

IN THE SUPREME COURT OF THE STATE OF NEVADA

AMERICAN CIVIL LIBERTIES
UNION OF NEVADA, a domestic
nonprofit corporation; and
STEVEN BACUS, an individual,

Petitioners,

vs.

THE COUNTY OF NYE, a
governmental entity; and MARK
KAMPF, in his official capacity as
interim County Clerk,

Respondents.

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EMERGENCY MOTION FOR CLARIFICATION
PURSUANT TO NRAP 27

IMMEDIATE ACTION REQUESTED BY OCTOBER 31, 2022

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STATEMENT OF THE ISSUE

1. Whether Respondents' vote counting process, where Nye County election workers, prior to polls closing on November 8, 2022, read aloud the content of ballots within hearing distance of public observers, violates the order issued by this Court on October 21, 2022, even if (1) the observers certify that they will not share the information they receive as an observer and (2) will not have access to the totality of the vote count results.

PROCEDURAL HISTORY

On October 17, 2022, Petitioners filed an Emergency Petition for Writ of Mandamus Pursuant to NRAP 21(A)(6) before this Court challenging the election procedures that Respondents intended to implement during the 2022 elections.¹ Among other issues, Petitioners challenged Respondents' plan to have election workers read aloud the contents of ballots in front of public observers prior to the close of the

¹ Pet'rs' Emergency Pet. for Writ of Mandamus Pursuant to NRAP 21(a)(6) (hereafter "Petition").

polls on November 8, 2022, arguing that this practice would violate NRS 293.3606 and NRS 296.269935.²

On October 19, 2022, Respondents filed their Answer to Emergency Petition for Writ of Mandamus Pursuant to NRAP 21(A)(6).³ In their Answer, Respondents argued that having election workers read aloud the contents of ballots within the hearing distance of observers would not violate NRS 293.3606 or NRS 293.269935 because the Secretary of State would require all observers to certify that they would not “prematurely release information relating the count of returns.”⁴

On October 20, 2022, Petitioners filed their Reply to Response to Emergency Petition for Writ of Mandamus.⁵ In their Reply, Petitioners argued that the certification proposed by Respondents would be insufficient because “dissemination of information to the observers *themselves* is ‘disseminat[ing] to the public information relating to the

² *Id.* at 15–19.

³ County of Nye and Mark Kampf’s Answer to Emergency Petition for Writ of Mandamus Pursuant to NRAP 21(a)(6) (hereafter “Answer to Petition”).

⁴ *Id.* at 10.

⁵ Reply to Response to Emergency Petition for Writ of Mandamus (hereafter “Reply to Response”) at 11.

count of returns for early voting before the polls close’ and ‘the count of mail ballots’ in violation of NRS 293.3606 and NRS 293.269935.” Petitioners further argued that observers were explicitly recognized as “members of the general public” under NRS 293B.353.⁶

On October 21, 2022, this Court granted in part, and denied in part, the Petitioners’ request for relief.⁷ In relation to NRS 293.3606 and NRS 293.269935 and Nye County’s proposed “read-aloud requirement”, this Court stated the following:

[W]e note our concern that, if the read-aloud requirement remains and observers are positioned to hear it, the observers, themselves members of the public, NRS 293B.353, are likely to learn election result information before the release of such information is statutorily authorized, even if they certify that they will not disclose this information to others. The record is insufficiently developed at this point, but we note that if such observers hear results, this would violate the applicable statutes.⁸

In turn, this Court ordered that Nye County “require all observers to certify that they will not prematurely release any information regarding

⁶ Reply to Response at 11–12.

⁷ Order Granting in Part Petition for Writ of Mandamus (hereafter “Order”) at 10.

⁸ Order at 6.

the vote count before [the close of polls on November 8], and ensure public observers do not prematurely learn any election results . . .”⁹

STATEMENT OF FACTS

Following issuance of this Court’s order, the Secretary of State’s office contacted Respondent Kampf on October 22, 2022, “seeking written explanation as to how Nye County and [Kampf] intend to comply with all of the provisions from the writ of mandamus, in particular how Nye County will ‘ensure public observers do not prematurely learn any election results.’”¹⁰

Nye County, through counsel, provided the Secretary of State with a written response on October 24, 2022. Regarding compliance with the Court’s order as to the dissemination of information to the public, Nye County stated:

With respect to the public dissemination issue, the Nevada Supreme Court did not explicitly bar the “read-aloud” element of the County’s hand count process (it only barred the livestreaming thereof). Moreover, the Supreme Court clearly differentiated the “vote count” from “election

⁹ Order at 10.

¹⁰ Letter from Deputy Secretary of State for Elections Mark Walschin to Nye County Clerk Mark Kampf from October 22, 2022, Pet’rs’ App., Vol. 2, APP0061

results.” As I’m sure you would agree, “election results” refers to the totality of vote count results. This is why the Supreme Court has required the County to have all observers of the hand count process certify they will not “prematurely release any information regarding the *vote count* [not election results]” prior to close of all polls (emphasis added).

Finally, the County plans to employ a bi-fold approach to ensuring observers do not “prematurely learn any election results,” which again clearly refers to the totality of returns, not the individual counting of ballots. Not accounted for in the Order is the fact that the County’s hand count process will take place in multiple rooms. [Because the counting will be conducted simultaneously in each room] not a single observer will be able, even if they wanted to, to learn the totality of the vote count (i.e. election results). As a secondary safeguard, the County, [...] is having observers declare under the penalty of perjury that, among other things, they will not undertake any efforts to interfere with, obstruct or otherwise impede the election or its processes.¹¹

Nye County stated that these procedures were sufficient to comply with this Court’s order.¹²

¹¹ Letter from Attorney Brian Hardy to Deputy Secretary of State for Elections Mark Walschin from October 24, 2022, Pet’rs’ App., Vol. 2, at APP0062–63.

¹² *Id.*

At the request of counsel representing the Secretary of State, Petitioners provided a written response to Nye County's position.¹³ In that response, Petitioners emphasized this Court's concern that "if the read-aloud requirement remains and observers are positioned to hear it, the observers, themselves members of the public, [...] are likely to learn election result information before the release of such information is statutorily authorized, even if they certify that they will not disclose this information to others," and pointed out that this Court's order did not distinguish between a "partial release of results and the final count of the votes."¹⁴

On October 25, 2022, the Secretary of State, through counsel, advised the parties to seek clarification from this Court as to this limited issue.¹⁵

¹³ Email exchange between Deputy Solicitor General Craig A. Newby, Attorney Brian R. Hardy, and Attorney Harry L. Arnold, CC'ing Attorney Sadmira Ramic, from October 24, 2022, Pet'rs' App., Vol. 2, at APP0068; Letter from Attorney Sadmira Ramic to Deputy Secretary of State for Elections Mark Wlaschin from October 25, 2022, Pet'rs' App., Vol. 2, APP0070–72.

¹⁴ Letter from Attorney Sadmira Ramic to Deputy Secretary of State for Elections Mark Wlaschin from October 25, 2022, Pet'rs' App., Vol. 2, APP0071.

¹⁵ Letter from Deputy Solicitor General Craig A. Newby on behalf of Secretary of State to Attorneys Brian R. Hardy and Sadmira Ramic from October 25, 2022, Pet'rs' App., Vol. 2, at APP0073.

On October 26, 2022, Athar Haseebullah and Cèsar Carvajal, as members of the general public, travelled to Pahrump, Nevada, to observe Nye County's hand counting process.¹⁶ As a public observer, Haseebullah heard Nye County election workers read aloud results from multiple ballots.¹⁷ Every time an election worker read out the information on a ballot, the worker explicitly and audibly identified which candidate the voter had selected for each race.¹⁸

As a public observer, Cèsar Carvajal heard Nye County election workers read out loud results from multiple ballots.¹⁹ Every time the election worker read out the information on the ballot, the worker explicitly and audibly identified which candidate the voter had selected for each race.²⁰

¹⁶ Declaration of Athar Haseebullah in Support of Motion for Clarification, October 26, 2022, Pet'rs' App., Vol. 2, at APP0076; Declaration of Cèsar Carvajal in support of Motion for Clarification, October 26, 2022, Pet'rs' App., Vol. 2, at APP0074.

¹⁷ Declaration of Athar Haseebullah in Support of Motion for Clarification, October 26, 2022, Pet'rs' App., Vol. 2, at APP0077.

¹⁸ *Id.*

¹⁹ Declaration of Cèsar Carvajal in support of Motion for Clarification, October 26, 2022, Pet'rs' App., Vol. 2, at APP0075.

²⁰ *Id.*

DISCUSSION

This Court has ordered that Respondents “require all observers to certify that they will not prematurely release any information regarding the vote count [before November 8, 2022], and ensure public observers do not prematurely learn any election results.”²¹ As the Court cited in its order, NRS 293.3606 prohibits the “disseminat[ion] to the public information on the count of returns for early voting” and NRS 296.269935 prohibits the “disseminat[ion] to the public in any way information pertaining to the count of mail ballots before all polling places are closed and all votes have been cast on the day of the election.”²² The Court observed “that, if the read-aloud requirement remains and observers are positioned to hear it, the observers, themselves members of the public [...], are likely to learn election result information before the release of such information is statutorily authorized, even if they certify that they will not disclose this information to others,” and “if such observers hear results, this would violate the applicable statutes.”²³

²¹ Order at 9 – 10.

²² Order at 5 n. 4 & 5 (emphasis added).

²³ Order at 6.

According to the letter they provided the Secretary of State, Respondents believe that they will not violate this Court's order by disclosing the content of election ballots to public observers as long as a public observer does not prematurely learn "the totality of the vote count" and the observer has certified that they will not share the information that they learn with others.²⁴ It is Petitioners' position that when an election worker reads aloud the content of a ballot prior to November 8, 2022, within hearing distance of a public observer, this action violates NRS 293.3606 and NRS 296.269935, and by extension this Court's order.

In light of this disagreement and the Secretary of State's suggestion that parties seek clarification, Petitioners request that the Court clarify whether Nye County's current practice of reading aloud the content of each ballot within hearing distance of public observers violates this Court's October 21, 2022, order even if Nye County (1) has each public observer certify that they will not disclose the information that they receive to others and (2) arranges its process so that no one observer would be able to aggregate the total results from all ballots announced.

²⁴ Letter from Attorney Brian Hardy to Deputy Secretary of State for Elections Mark Walschin from October 24, 2022, Pet'rs' App., Vol. 2, at APP0062-63.

CONCLUSION

Petitioners respectfully requests this Court to clarify whether Respondents' procedure where Nye County election workers, prior polls closing on November 8, 2022, read aloud the content of ballots within hearing distance of public observers violates the order issued by this Court on October 21, 2022.

DATED this 26th day of October 2022.

Respectfully submitted:

**AMERICAN CIVIL LIBERTIES
UNION OF NEVADA**

/s/ Sadmira Ramic

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VERIFICATION

I, Sadmira Ramic, declare as follows:

1. I am counsel for Petitioners ACLU of Nevada and Steven Bacus.
2. I verify that I have read the foregoing Emergency Petition and that the same is true of my own knowledge, except for matters state on information and belief, and as to those matters, I believe them true.
3. I declare under penalty of perjury under the law of the Nevada that foregoing is true and correct.

Executed this 26th day of October 2022, in Las Vegas, Nevada.

/s/ Sadmira Ramic

Sadmira Ramic, Esq.

Nevada Bar No.: 15984

CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14 point Century Schoolbook.

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Finally, I hereby certify that this brief complies with the type-volume limitations of NRAP 27(c) and 32(c)(2) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and is no more than 10 pages.

DATED this 26th day of October 2022.

Respectfully submitted:

**AMERICAN CIVIL LIBERTIES
UNION OF NEVADA**

/s/ Sadmira Ramic

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NRAP 27(e) CERTIFICATE

I, Christopher Peterson, declare as follows:

4. I am counsel for Petitioners ACLU of Nevada and Steven Bacus.
5. The telephone numbers and address of the attorneys for the parties are as follows:

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6. Emergency relief is proper because Mr. Kampf has begun the hand counting process as of October 25, 2022. The parties explicitly disagree regarding the limitations ordered by the Court's order, and the Secretary of State has indicated that it will not take any action without further clarification from this Court.

7. Prior to filing this brief, I attempted to contact both Harry L. Arnold and Brian R. Hardy via phone on October 26, 2022. I then emailed attorneys Harry L. Arnold and Brian R. Hardy on October 26, 2022. I explained in that email that we were seeking clarification regarding the limitations imposed by the Court on Nye County's plan to read aloud the content of ballots in the presence of public observers. Mr. Arnold

confirmed receipt of the email. I sent Mr. Arnold and Mr. Hardy, via email, a digital copy of the foregoing motion and Petitioner's Appendix, Volume 2, on October 26, 2022, before they were filed with this Court.

8. I also contacted the Office of the Clerk of the Supreme Court of Nevada on October 26, 2022, to notify it that the ACLU of Nevada would be filing this motion, in accordance with Nevada Rule of Appellate Procedure 27(e)(1), on behalf of petitioners.

Executed this 26th day of October 2022, in Las Vegas, Nevada.

/s/ Christopher Peterson
Christopher M. Peterson, Esq.
Nevada Bar No.: 13932

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2022, I electronically filed the foregoing **EMERGENCY MOTION FOR CLARIFICATION PURSUANT TO NRAP 27** with the Nevada Supreme Court by using the appellate electronic filing system.

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

Harry L. Arnold
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10001 Park Run Drive
Las Vegas, NV 89145

I further certify that a true and correct copy of this document was served by email to:

Harry L. Arnold
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/s/ Christopher Peterson

Christopher Peterson

An employee of the ACLU of Nevada