

AARON FORD
Attorney General
Craig Newby, Esq. (Bar No. 8591)
Deputy Solicitor General
Laena St-Jules, Esq. (Bar No. 15156)
Deputy Attorney General
Office of the Attorney General
555 E. Washington Ave, Ste. 3900
Las Vegas, NV 89101
(702) 486-3420 (phone)
(702) 486-3773 (fax)
cnewby@ag.nv.gov
lstjules@ag.nv.gov

*Attorneys for Defendant
Barbara Cegavske*

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

PROGRESSIVE LEADERSHIP ALLIANCE
OF NEVADA,

Plaintiffs,

vs.

BARBARA CEGAVSKE, in her official
capacity as NEVADA SECRETARY OF
STATE,

Defendant.

Case No. 22 OC 00101 1B

Dept. No. II

**DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

Defendant BARBARA CEGAVSKE opposes Plaintiff Progressive Leadership Alliance of Nevada's ("Plaintiff" or "PLAN") Motion for Preliminary Injunction. This opposition is made and based on the following Memorandum of Points and Authorities, all the papers and pleadings on file herein, and any argument that this court should entertain.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

PLAN seeks a "preliminary and permanent injunction prohibiting the Secretary of State from authorizing or permitting counties to engage in hand counting."¹

¹ Compl. at p. 14:5-9.

1 PLAN has no likelihood of success on the merits for obtaining such relief because the
2 Legislature has not prohibited hand counting of ballots. In 2003, the Legislature did not
3 implicitly ban the hand counting of ballots when passing NRS 293.2696(5). Review of the
4 applicable state and federal legislative history, federal agencies' regulatory actions to
5 address mechanical error rates only, and the lack of changes to Nevada statutes to prohibit
6 hand counting does not support PLAN's reading of Nevada statute.

7 Based on existing Nevada law, PLAN has no likelihood of success on the merits of
8 invalidating the Secretary's temporary regulation because it promotes uniformity by any
9 county who chooses to use hand counting as the method for determining its election results,
10 rather than mechanical tabulation, which applies in all other circumstances.

11 Finally, PLAN cannot meet its burden on the other requirements for injunctive
12 relief. To the extent no Nevada county has adopted hand counting as the method for
13 determining its election results, PLAN only has speculative harm premised on a potential
14 event that has not yet (and may never) occur. The balancing of equities and the public
15 interest weigh strongly in favor of having temporary regulations versus having no
16 regulations to guide a Nevada county who may choose to engage in hand counting as the
17 method for determining its election results. Without the temporary regulations, the Nevada
18 county may not have access to best practices associated with jurisdictions throughout the
19 United States that still hand count ballots. Neither the Secretary nor interested parties
20 such as PLAN have a clear legal baseline against which to judge any county's hand count.

21 Because PLAN has not met its extraordinary burden, the motion must be denied.

22 **II. BACKGROUND**

23 **A. Nevada's Voting Method Laws and Rules**

24 Nevada statute does not prohibit hand counting of ballots.

25 Voting is permitted by "mechanical voting system,"² which is "a system of voting
26 whereby a voter may cast a vote" (1) "[o]n a device which mechanically or electronically
27 compiles a total of the number of votes cast for each candidate and for or against each

28 ² NRS 293.050.

1 measure voted on” or (2) “[b]y marking a paper ballot which is subsequently counted on an
2 electronic tabulator, counting device or computer.”³

3 However, use of a mechanical voting system is optional, not mandatory. Since 1985,
4 Nevada statute has provided that “[a]t all statewide, county, city and district elections of
5 any kind held in this State, ballots or votes *may* be cast, registered, recorded and counted
6 by means of a mechanical voting system.”⁴ Nothing previously prohibited hand counting.

7 Currently, each Nevada county uses mechanical voting systems as the method to
8 determine election results.⁵ Vote tabulation by mechanical voting machine varies with the
9 method of voting. Following signature verification, mail ballots are machine tabulated.⁶
10 For in-person voting, voters vote on an electronic voting machine, with the vote data
11 physically transferred from the electronic voting machine onto a tabulation computer.⁷

12 However, certain counties have expressed interest in hand counts.⁸ To promote best
13 practices and uniformity for hand counting of ballots, the Secretary, as Nevada’s Chief
14 Elections Officer, determined it was in the State’s interest to promulgate a temporary
15 regulation relating to hand counts as the method of determining the election results.⁹

16 The Regulation establishes requirements “where the primary method of counting the
17 votes” is a hand count.¹⁰ These include minimum standards, such as at least two tallies,
18 the composition of tally teams, shift limitations for the tally teams, and tally standards.¹¹
19 To date, no county clerk has submitted a plan for conducting the hand count “not later than
20 30 days before the date of the election.”¹² Absent such a plan to comply with the Regulation,

21 ³ NRS 293B.033.

22 ⁴ NRS 293B.050 (emphasis added).

23 ⁵ See Wlaschin Decl. (9/15/2022) at ¶ 2, attached here to as **Exhibit 1**.

24 ⁶ *Id.* at ¶ 3.

25 ⁷ *Id.* at ¶ 4.

26 ⁸ The Motion references a potential effort by Nye County to implement a parallel
27 tabulation process. Mot. at 4:3-7. Absent compliance with the Regulation, only the
28 mechanical voting system tabulation determines the election outcome.

⁹ See Ex. A to the Motion (hereinafter referred to as the “Regulation”).

¹⁰ *Id.* at § 7(3).

¹¹ *Id.* at §§ 4, 5, 11, 12.

¹² *Id.* at § 3.

1 no Nevada county can use hand counting as the method for determining the election
2 results.¹³ Without such a submitted plan, all Nevada counties will continue using
3 mechanical voting systems to tabulate votes, as done most recently for the 2022 primary.

4 **B. The Help America Vote Act**

5 The 2003 Nevada Legislature adopted NRS 293.2695(5) to comply with the Help
6 America Vote Act.¹⁴ In response to the 2000 Election, particularly the controversy as to how
7 Florida counted certain punch card votes, Congress enacted HAVA, which mandated that
8 voting systems for federal elections allow a voter to (1) verify the votes selected before the
9 ballot is cast and counted; (2) provide the opportunity to change the votes or correct any
10 error; and (3) provide the opportunity to correct any overvote for a particular office.¹⁵

11 However, HAVA did not prohibit paper ballot voting systems, which includes hand
12 counting. HAVA specifically acknowledges that a “paper ballot voting system” could comply
13 with its requirements for providing voters the opportunity to correct any overvote.¹⁶ To the
14 extent unclear, HAVA specifically mandated the protection of paper ballot voting systems:

15 **(2) Protection of paper ballot voting systems**

16 For purposes of subsection (a)(1)(A)(i), the term “verify” may not be defined in
17 a manner that makes it impossible for a paper ballot voting system to meet
18 the requirements of such subsection or to be modified to meet such
19 requirements.¹⁷

19 To receive federal funding to implement HAVA, Nevada had to submit a plan to
20 “adopt voting system guidelines and processes which are consistent with the requirements
21 of [52 U.S.C. § 21081].”¹⁸

22 **C. Nevada Adopts NRS 293.2696 to Comply with HAVA**

23 It was in this federal context that the 2003 Nevada Legislature adopted NRS
24 293.2696. There, the Nevada Legislature adopted HAVA’s requirement that voting systems

25 ¹³ *Id.* at § 3.

26 ¹⁴ Pub. L. 107–252, 116 Stat. 1706 (codified at 52 U.S.C. § 20901, *et seq.*) (“HAVA”).

27 ¹⁵ *Id.* at § 21081(a)(1)(A).

28 ¹⁶ *Id.* at § 21081(a)(1)(B).

¹⁷ *Id.* at § 21081(c)(2).

¹⁸ 52 U.S.C. § 21004(a)(4).

1 comply with the error rate standards established by the Federal Election Commission,
2 which standards later were set by the Election Assistance Commission.¹⁹ The Legislature
3 did not evidence any intention to prohibit hand counting of ballots by passing NRS
4 293.2696. There is no discussion of NRS 293.2696 having such an impact. The Legislature
5 did not amend other statutes, such as the discretionary language of NRS 293B.050 allowing
6 for mechanical voting systems, to make them mandatory. This silence is consistent with
7 HAVA's protection "of paper ballot voting systems."

8 HAVA's subsequent implementation further confirms that NRS 293.2696 does not
9 apply to the hand counting of paper ballots. HAVA defines a voting system as "the total
10 combination of mechanical, electromechanical, or electronic equipment" and "the practices
11 and associated documentation" used for certain defined purposes.²⁰ Similarly, the Voting
12 System Standards in effect at the time of HAVA and NRS 293.2696's enactment defines
13 "voting system" as "a combination of mechanical electromechanical, or electronic
14 equipment. It includes the software required to program, control, and support the
15 equipment that is used to define ballots; to cast and count votes; to report and/or display
16 election results; and to maintain and produce all audit trail information."²¹ The updated
17 version of the standards defines "voting system" similarly.²² Neither definition addresses
18 paper ballots voting systems, consistent with HAVA's specific exclusion.

19 Given HAVA's protection of paper ballot voting systems, it is understandable that
20 the Election Assistance Commission has not provided an analysis of the accuracy of hand
21 counting of paper ballots generally or under any specific paper ballot voting system.
22

23 ¹⁹ Compare NRS 293.2696 with 52 U.S.C. 21081(a)(5).

24 ²⁰ 52 U.S.C. § 21081(b).

25 ²¹ Voting System Standards Volume I – Performance Standards, Federal Election
26 Commission (April 2002), at 10-11, available at
https://www.eac.gov/sites/default/files/eac_assets/1/28/Voting_System_Standards_Volume_I.pdf (last visited Sept. 12, 2022).

27 ²² 2015 Voluntary Voting System Guidelines, Election Assistance Commission, at 6-
28 7, available at
https://www.eac.gov/sites/default/files/eac_assets/1/28/VVSG.1.1.VOL.1.FINAL1.pdf (last
visited Sept. 12, 2022).

1 Instead, consistent with the purpose and structure of HAVA, the Election Assistance
2 Commission examines the efficacy of election machinery and technology.

3 **III. STANDARD OF REVIEW**

4 Injunctive relief is extraordinary relief.²³ A preliminary injunction is an
5 “extraordinary remedy that may only be awarded upon clear showing that the plaintiff is
6 entitled to such relief.”²⁴ A “preliminary injunction is available if an applicant can show a
7 likelihood of success on the merits and a reasonable probability the non-moving party’s
8 conduct, if allowed to continue, will cause irreparable harm.”²⁵ Even where a plaintiff
9 makes those showings, a court may decline to order injunctive relief due to the potential
10 hardship on each party and considerations of the public interest.²⁶ In cases like this one,
11 where the party opposing injunctive relief is a government entity, the potential hardship
12 and the public interest considerations are merged.²⁷

13 When considering a constitutional challenge to a statute, courts must start with the
14 presumption in favor of constitutionality, and therefore “will interfere only when the
15 Constitution is clearly violated.”²⁸ “When making a facial challenge to a statute, the
16 challenger generally bears the burden of demonstrating that there is no set of
17 circumstances under which the statute would be valid.”²⁹

18 PLAN cannot meet their extraordinary burden, as set forth below.

19 **IV. LEGAL ANALYSIS**

20 **A. PLAN Is Unlikely to Succeed on the Merits of its Claims**

21 **1. PLAN Incorrectly Presumes Nevada Law Prohibits the Hand** 22 **Counting of Ballots**

23 ²³ *Dep’t of Conservation & Nat. Res., Div. of Water Res. v. Foley*, 121 Nev. 77, 80, 109
24 P.3d 760, 762 (2005).

25 ²⁴ *Winter v. Nat. Res. Def’ Council, Inc.*, 555 U.S. 7, 22 (2008); *see also* NRS 33.010(1).

26 ²⁵ *Clark Cty. Sch. Dist. v. Buchanan*, 112 Nev. 1146, 1149, 924 P.2d 716, 719 (1996).

27 ²⁶ *Univ. & Cmty. Coll. Sys. v. Nevadans for Sound Gov’t*, 120 Nev. 712, 721 (2004).

28 ²⁷ *Nken v. Holder*, 556 U.S. 418, 435 (2009).

29 ²⁸ *List v. Whisler*, 99 Nev. 133, 137, 660 P.2d 104, 106 (1983).

30 ²⁹ *Deja Vu Showgirls of Las Vegas, LLC v. Nev. Dep’t of Taxation*, 130 Nev. Adv. Op.
73, 334 P.3d 392, 398 (2014).

1 PLAN incorrectly argues that the Secretary “authorizes county clerks to abandon, in
2 whole or in part, the electronic and mechanical voting systems.”³⁰ This is wrong because
3 Nevada statutes do not prohibit hand counting. Since 1985, the Legislature has provided
4 that “ballots or votes *may* be cast, registered, recorded, and counted by means of a
5 mechanical voting system.”³¹ Authorization for non-mechanical voting systems predates
6 1985 and the Legislature has not amended Nevada statute to state that “ballots or votes
7 *must* be cast, registered, recorded, and counted by means of a mechanical voting system.”

8 To avoid the plain language of Nevada statute, PLAN contends that the 2003
9 Legislature repealed the hand counting of ballots implicitly by passing NRS 293.2696(5).³²
10 PLAN does so by arguing that all voting systems must “[m]eet[] or exceed[] the standards
11 for voting systems established by the United States Election Assistance Commission,
12 including, without limitation, the error rate standards.”

13 However, NRS 293.2696 was not adopted by the 2003 Legislature in a vacuum; it
14 was passed to comply with HAVA, which explicitly excluded “paper ballot voting systems”
15 from its terms. As such, this court must interpret NRS 293.2696 within the context of
16 HAVA.³³ HAVA defines a voting system as “the total combination of mechanical,
17 electromechanical, or electronic equipment” and “the practices and associated
18 documentation” used for certain defined purposes.³⁴ Federal standards similarly define
19 voting systems standards applying *only* to voting systems that are mechanical,
20 electromechanical, or electronic.³⁵ Federal regulators have not established error rates or
21 standards for paper ballot election systems, consistent with the HAVA protection of those
22 systems from HAVA’s reach.

23
24 ³⁰ Compl. at ¶ 2.

25 ³¹ NRS 293B.050 (emphasis added).

26 ³² Mot. at 7:16-8:24.

27 ³³ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (“It is a
28 ‘fundamental canon of statutory construction that words of a statute must be read in their
context and with a view to their place in the overall statutory scheme.’”).

³⁴ 42 U.S.C. § 21081(b).

³⁵ See *supra* at n. 20-21.

1 Therefore, NRS 293.2696's reference to "voting systems" only relates to mechanical,
2 electrical, or electromechanical equipment. Understandably, the 2003 Legislature neither
3 discussed eliminating hand counting of paper ballots when considering NRS 293.2696 nor
4 by amending NRS 293B.050 to require the use of mechanical voting systems. Because there
5 is no prohibition on hand counting of ballots under Nevada law, PLAN is unlikely to
6 succeed on the merits that the Secretary exceeded her authority by adopting the
7 Regulation.

8 **2. The Regulation Does not Create a Non-Uniform Standard for**
9 **What Qualifies as a Vote**

10 PLAN misconstrues the right to a uniform, statewide standard for counting votes.³⁶
11 PLAN appears to argue that it requires one sole *method* of counting votes.³⁷ During the
12 2020 election, this court rejected that type of argument in analyzing different methods of
13 voting, each of which involved different procedures.³⁸

14 Instead, the right to a statewide standard relates to the determination of *what*
15 qualifies as a vote. Both the *Bush v. Gore* decision and HAVA's language reflect that the
16 right to a uniform, statewide standard for counting votes concerns determining voter
17 intent.

18 In *Bush v. Gore*, the Supreme Court focused on the lack of uniformity across Florida
19 counties for determining voter intent and whether to count a vote.³⁹ The lack of uniform
20 rules meant that there was an unequal evaluation of ballots because different standards
21 could be used to determine how to interpret marks, holes, or scratches on cardboard or
22 paper.⁴⁰ However, the Supreme Court was *not* addressing whether "local entities, in the
23 exercise of their expertise, may develop different systems for implementing elections."⁴¹

24
25 ³⁶ See NEV. CONST. art. 2, § 1A(10); NRS 293.2546(10).

26 ³⁷ See Motion at 6:23-7:15.

27 ³⁸ *Kraus v. Cegavske*, No. 20 OC 00142 1B, 2020 WL 8340238, at *4-5 (Nev. Dist. Ct.
28 Oct. 29, 2020).

³⁹ 531 U.S. 98, 106 (2000).

⁴⁰ *Id.*

⁴¹ *Id.* at 109.

1 Consistent with this focus, HAVA requires states to “adopt uniform and nondiscriminatory
2 standards that define what constitutes a vote and what will be counted as a vote.”⁴² This
3 provision “requires some basic level of consistency in the way election officials interpret
4 whether a particular type of ballot marking is a valid expression of voter intent.”⁴³

5 Nevada’s right to a uniform, statewide standard for counting votes similarly does
6 not require uniformity of vote counting method. Questions of how to determine whether a
7 vote must be counted are addressed by statute and regulation, such as specifying that “[a]
8 vote must be counted if the designated space is darkened or there is a writing in the
9 designated space, including, without limitation, a cross or check.”⁴⁴

10 PLAN does not contend that the Regulation imposes different standards for
11 determining whether to count a vote, such as if there is an overvote. PLAN’s grievance,
12 instead, is that different methods may be used for counting votes. But different methods
13 have always been and still continue to be used to count votes in Nevada, with counties
14 using different vendors to provide vote tabulation hardware and software. Those
15 differences in counting hardware and software do not negate the uniform, statewide
16 *standard* for counting the votes. The Regulation promotes uniformity in counting votes. It
17 sets minimum standards for hand counts that will ensure votes are counted in a
18 standardized manner. The Regulation does not violate Nevada’s right to a uniform,
19 statewide standard for counting votes.

20 **3. The Regulation Does Not Violate the Equal Protection Clause**

21 PLAN’s Equal Protection Clause challenge is not likely to succeed. As addressed
22 above, PLAN’s presumption that Nevada statute prohibits hand counting of ballots is
23 wrong. Notably, this court rejected an Equal Protection challenge made to the method of
24 voting, recognizing that “no evidence that any vote that should lawfully not be counted has
25 been or will be counted” and that there was “no evidence of any injury, direct or indirect,

26 ⁴² 52 U.S.C. § 21081(a)(6).

27 ⁴³ *State of New Mexico ex rel. League of Woman Voters v. Herrera*, 145 N.M. 563, 568,
28 203 P.3d 94, 99 (2009).

⁴⁴ NRS 293.3677(2)(a).

1 to themselves or any other person or organization as a result of the different procedures.”⁴⁵

2 Nothing in the evidence before this court requires a different ruling as to the Regulation.

3 Instead, the Secretary has a significant interest in implementing the Regulation to
4 ensure uniformity if or when a county chooses hand counting of ballots for determining its
5 election results. The Regulation seeks to address common concerns with hand counts, such
6 as requiring the provision of a plan at least 30 days in advance of the election
7 demonstrating how any such count would meet existing statutory deadlines for election
8 results, ballot security, avoiding worker fatigue, and the use of multiple tallies.⁴⁶ PLAN
9 fails to show that the Regulation would in fact disenfranchise any voters. Without the
10 Regulation, county efforts to use hand counting may not be uniform.

11 **B. PLAN Is Unlikely to Suffer Irreparable Harm**

12 PLAN has offered no evidence that it will suffer irreparable harm. To date, no county
13 has indicated that it will use hand counting as the primary method of tabulating the votes
14 in the November 2022 general election.⁴⁷ This refutes PLAN’s unsupported speculation
15 that there would be “non-uniform statewide standards for ballot counting.”⁴⁸

16 Further, the status quo, absent the Regulation, allows a Nevada county to use hand
17 counting without any of the Regulation’s safeguards, causing harm under PLAN’s theory.

18 **C. The Balance of Equities and the Public Interest Requires Denying**
19 **the Preliminary Injunction**

20 PLAN’s balancing of equities mistakenly presumes Nevada statute prohibits the
21 hand counting of ballots. The Regulation works to promote uniformity and accuracy, to the
22 extent any county chooses to use hand counting. If a county does not comply with the
23

24 ⁴⁵ *Kraus v. Cegavske*, No. 20 OC 00142 1B, 2020 WL 8340238, at *4 (Nev. Dist. Ct.
25 Oct. 29, 2020).

26 ⁴⁶ Ex. A to the Motion.

27 ⁴⁷ Ex. 1 at ¶ 7.

28 ⁴⁸ To the extent PLAN speculates without a legal basis it has suffered a specific
harm, rather than a general interest, the Secretary reserves the right to file the appropriate
responsive motion addressing its standing and ripeness to pursue a facial challenge to the
Regulation.

1 Regulation, it may not use hand counting to determine its election results. Without the
2 Regulation, counties may choose hand counting without any of the Regulation's safeguards.

3 **V. CONCLUSION**

4 PLAN's Motion for a Preliminary Injunction should be denied.

5 DATED this 15th day of September, 2022.

6 AARON D. FORD
7 Attorney General

8 By: 

9 Craig Newby, Esq. (Bar No. 8591)
10 Deputy Solicitor General

11 Laena St-Jules, Esq. (Bar No. 15156)
12 Deputy Attorney General

13 *Attorneys for Defendant Barbara Cegavske*

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AFFIRMATION

Pursuant to NRS 239B.030/603A.040

The undersigned does hereby affirm that the preceding document does not contain "Personal Information" and agrees that upon filing of additional documents in the above matter, an Affirmation will be provided ONLY if the document contains a social security number (NRS 239B.030) or "personal information" (NRS 603A.040), which means a natural person's first name of first initial and last name in combination with any one or more of the following data elements:

1. Social Security number.
2. Drivers license number, driver authorization card number or identification card number.
3. Account number credit card number or debit card number, in combination with any required security code, access code or password that would permit access to the person's financial account.
4. A medical identification number or a health insurance identification number.
5. A user name, unique identifier or electronic mail address in combination with a password, access code or security question and answer that would permit access to an online account.

The term does not include publicity available information that is lawfully made available to the general public.

DATED this 15th day of September, 2021.

AARON D. FORD
Attorney General

By: 

Craig Newby, Esq. (Bar No. 8591)
Deputy Solicitor General
Laena St-Jules, Esq. (Bar No. 15156)
Deputy Attorney General
Attorneys for Defendant

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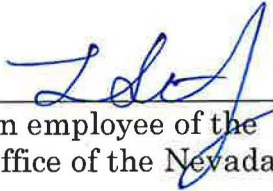
CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on the 15th day of September, 2022, pursuant to party agreement, I served the foregoing document by emailing a true and correct copy to the following:

Bradley S. Schrager, Esq.
John Samberg, Esq.
Daniel Bravo, Esq.
WOLF, RIFKIN, SHAPIRO, SCHULMAN
& RABKIN, LLP
3773 Howard Hughes Parkway, Suite 590 South
Las Vegas, Nevada 89169
bschrager@wrslawyers.com
dbravo@wrslawyers.com
jsamberg@wrslawyers.com

David R. Fox, Esq.
Maya Sequeira, Esq.
Dan Cohen, Esq.
Makeba Rutahindurwa, Esq.
ELIAS LAW GROUP LLP
10 G St. NE Suite 600
Washington, DC 20002
dfox@elias.law
msequiera@elias.law
dcohen@elias.law
mrutahindurwa@elias.law

Attorneys for Plaintiffs



An employee of the
Office of the Nevada Attorney General

EXHIBIT 1

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EXHIBIT 1

1 AARON FORD
Attorney General
2 Craig Newby, Esq. (Bar No. 8591)
Deputy Solicitor General
3 Office of the Attorney General
555 E. Washington Ave, Ste. 3900
4 Las Vegas, NV 89101
(702) 486-3420 (phone)
5 (702) 486-3773 (fax)
cnewby@ag.nv.gov
6

7 *Attorneys for Defendant*
Barbara Cegavske

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

10 PROGRESSIVE LEADERSHIP ALLIANCE
11 OF NEVADA,

Case No. 22 OC 00101 1B

Dept. No. II

12 Plaintiffs,

13 vs.

14 BARBARA CEGAVSKE, in her official
15 capacity as NEVADA SECRETARY OF
STATE,

16 Defendant.
17

18 **DECLARATION OF MARK WLASCHIN**

19 I, MARK WLASCHIN, hereby state that the assertions of this declaration are true:

20 1. I have been the Deputy Secretary of State for Elections since October 2020.

21 I make this declaration based on personal knowledge.

22 2. Each Nevada county currently uses mechanical voting systems as the
23 method to determine election results.

24 3. Mail ballots are currently tabulated by machine after signature verification.

25 4. In-person voters vote on electronic voting machines, and the vote data is
26 physically transferred from the electronic voting machine onto a tabulation computer.

27 5. In the fall of 2021, I heard about jurisdictions across the country starting to
28 contemplate hand counting votes as a replacement for mechanical tabulation. I reviewed

1 Nevada law and consulted with an attorney at the Department of Justice specializing in
2 questions relating to the Help America Vote Act and determined nothing under existing
3 law prevents Nevada counties from conducting hand counts.

4 6. The Secretary of State's Office determined that it was in the interest of the
5 State and its citizens to promulgate temporary regulations on hand counts, should a
6 Nevada county decide to hand count votes for the 2022 general election. My team and I
7 consulted with our counterparts in other states and other sources to establish best
8 practices for hand counts that would promote accuracy and consistency. Following a
9 workshop, public comment, and public submissions, those best practices, in light of
10 Nevada's needs, are embodied in the temporary regulation adopted on August 26, 2022.

11 7. No county has indicated to the Secretary of State that it will use hand
12 counting as the primary method of tabulating the votes in the November 2022 general
13 election.

14 8. On page 4 of its motion, PLAN references a Nye County proposal for a
15 "parallel tabulation" process involving hand counting. Absent compliance with the
16 Regulation, only the mechanical voting system tabulation determines the election
17 outcome.

18 Pursuant to NRS 53.045, I declare, under penalty of perjury, that the foregoing is
19 true and correct.

20 Executed on this 15 day of September, 2022.

21 
22 MARK WLASCHIN