

IN THE SUPREME COURT OF THE STATE OF NEVADA

AMERICAN CIVIL LIBERTIES UNION
OF NEVADA, A DOMESTIC
NONPROFIT CORPORATION,
Petitioner,

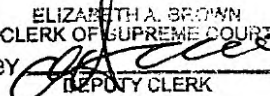
vs.

THE COUNTY OF NYE, A
GOVERNMENTAL ENTITY; AND MARK
KAMPF, IN HIS OFFICIAL CAPACITY
AS INTERIM COUNTY CLERK,
Respondents.

No. 85636

FILED

NOV 14 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

This emergency, original petition for a writ of mandamus challenges Nye County's current plan to conduct a parallel hand count of general election ballots after machine tabulation, as well as the location of the hand count.¹ In particular, petitioner American Civil Liberties Union of Nevada challenges the hand count as unauthorized under Nevada law, violative of statutory and regulatory laws, and an infringement on voter protections under the Nevada Constitution. Respondents, Nye County and Mark Kampf, interim County Clerk, have filed an answer.²

¹We note that under the current plan, revised on November 4, 2022, Nye County began hand-counting ballots on November 10, post-general election, apparently upon approval from the Nevada Secretary of State after petitioner challenged certain aspects of Nye County's prior hand-count process in *ACLU v. County of Nye*, Docket No. 85507. Petitioner did not challenge the parallel hand-count process as altogether unauthorized in that case. *See id.* (Oct. 17, 2022, emergency petition).

²We grant respondents' motion for leave to file an answer, NRAP 21(b); the answer and accompanying appendix were filed on November 14, 2022.

A writ of mandamus may issue to compel the performance of a legally required act or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Petitioner bears the burden of demonstrating that such relief is clearly warranted. *Halverson v. Sec'y of State*, 124 Nev. 484, 487, 186 P.3d 893, 896 (2008) ("A petition will only be granted when the petitioner has a clear right to the relief requested."); *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) ("Petitioners carry the burden of demonstrating that extraordinary relief is warranted."); see *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991) (observing that "the issuance of a writ of mandamus . . . is purely discretionary with this court"). We have previously explained that writ petitions involving factual questions should be filed in the district court in the first instance. *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) ("When disputed factual issues are critical in demonstrating the propriety of a writ of mandamus, the writ should be sought in the district court, with appeal from an adverse judgment to this court.").

Petitioner asserts that (1) Nye County failed to timely obtain approval by the Nevada Secretary of State of its current hand-count process pursuant to NRS 293.3677 (governing the Secretary of State's adoption of regulations establishing uniform, statewide, vote-counting standards) and NAC 293B.040 (requiring county clerks to submit to the Secretary of State "a plan to ensure the accuracy and security of voting in the county" by the 90th day before a general election) and that any such approval by the Secretary of State after that deadline violates both the statute and the regulation, (2) no Nevada law allows for a parallel hand count, and (3) the hand count does not fit within any of the three Nevada laws providing for

the count of a ballot already once counted: during an audit, a recount procured by a defeated candidate, and an election contest, none of which processes the hand count fits. Further, petitioner asserts that Nye County unlawfully moved location of the hand count after the April 15 deadline for obtaining approval of counting places, "with no assurances of ballot security, with no protections against ballot alteration, and without using the transparent, bipartisan process required by state law."

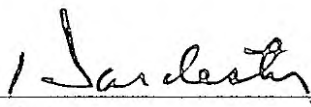
As petitioner acknowledges, the Secretary of State is charged with executing and enforcing this state's election laws. NRS 293.124; *see also Heller v. Legislature*, 120 Nev. 456, 461, 93 P.3d 746, 750 (2004) ("In his capacity as the state's chief elections officer, the Secretary must obtain and maintain consistency in the application, operation and interpretation of election laws." (citing NRS 293.247)). Indeed, a significant portion of the petition asserts that Nye County's process violates the Secretary's regulations. In their response and accompanying declaration, respondents confirm that the hand count is a secondary counting method and will not be used to report the County's election results. They further state that the Secretary of State's Office approved their current hand-count process on November 5, and while it is unclear from the petition whether petitioner's concerns have been brought to the Secretary's attention, respondents point out that petitioner contacted the Secretary of State's Office by letter dated November 7, apparently without result.

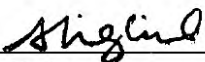
Having reviewed the petition and answer, we conclude that petitioner has not demonstrated that our extraordinary intervention is warranted at this time. Petitioner has pointed to no law clearly prohibiting the parallel hand count or precluding any post-deadline revision to secondary vote-counting plans approved by the Secretary. Moreover, this petition raises a number of factual issues concerning the hand-count process


and the location change, as well as questions concerning the application of the election regulations to them. As we have repeatedly emphasized, this is not a fact-finding court. *Round Hill*, 97 Nev. at 604, 637 P.2d at 536. Further, petitioner did not name the Secretary as a party to this original proceeding essentially challenging her actions or inactions in enforcing the election laws. Under these circumstances, we decline to exercise our discretion to consider this writ petition, and we

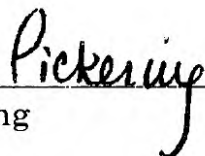
ORDER the petition DENIED.


Parraguirre, J.


Hardesty, J.


Stiglich, J.


Cadish, J.


Pickering, J.


Herndon, J.

cc: Brennan Center for Justice
American Civil Liberties Union of Nevada/Las Vegas
Jenner & Block LLP/New York
Marquis Aurbach Chtd.