statutes -- state statutory questions are
17 before the court, the Supreme Court that is, and therefore
18 Pullman applies with full force in this instance. So I just
19 thought I'd begin with that, Your Honor, since you had asked
20 about where that state court proceeding stands.

21 THE COURT: Thank you. I appreciate that.

22 MR. DEVANEY: And, Your Honor, I don't want to belabor
23 the points that have been made already, but there are a few
24 points that I really do want to emphasize. One is just the
25 extraordinary context of this case.

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1 The Agilis system was used in the June primary. It's
2 public knowledge that this system has been used. As
3 Judge Wilson found, this system is used by multiple
4 jurisdictions around the country, including very large cities
5 around the country. It's been proven to be reliable. And
6 people in Nevada have known, including plaintiffs' counsel,
7 that this machine has been in use for many months in Nevada,
8 and that it would be used in this election. And, you know,
9 here we are now, it is literally 2 days after election that
10 they filed their complaint -- 2 days after Election Day,
11 knowing for months that this system was being used and coming
12 in and asking the Court to stop use of the system. You know,
13 one -- one can just hear that story and understand the equities
14 that -- the equitable problems that raises. It cries out for
15 laches. It cries out for equitable estoppel. And the
16 disruption that would be created by stopping the use of this
17 machine, when, as Ms. Miller just mentioned, there's still
18 62,000, approximately, ballots that need to be processed. And
19 literally the whole country is looking at Nevada, and
20 Clark County in particular, and waiting for the election
21 results. And I don't know exactly how much delay would be
22 (unintelligible) from Agilis, but I know from the evidentiary
23 proceeding we had last week that it would be meaningful, it
24 would probably be days and days. I don't know if it would
25 compromise the canvassing deadline now, but there certainly

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1 would be delay, and it would create chaos and confusion. And
2 given the timing of this, where plaintiffs' counsel at least,
3 have known about the use of Agilis for months, it's just
4 extraordinary that they'd come in and even ask for this relief
5 knowing the chaos that would result from it. So I just wanted
6 to emphasize that very important context as we consider the
7 legal arguments that -- the claims that are before you.

8 And also then relatedly, it's just the fundamental
9 lack of evidence, the -- let's just pause for a moment and
10 think about what evidence is before you that would cause the
11 Court to stop the use of Agilis. It is a single declaration
12 from a single voter who doesn't even know if Agilis affected
13 her ability to vote. That's not established anywhere. And
14 we've heard the facts relating to her attempt to vote, which
15 are quite different from what were represented initially, where
16 she was given a chance to vote, she was given a chance to
17 submit a provisional ballot and she refused that opportunity
18 and it's just extraordinary that you would be asked to take the
19 leap from that flawed affidavit, the declaration, to shutting
20 down Agilis altogether and stopping, essentially, the counting
21 or processing of ballots in Clark County while the whole
22 country looks on. It's really just a remarkable leap that
23 you're being asked to make.

24 In addition to those problems, Your Honor, there is a
25 fundamental standing problem here. And you've read our briefs

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1 and I'm mindful of your comment earlier that we shouldn't
2 repeat what's in our briefs, but I do just want to briefly
3 emphasize that their theory here is vote dilution, that the
4 Agilis machine somehow causes more wrongful rejection of
5 ballots in Clark County than elsewhere in the state. First of
6 all, there's no proof of that. That's number one. But even if
7 there were vote dilution, it's well-established by the case law
8 cited in our brief, it's not a basis for standing. It's a form
9 of alleged harm that affects everybody in the state equally.
10 If there's dilution, then everybody's vote is diluted equally
11 across the state. And, so, that's why courts have consistently
12 found that a vote dilution based on fraud theory is
13 insufficient to confer standing and multiple cases have
14 resulted in courts finding a complete lack of standing based on
15 a vote dilution theory.

16 And then, Your Honor, the second standing problem that
17 plaintiffs have relates to their claim under the elections
18 clause. As I understand it, they're claiming that the use of
19 Agilis and perhaps even the registrar's decision on observation
20 somehow violates the legislative demands in Nevada and that the
21 registrar is usurping the authority of the legislature by
22 administering the election in this way. And, again,
23 Your Honor, there's significant case law establishing that --
24 that there is no standing, that they cannot stand in the shoes
25 of the legislature. It's only the legislature that would have

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1 standing to come in and claim that their power is being
2 usurped. Certainly these plaintiffs do not have that
3 authority, and I cite the Court to *Corman v. Torres* which makes
4 that proposition clear, as does *Lance v. Coffman*, a Supreme
5 Court case, and the standing deficiencies aren't remedied by
6 tacking on the two committee candidates as parties. The
7 pleadings don't even allege any harm to those committees, so,
8 in addition to the -- the equitable problems they have that I
9 started off with, there is a fundamental standing problem that
10 exists in this case.

11 And then, Your Honor, that takes me to the merits,
12 which other counsel have addressed and I don't -- I will not
13 spend a lot of time on the merits, but I will respond to the
14 suggestion from plaintiffs' counsel that the DNC somehow
15 misrepresented to the Court the statutory scheme relating to
16 use of electronic technology in processing ballots. The
17 language is very clear. It says that electronic technology can
18 be used, and that's not inconsistent with elsewhere in the
19 statute where it says the clerks shall -- shall review ballots.
20 It doesn't mean that clerks can't rely on electronic
21 technology, as Judge Wilson found, and then as we've talked
22 about, Judge Wilson found that technology is completely
23 reliable and used in a standard way by multiple jurisdictions
24 around the country.

25 Your Honor, just a couple more points, and that is

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1 that on the observation claim, Your Honor alluded to it, but
2 it's absolutely right that the time, place, and manner of
3 conducting elections is within the jurisdiction of election
4 officials and the legislature and the court -- a court should
5 not get into micromanaging how -- where people stand, what
6 machines are used to process ballots, and that's what you're
7 being asked to do. And it really does get into a separation of
8 powers issue, and time, place, and manner is exclusively within
9 the jurisdiction of the legislature and registrars, you know,
10 unless there is a constitutional violation, and there's nothing
11 here that's close to a constitutional violation. So, I just
12 wanted to reiterate that point.

13 And then, finally, Your Honor, I'll just conclude with
14 the equitable considerations that bar relief because I just
15 think they're so compelling and important. One is they sat on
16 their claims; two, it's against the public interest to just
17 disrupt the processing now; three, the plaintiffs are able to
18 observe, so you (unintelligible) to the parties, they are able
19 to observe. The delay in reporting results is significant.
20 It's a -- it's not just a Nevada interest, it's a national
21 interest. And last, this claim, just like the claim that
22 Judge Wilson considered, is singling out Clark County, it's
23 treating Clark County disparately from other counties in the
24 state. There's no -- we don't see the Trump campaign or other
25 parties going into counties other than Clark to ask about

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1 observation, to redress observation, and that's just another
2 equitable fact is the disparate treatment that's being imposed
3 on Clark that I would ask the Court to consider.

4 Your Honor, there's more I'd say, but I think it's
5 covered in our briefs and it's been covered by the other
6 parties, so I'll stop now and, of course, entertain any
7 questions you might have.

8 THE COURT: Given that brevity is the soul of wit,
9 Mr. Devaney, I appreciate your comment.

10 MR. DEVANEY: Thank you.

11 THE COURT: Let me turn back to Mr. O'Mara, since it's
12 your motion, you get the rebuttal. Address for me, if you
13 would, first off, this argument of Pullman abstention. If the
14 Supreme Court of Nevada currently has this case pending in
15 front of it addressing these various issues, why should I wade
16 into their pool?

17 Mr. O'Mara?

18 Uh-oh. Let's go off the record for a second and see
19 if we can. . . is he on there?

20 Off the record for a technical standpoint. Let's see
21 if we can get Mr. O'Mara.

22 MR. O'MARA: Okay. Is that me?

23 THE COURT: Okay. All right. Back on the record. We
24 got you. Thank you.

25 MR. O'MARA: Sorry.

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1 THE COURT: Back on the record.

2 That's okay. No worries.

3 MR. O'MARA: So, Your Honor, the argument about the
4 fact that the Supreme Court is getting -- addressed this issue
5 is not likely to happen because the parties to the issue have
6 moved and are trying to dismiss (unintelligible) DNC's ability
7 or their not wanting to sign an agreement takes that into
8 effect, but also this is a TPO. We're asking for the Court for
9 the relief to review the statute and, so, to me, the issue, if
10 you look at the Nevada Supreme Court, the briefing is not going
11 to be until next week, the likelihood is that the votes will
12 already be counted, the Agilis machine will have already been
13 used and therefore extraordinary relief is necessary for this
14 Court because it's not going to be able to defer to the Nevada
15 Supreme Court. So, with that in mind, the Court needs to
16 protect the integrity of this election to provide for Nevadans
17 and with all due respect to the rest of the country, this is a
18 Nevada election and it needs to be followed by Nevada law.

19 And secondly --

20 THE COURT: So shouldn't -- no, but shouldn't that be
21 decided by Nevada justices elected by Nevada residents? Why
22 should I, a federal judge, wade into the Nevada elected
23 justices dealing with state election law?

24 MR. O'MARA: Because the -- the issue is in front of
25 you today and it will not be addressed by Nevada state law, and

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1 it needs to be addressed in an expedited manner so the vote is
2 protected moving forward.

3 THE COURT: So shouldn't you address that to the
4 Supreme Court of Nevada and ask them to expedite their hearing?

5 MR. O'MARA: Well, Your Honor, that is a separate
6 case. We have separate harm in this case with the client. So,
7 my clients do not have the right to expedite this issue to the
8 Nevada Supreme Court. My client has been harmed. And contrary
9 to what the DNC says, this is not a voter dilution case.

10 I'm sorry, is someone not muted? I'm hearing a lot of
11 background.

12 THE COURT: Yeah. No, I agree. Let me ask again,
13 everyone on the line, please mute your phone and microphone and
14 we are getting a little interruption here. Again, whether
15 you're on the telephone or some other access, please mute your
16 phone and microphone.

17 Thank you, Mr. O'Mara, I apologize for that.

18 MR. O'MARA: I'm sorry.

19 So, this is -- my clients have been -- just my client
20 in regards to Ms. Stokke, has been disenfranchised by the use
21 of a machine that is improperly done and we don't have the
22 ability to move forward in the Supreme Court. She needs relief
23 now, relief to show that that machine should not be working so
24 that no other disenfranchisement is handled.

25 Now, in regards to the standing, we have -- she

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1 actually has actual injury. She wasn't -- what Ms. -- what
2 Ms. Miller said today was that Mr. Gloria and two of his
3 employees looked over the machine. Okay. And that -- the
4 only -- know that that happened was after my client went to the
5 board -- to Mr. Gloria and said this vote is stolen; it's not
6 mine because you're -- again, I hear some muting.

7 THE COURT: Again, please mute your phones. We're
8 having a little bit of interruption.

9 Go ahead, Mr. O'Mara.

10 (Court reporter interruption).

11 THE COURT: So, Mr. O'Mara, again, if you'll get
12 closer to the phone and I'm going to ask everyone to mute their
13 phones.

14 Go ahead.

15 MR. O'MARA: So, we look at the situation and we
16 don't -- we don't have, as a normal Nevada law, you know, would
17 have it. We have a situation here where there is a -- we don't
18 have the opportunity to do that. Our client --

19 (Court reporter interruption).

20 THE COURT: Mr. O'Mara, are you on a speaker phone?

21 MR. O'MARA: I'm on a Zoom, Your Honor, so it's --

22 THE COURT: Okay. Go ahead. Yeah.

23 Go ahead.

24 MR. O'MARA: So, my client has been harmed. She has
25 equal protection grounds. This hasn't been a dilution -- well,

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1 there is standing on equal protection grounds if there is a --
2 been a dilution or debasement of voting. What we have, a
3 situation where Ms. Miller talks about Mr. Gloria only
4 reviewing the -- or I'm going to infer that since she didn't
5 say that Mr. Gloria had (unintelligible) already reviewed the
6 ballot signature that they went over it again with my client,
7 we believe it was the first time that Mr. Gloria, after the
8 vote had already been taken, after Mr. Gloria says, oh, you
9 know, your vote -- if you claim that your vote has been taken,
10 you can have a secondary -- we will treat you secondary and
11 give you a provisional ballot and you don't get the opportunity
12 to do your vote. She's been -- she's been harmed. She
13 deserves recourse.

14 THE COURT: Why -- wait. Okay. Let me address -- let
15 me address that directly because that -- I'm still, I guess,
16 having a hard time understanding your argument. If -- if --
17 assume that everything your client is saying is correct, that
18 her -- somebody else turned in her ballot for her --

19 MR. O'MARA: Um-hmm.

20 THE COURT: -- and Mr. Gloria said we'll let you vote
21 again and we will count your new vote, it's a provisional. If
22 we can prove that your original vote is fraud or false or not
23 your signature, we'll invalidate that one and we will let your
24 vote count. Why doesn't that cure the problem?

25 MR. O'MARA: Well, it doesn't let her vote, first of

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1 all, because there is a ballot out there that has fraudulently
2 been filed and --

3 THE COURT: But if they invalidate that ballot and let
4 your client vote, doesn't that cure the problem? Because
5 otherwise, there's never a remedy to fix it, you're saying.

6 MR. O'MARA: Well, Your Honor, there is -- there is no
7 evidence to show that the Registrar of Voters can go back in
8 and find the vote and say this one has been canceled out.

9 THE COURT: Okay. So let's say -- so let's say they
10 can't. Then we allow your client to vote. If this vote comes
11 down to one vote, then we may have an issue, but if there's a
12 fraudulent vote hanging out there and your client -- okay. I
13 understand what your argument, sort of, but I guess I'm not
14 sure, factually, whether what you're saying is correct or not.

15 MR. O'MARA: My client, Your Honor, is entitled to the
16 same rights as every other American and every other Nevadan and
17 then that is the right to vote their ballot and have their
18 ballot counted. And when we have a system that is put into
19 place where it is contrary to Nevada law, it is contrary to the
20 provisions throughout the state and she loses her ballot, she
21 is harmed and that is really terrible, unfortunate, and not the
22 American way, nor is it Nevada.

23 Now, the Democratic party says, oh, we're only going
24 after Clark County. Well, the reason why you're only going
25 after Clark County is because every other county eyeballed and

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1 did it appropriately through the statute. Okay. They didn't
2 have the right to do this. And if you look at what the
3 legislature's declaration of voter rights is, under N.R.S.
4 293.2546, it specifically says that the legislature hereby
5 declares that each voter has the right to have a uniform
6 statewide standard for counting and recounting all votes
7 accurately, and that's exactly what happened when you look at
8 the statutes. I mean, we look at mail ballots and people are
9 always saying mail ballots, absentee ballots, they're all the
10 same in regards to how you -- well, how you go about doing the
11 verification. You have to have the clerk look at it and say
12 this is valid. To say that you can read into the statute of
13 N.R.S. -- of the statute and say that the clerk or employee
14 shall check the signature -- but they don't actually have to
15 check it, they can use a machine -- against all other
16 signatures, that's an absurd result, especially when you look
17 at N.R.S. (unintelligible) Subsection 1. It says except as
18 provided in provision -- in N.R.S. 293D.200. That's not the
19 section before it. If the legislature truly wanted to, they
20 would have said, you know, except as otherwise provided in
21 N.R.S. 293.8871(2)(a) that the clerk and employee has it [sic].
22 It specifically says, under the statute of 293.8871, while
23 there is a mechanism for the process and counting by electronic
24 means, it also says, "and must not conflict with provisions of
25 N.R.S. 293.8801 to 293.8887." So you look at the next --

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1 THE COURT: Except -- I get the -- I get the argument.
2 I get the argument. Isn't the reverse argument to that,
3 though, that the legislature wanted to, they could have said it
4 has to be checked by eyeball or by finger or by Braille or by
5 some mechanical method and the fact is, they wrote it the way
6 they wrote it and they added the statute that said they can do
7 that by electronic mail -- by electronic means in the other
8 statute. I mean, at some point --

9 MR. O'MARA: No -- no, Your Honor, because they
10 quantify it and qualify it by saying that the next -- in the
11 next section, it says must not conflict with provisions of
12 N.R.S. 293.8801. It's a conflict.

13 When you look at the statutory language, it says
14 duties of clerk upon return of mail ballots. Procedure for
15 checking signature. Now, it sets forth (a) and (b). So if you
16 don't do (a), you can't get to (b). So, that's -- you can't
17 come up and have a reasonable argument that says that. You
18 know, they -- and, so, you move forward and -- and the statute
19 is very clear.

20 Now, the second thing is that they talk about, like,
21 Judge -- Judge Wilson's argument. Well, we didn't know that
22 there was a harm. That was one of the things that the judge
23 looked at. We now know that there is a harm, and that's -- and
24 we have a harm. We have -- we have a person that was not
25 entitled to vote. And, so, there's a different analysis in

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1 this case than there is on the other one.

2 Additionally, what we're asking for is a TPO.

3 Ms. Miller has contested -- or has stated that if you do just
4 set these aside for these last ones until we can come back in
5 here and show other information and other evidence and go
6 through the Agilis machine, and send a 5-year Agilis machine
7 [sic], it may be delayed, but they will still be able to get to
8 it. And it is more important for Nevada to do it right than it
9 is for Nevada to do it fast. That is exactly what Mr. Gloria
10 has been saying throughout the whole entire process, why he's
11 been -- why there has been delays. It is to do it properly and
12 not to do it fast. So, if we're going to do it properly and
13 we're going to take the situation where we're going to look at
14 the situation, they -- there is no harm to them -- to the
15 Registrar of Voters except for a little bit of time to set
16 aside the Agilis machine and eyeball -- eyeball and look at it
17 and have a clerk or an employee look at it first and then move
18 forward.

19 And when you look at whether or not there's -- the
20 legislature says this, look at all the other counties in
21 Nevada. Only Clark County said we're going to go ahead and do
22 this. Now, if Clark County would have wanted to make sure that
23 they had this Agilis machine, they -- the legislature could
24 have put in there, specifically, that we no longer care that
25 there's uniform standards and Clark County can do whatever they

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1 want and have a machine or whatever they want and then
2 everybody else has to do it the right way and under the
3 statute, but -- excuse me, not the right way, but under the
4 statute in that regard. So --

5 THE COURT: Well, isn't -- isn't -- isn't that implied
6 in 293.871(1) that says, "The county or city clerk, as
7 applicable, shall establish procedures to the processing and
8 counting of mail ballots"? Doesn't that give to each county
9 the right to do what they think is best and then get it blessed
10 by the Secretary of State? So the legislature presumed there
11 might be different systems used, right?

12 MR. O'MARA: Well, here -- here's the thing,
13 Your Honor. You make -- you bring up a good point. You talk
14 about how the Secretary of State has to approve and put it as a
15 blessing, but the Nevada legislature -- or the Nevada Supreme
16 Court has consistently held that oral -- oral consent of the
17 Secretary of State is not proper. If you look at *Kelly vs.*
18 *Murphy*, 79- --

19 THE COURT: Wait. Wait. Wait. Whoa. Whoa. That's
20 not your brief. That's way far afield of what we're here on
21 today and -- and that's really getting into a Pullman issue.
22 You know, we're here on the allegations in your motion and that
23 is Ms. Stokke and Mr. Prudhome.

24 MR. O'MARA: Right.

25 THE COURT: And. . .

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1 MR. O'MARA: Exactly, but it goes towards the
2 provisions, Your Honor, and you were talking about -- and you
3 were saying that it has to have the blessing of the Nevada --
4 of the Secretary of State and I'm telling you, what I'm saying
5 is that Nevada law was that the Secretary of State cannot just
6 give oral communications, they have to promulgate regulations.
7 And if they don't do that, then the oral communication and
8 actions are a futile act undertaken within -- without lawful
9 authorization.

10 So we have --

11 THE COURT: Well, let me -- let me ask you to follow
12 up on that then because looking at the statute, the plain
13 language of the statute makes no reference to the Secretary of
14 State. It just says, "For any elected -- any affected
15 election, the county or city clerk, as applicable, shall
16 establish procedures for the processing and counting of mail
17 ballots."

18 MR. O'MARA: Right.

19 THE COURT: Doesn't even have to be approved by the
20 Secretary of State, apparently.

21 MR. O'MARA: Well, and that is -- and then you can
22 read that, but you have to also look at Subsection 2, which
23 says that they are only to establish those procedures if they
24 do not conflict with the other provisions. And --

25 THE COURT: Okay.

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1 MR. O'MARA: -- the other provisions are clerk or
2 employee. If they wanted -- they could have just said clerk or
3 employee or any mechanical device or -- but it doesn't. It
4 specifically says "clerk or employee shall." It doesn't say
5 may. It doesn't say may, the clerk or employee may check. It
6 says they have -- they shall check.

7 THE COURT: Okay. Let me ask you this then: Under
8 293.881(1) it talks about having to count, the mail ballot
9 central counting board, they have to count. It doesn't say how
10 they count it. Does that mean they have to count them all by
11 hand? Are they allowed to use a calculator? Are they allowed
12 to use a machine to count? It doesn't say --

13 MR. O'MARA: There's no procedure or policy that
14 conflicts with what the -- what the Agilis machine is. Okay.
15 So, there's nothing in there that says this is how they have to
16 count the ballots. It says that they have to count them. And,
17 so, they may authorize ballots to be processed and counted by
18 (unintelligible) election means.

19 Now, for example, when Ms. Miller talks about
20 Subsection 1, or Section 1 of the Agilis machine first, she
21 runs it through and they do something with it, that's a
22 processing. But when they do the second one, that one is
23 outside of the realm of what the Agilis machine can be used
24 for. It cannot be used for the verification because the
25 verifications without a clerk or an employee. So therefore you

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1 can -- you can run it through to make sure that that person is
2 no longer going to vote, which is exactly what happened, we
3 believe, with my client, it ran through the system, it clicked
4 her off so she couldn't go in and vote. Then it comes back,
5 then they run it through improperly because the next statute
6 requires that a clerk or employee shall check the signature.
7 There's nothing -- there's no evidence to show that there's no
8 clerk checking that signature at that time, and the Agilis
9 machine spits out 30 percent of them saying I've checked it,
10 not a clerk or an employee. The Agilis machine. Not the clerk
11 or the employee. And then the third one, if you go to the
12 counting of the ballots in that regard. So --

13 THE COURT: Yeah, I -- I get the argument. We're all
14 repeating ourselves now. I understand the argument.

15 MR. O'MARA: Okay. As to proven reliable, we already
16 know that -- we're obviously saying something different, which
17 was not available at the time of Judge Wilson's decision.

18 Ms. Stokke didn't have -- didn't know about her ballot really
19 until at least October 29th when she went back in to
20 Mr. Gloria. So there was obviously no time to bring that up to
21 Judge Wilson's ability to make his decision on that date.

22 Sorry, Your Honor, let me just scan my notes a minute.

23 THE COURT: Yep.

24 (Brief pause in proceedings).

25 MR. O'MARA: Also, Your Honor, where are -- there are

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1 no policies and procedures as to the Agilis machine. There
2 hasn't been anything established. What it has been is a
3 definite unilateral decision by the Registrar of Voters to
4 implement a system. There's no policies and procedures.
5 There's nothing that saying he's going to do this, these are
6 the steps that we're going to take. He just basically says I'm
7 going to do this. No policies and procedures of the Agilis
8 machine. So, he himself has not set policies and procedures to
9 allow the Agilis machine and therefore, again, it's a futile
10 act under the (unintelligible) system that's unlawful and
11 therefore you can't -- you got to have everything in writing.
12 You got to have the policies and procedures in place.

13 The lach- -- I think the laches, do you need me to go
14 into more of the laches, Your Honor?

15 THE COURT: No. No. No. No. I was just throwing
16 that out there as an example. I'm not relying upon laches.

17 MR. O'MARA: Like I said, Your Honor, today, you know,
18 we're asking the Court, and Ms. Miller has said that the
19 stopping the Agilis machine will have very little harm to
20 the -- to Registrar of Voters, we're asking for you to set that
21 aside for the weekend or until Monday or Tuesday to allow
22 people to further brief and present in an Evidentiary Hearing
23 on Tuesday and all ballots should go through the legally
24 required process for digital verification and once they go
25 through that verified visual verification, we're not asking for

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1 the ballots to be stopped and uncounted, but we are asking for
2 the Agilis machine to be not used over the next few days until
3 the Court can have an Evidentiary Hearing.

4 We are asking that you segregate all ballots that have
5 been counted by the Agilis machine previously so that if the
6 Court does issue a ruling on a TPO, or on the injunctive relief
7 after an Evidentiary Hearing, those ballots can already be
8 ready to go so that they can be visually verified without
9 delay. Like I said, we're not asking them to count -- stop
10 counting. And we need to have uniform standards where every
11 county, it's the same.

12 And, so, we ask you to enter, as I presented in the
13 opening, a plan for observation as well as what I just talked
14 about, about the Agilis machine.

15 Thank you, Your Honor.

16 THE COURT: Thank you, Mr. O'Mara.

17 Let me -- let me just backtrack for just a second to
18 Ms. Miller, and if you don't know the answer to this, I
19 appreciate that, but let me ask you, because I asked this or
20 suggested this to Mr. O'Mara, and that is that, if, in fact,
21 it's determined that Ms. Stokke's original ballot that she
22 claims was fraudulently submitted was, in fact, a fraud, is
23 there a way to cancel that ballot out?

24 MS. MILLER: Probably not at this time. Maybe when
25 she first complained about it, it -- it could have been

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1 segregated, but once the ballot envelope is separated from the
2 ballots, you can't go back and take it out of the pool for that
3 reason. But she could have gone ahead, acknowledged by
4 affidavit that it was not hers and that she did not vote the
5 ballot and she would have given -- been given a provisional
6 ballot, a full provisional ballot. So, it's really not any
7 different than if somebody went up to in-person voting and
8 forged her signature on the sign-in in such a fashion that the
9 poll worker said, yeah, that's good enough, go vote. Once that
10 vote gets into the system, we can't pull it back out, but she
11 could have, either when talking with Mr. Gloria or at in-person
12 voting, said, I'll sign the affidavit, let me vote. And she
13 chose not to do that. And she hasn't established that it was
14 the Agilis machine rather than somebody committing fraud upon
15 her that caused her harm.

16 THE COURT: So -- so just to follow up and be clear.
17 If I walk up to the polling headquarters and say I want to vote
18 and they show me the book and say sign here and it's got
19 somebody else's signature on my spot and I show them that's not
20 my signature and somebody apparently voted in my place, the
21 poll worker there could verify that signature isn't correct and
22 I would be given a new ballot and I could vote that ballot?

23 MS. MILLER: If you signed an affidavit saying it
24 wasn't your signature --

25 THE COURT: Correct, yes.

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1 MS. MILLER: -- and that you had not voted yet, yes.

2 THE COURT: And Ms. Stokke, in your opinion, since you
3 raised the issue, if she would have signed an affidavit that
4 says this is -- the original ballot was not mine, they would
5 have given her a ballot and she could have signed that, or she
6 could have voted on that ballot?

7 MS. MILLER: Yes.

8 THE COURT: Okay. Thank you.

9 (Brief pause in proceedings).

10 THE COURT: All right. Here's my decision.

11 As I mentioned earlier, I take into account
12 Justice Kavanaugh and his concurrence in the *Democratic*
13 *National Committee vs. Wisconsin State Legislature* case. His
14 concurrence on October 22nd of 2020 strongly suggests that
15 district court judges like me should not interfere with state
16 election proceedings unless there are. . . significant, I'll
17 call it, reasons to. I won't repeat the quotes I put on the
18 record earlier, but I incorporate them here. The notion being
19 that it's for the state legislature to write state election
20 laws and I should not usurp that proper role of state
21 legislatures and rewrite state election laws.

22 In determining whether to enter a Temporary
23 Restraining Order, or Preliminary Injunction, I'm guided by the
24 four-factor test that's set forth in the Supreme Court's
25 decision of *Winter vs. Natural Resources Defense Council, Inc.*,

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1 which is at 555 U.S. 7, at Page 20, it's a 2008 case. There
2 are four factors:

3 One, a likelihood of success on the merits; two, a
4 likelihood of irreparable harm; three, the balance of hardships
5 favors the plaintiff; and four, an injunction is in the public
6 interest. And it's the plaintiff seeking a motion for -- or
7 seeking a Temporary Restraining Order that has the burden of
8 demonstrating those.

9 In addition, when the plaintiff seeks a mandatory
10 injunction, that is, an injunction that requires affirmative
11 conduct, that means forcing the defendant to do something
12 different as opposed to just stopping them from doing
13 something, that standard is even higher because those requests
14 are subject to heightened scrutiny, and the Ninth Circuit has
15 said they should not be used unless the facts and law clearly
16 favor the moving party. That comes from the case of *Dahl* --
17 *D-a-h-l* -- *vs. HEM Pharmaceutical Corporation*, 7 F.3d 1399 at
18 1403, Ninth Circuit case from 1993.

19 Turning to the first prong of the *Winter* test, the
20 likelihood of success on the merits, I don't find that the
21 plaintiff has demonstrated -- plaintiffs, plural -- have
22 demonstrated a likelihood of success. I am concerned that the
23 Pullman document -- doctrine would suggest I stay away from
24 this case given that these issues are being litigated right now
25 in front of the Supreme Court of Nevada. This is an issue of

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1 significant state concern involving state laws and should be
2 interpreted by state courts, particularly Supreme Court
3 justices elected by state of Nevada citizens.

4 The Pullman abstention doctrine is narrow, and I don't
5 use that to completely step away from cases unless there are
6 significantly good reasons to do so. There's a three-factor
7 test set forth in the case of *Porter vs. Jones*, 319 F.3d 483, a
8 Ninth Circuit case from 2003. Those factors here suggest that
9 I should step away and allow the Supreme Court of Nevada to
10 make that decision. I'm not going to do that. I'm not going
11 to say I'm abstaining, but I do think I -- I do take that into
12 consideration in looking at the likelihood of success on the
13 merits in this case.

14 The defendants and DNC raise issues of standing on
15 behalf of the plaintiffs, or that the plaintiffs don't have
16 standing. I'm not going to get into that issue today. I'll
17 presume for purpose of today that they do have standing.

18 Turning to the statutes of Nevada, Nevada Revised
19 Statute § 293.874(1)(a) says, "The clerk or employee shall
20 check the signature used for the mail ballot against all
21 signatures of the voter available in the records of the clerk."
22 Nevada Revised Statute § 293.887(1) says that "for an affected
23 election, the county or city clerk shall establish procedures
24 for the processing and counting of mail ballots," and it goes
25 on to say that those procedures may authorize mail ballots to

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1 be processed and counted by electronic means. Mr. O'Mara
2 correctly points out that the second part of that subsection
3 says that those procedures must not conflict with the
4 provisions of the other parts of the Nevada election statute.
5 That's true. I don't find the Agilis system as used here, so
6 far, to conflict with the other provisions of the Nevada
7 election laws.

8 I don't see a likelihood of success on the merits of
9 the plaintiffs' claims. Nor do I see a likelihood of success
10 in showing that Mr. Prudhome was denied public access to
11 observe the procedures as required under the statute, and the
12 injunction that's being requested, at least on the papers,
13 didn't quite address the harm alleged and I am loath to get
14 into the weeds of entering an injunction about distances and
15 volumes and overhearing what the reporter -- or the election
16 counters are doing and all those kind of things. The cases are
17 legion that judges like me should try to avoid that when
18 possible. I would do that if I thought there was a stronger
19 reason to do that here, but I don't see that.

20 Turning to the prong of irreparable harm, Ms. Stokke,
21 it appears to me, could have repaired her harm by filing a
22 provisional ballot with the affidavit. There is also little to
23 no evidence that the Agilis machine incorrectly verified
24 Ms. Stokke's signatures in particular. There's little to no
25 evidence that the machine is not doing what it's supposed to

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1 do, or incorrectly verifying other signatures. There's no
2 evidence that the Agilis machine even touched her ballot, or if
3 it did, that it kicked out a different problem, nor is there
4 evidence that a human review would have done it better. At
5 best, we have one piece of evidence, Ms. Stokke's affidavit.
6 We've got the statements, apparently, that Mr. Gloria and two
7 other supervisors actually did look at it by hand, so that's
8 the relief that the plaintiffs' counsel wants, and that was
9 given to them.

10 Turning to the balance of hardships, the plaintiffs
11 have shown that there is at best one ballot that was invalidly
12 placed. On the other hand, we have tens, if not hundreds of
13 thousands of votes that potentially might not be counted
14 because the signatures might not be able to be verified by
15 human beings before the canvass window closes under the
16 statute. Ms. Miller thinks that that may be doable, depending
17 upon how many are counted, but I don't have the evidence in
18 front of me to show that that could be done. In fact, I've got
19 Mr. -- or Judge Wilson's finding that at the time back then, it
20 could not be done. I acknowledge that Ms. Miller suggests that
21 it would not be as catastrophic this time, I factor that in to
22 the analysis of this -- of this factor. I don't know that it's
23 determinative one way or another on that point.

24 The public interest is not in favor of disrupting the
25 completion of the processing and counting of the ballots.

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1 There is an interest in having the Nevada legislature's rules
2 and laws carried out. There is an interest in not
3 disenfranchising tens, if not hundreds of thousands of votes,
4 potentially, balanced against potentially one improper ballot.
5 So the balance of hardships and equities and the public
6 interest don't favor entering injunctive relief at this time.

7 Now let me be clear, I threw around terms like
8 "laches" earlier. Let me be clear that I'm not deciding this
9 case on a technicality or some esoteric legal principle like
10 laches or Pullman abstention, rather I'm deciding that the
11 plaintiffs have not come to the Court at this point with a
12 sufficient legal showing and a sufficient evidentiary basis to
13 get what is required to obtain the extraordinary relief of an
14 injunction, especially a mandatory affirmative injunction that
15 would require me to dictate to the Clark County Elections Board
16 and folks over there how to do their jobs. So, I am going to
17 deny the motion for Temporary Restraining Order.

18 With regard to the Motion for Preliminary Injunction
19 that's attached to it, at this stage, I'm going to deny that as
20 well. If I give full credence to the two affidavits that are
21 attached to the motions, that is, the declarations I should say
22 of Mr. Prudhome and Ms. Stokke, even giving those the full
23 merit of truth, it still does not rise to the level of
24 justifying a Preliminary Injunction. So I'm going to deny the
25 Motion for Preliminary Injunction without prejudice. If the

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1 plaintiffs can come up with more evidence or different
2 arguments that are more compelling, but particularly more
3 evidence that would justify an Evidentiary Hearing, then I
4 would consider that on a Motion for Preliminary Injunction.
5 But at this stage, I don't see the need for an Evidentiary
6 Hearing because what's in front of me, even if I give credence
7 to those declarations, it would not cause me to issue the
8 injunction so an Evidentiary Hearing at this stage would not be
9 needed.

10 So that's my ruling. The motions are denied. The
11 case will go forward, as all civil cases do.

12 Anything else I can address for the parties?

13 Mr. O'Mara?

14 MR. O'MARA: No, Your Honor. Thank you very much,
15 again, on behalf of everybody, to your staff and everyone else
16 for setting this hearing so quickly.

17 THE COURT: You're welcome, and I do want to thank all
18 of the parties and all of the lawyers. This was very
19 well-briefed and it was on a compressed time frame. I do
20 appreciate everyone's professional- -- professionalism,
21 ability, and well-briefing.

22 Mr. Newby, anything further from you or your party?

23 MR. NEWBY: Nothing further at this time. Have a good
24 weekend, Your Honor.

25 THE COURT: You too.

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1 Ms. Miller, anything from you or your client?

2 MS. MILLER: No, thank you, Your Honor.

3 THE COURT: Mr. Devaney, anything further from you or
4 your client?

5 MS. MILLER: No thanks, Your Honor.

6 THE COURT: With that then, the hearing is concluded.
7 I hope you all stay safe, and wear your masks.

8 We're in recess on this matter.

9 (Proceedings adjourned at 4:12 p.m.)

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COURT REPORTER'S CERTIFICATE

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14 I, Heather K. Newman, Official Court Reporter, United
15 States District Court, District of Nevada, Las Vegas, Nevada,
16 do hereby certify that pursuant to Section 753, Title 28,
17 United States Code, the foregoing is a true, complete, and
18 correct transcript of the proceedings had in connection with
19 the above-entitled matter.

20

21 DATED: 11-16-2020

/s/ Heather K. Newman
Heather K. Newman, CCR #774
OFFICIAL FEDERAL REPORTER

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