

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

FRANCISCO V. AGUILAR, in his  
official capacity as NEVADA  
SECRETARY OF STATE

Petitioner,

vs.

WASHOE COUNTY BOARD OF  
COUNTY COMMISSIONERS,  
CLARA ANDRIOLA, in her official  
Capacity as WASHOE COUNTY  
COMMISSIONER, MICHAEL  
CLARK, in his official Capacity as  
WASHOE COUNTY  
COMMISSIONER, and JEANNE  
HERMAN, in her official Capacity as  
WASHOE COUNTY  
COMMISSIONER,

Respondent.

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Case No.: 88965

**MOTION OF AMERICAN CIVIL LIBERTIES UNION OF NEVADA  
FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF  
PETITION FOR A WRIT OF MANDAMUS**

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Pursuant to Rule 29(c) of the Nevada Rules of Appellate Procedure, the American Civil Liberties Union of Nevada hereby moves for leave to file a brief as amicus curiae in support of Petition for Writ of Mandamus. The proposed brief is being submitted with this motion.

This Motion is made and based on the papers and pleading on file herein, the Points and Authorities submitted herewith, and any further evidence and argument as may be adduced at a hearing on this matter.

Dated this 12<sup>th</sup> day of July 2024.

**AMERICAN CIVIL LIBERTIES  
UNION OF NEVADA**

/s/ Sadmira Ramic

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## INTERESTS OF THE AMICUS CURIAE

Proposed *Amicus Curiae* American Civil Liberties Union of Nevada (“ACLUNV”) is a nonpartisan, nonprofit organization that works to defend and advance the civil liberties and civil rights of all Nevadans. This includes assuring that all eligible Nevada voters can cast their ballot, that their votes are counted, and that any actions related to elections comply with federal and Nevada state law. It has taken an interest in the above-captioned matter because Respondents’ failure to certify the election results of the recount of the 2024 Primary election implicates the constitutional right of Nevadans to participate in elections and have their votes counted.

## REASONS WHY AN AMICUS BRIEF IS DESIRABLE

While “there is no inherent right to file an amicus curiae brief with the Court,” a court may in its discretion “grant leave to appear as *amicus* if the information offered is timely and useful.” *League to Save Lake Tahoe v. Tahoe Reg'l Plan. Agency*, No. 3:09-CV-478-RCJ-RAM, 2011 WL 3847185, at \*15 (D. Nev. Aug. 30, 2011), vacated and remanded on other grounds, 497 F. App'x 697 (9th Cir. 2012) (quoting *Long v. Resorts, Inc.*, 49 F. Supp. 2d 1177, 1178 (D. Nev. 1999)).

The proposed amici believe that their input will aid the Court in resolving the issues at hand in this matter. The proposed brief is useful because it provides the Court with relevant legal context not raised by the Petitioner. First, the brief explains

why courts in other jurisdictions have repeatedly held that county boards have a ministerial and nondiscretionary duty to certify election results. Second, the brief highlights the process of canvassing returns under the Nevada Revised Statutes and the powers and limitations of the county board of commissioners in conducting a canvass. Thus, the proposed brief does not “merely extend [] the length of either litigant’s brief” and provides context relevant to resolving the Petitioner’s Petition for a Writ of Mandamus.

Furthermore, the proposed brief is timely because the Court has not yet rendered a decision on the Petition and this brief is filed well in advance of deadlines for responses.

Accordingly, the proposed amicus request that the Court grant their motion to file an amicus brief in support of the Petition for a Writ of Mandamus.

## **CONCLUSION**

The undersigned respectfully request that the Court grant their Motion for Leave to File Brief as *Amicus Curiae*. A proposed brief is attached hereto as Exhibit A.

Dated this 12<sup>th</sup> day of July 2024.

**AMERICAN CIVIL LIBERTIES  
UNION OF NEVADA**

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# EXHIBIT A

**BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES  
UNION OF NEVADA IN SUPPORT OF PETITION FOR WRIT  
OF MANDAMUS**

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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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FRANCISCO V. AGUILAR, in his  
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Case No.: 88965

Petitioner,

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CLARA ANDRIOLA, in her official  
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COMMISSIONER, MICHAEL  
CLARK, in his official Capacity as  
WASHOE COUNTY  
COMMISSIONER, and JEANNE  
HERMAN, in her official Capacity as  
WASHOE COUNTY  
COMMISSIONER,

Respondent.

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**BRIEF OF AMICUS CURIAE ACLU OF NEVADA  
IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS**

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## NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following persons and entities as described in NRAP 26.1(a) must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

American Civil Liberties Union of Nevada Foundation, Inc., is a domestic nonprofit, non-stock corporation. It has no parent corporations, and no publicly held corporations have ownership in it. This amicus curiae is represented by Sadmira Ramic, Esq., of ACLU of Nevada.

No other law firms have appeared for the amici in this case or are expected to appear for the amici in this Court.

### **AMERICAN CIVIL LIBERTIES UNION OF NEVADA**

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## STATEMENT OF INTEREST

*Amici Curiae* American Civil Liberties Union of Nevada (“ACLUNV”) respectfully submits this brief in support of Petition for a Writ of Mandamus.

ACLUNV is a non-profit, non-partisan organization dedicated to defending civil liberties and civil rights guaranteed by federal, state, and local law. This includes assuring that all eligible Nevada voters can cast their ballot, that their votes are counted, and that any actions related to elections comply with federal and Nevada state law. Clarifying the role of a board of county commissioners in the certification process and assuring the Washoe County Board of Commissioners does not subvert its statutory duty to certify election results is of paramount importance to ACLUNV and several thousand ACLU members statewide as this process implicates the constitutional and statutory rights of Nevadans who participate in the electoral process. Moreover, this certification process will have a direct impact on ballots cast in the 2024 Nevada Primary election and the upcoming 2024 General election and remains a matter of paramount statewide importance.

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## INTRODUCTION

Three of five Washoe County Board of Commissioners (“the County Commission”) refused to certify the election results of the 2024 Primary after a recount was requested and thereafter conducted outside of the statutory mandated timeline for doing so. YouTube, Washoe County, Nevada, *Board of County Commissioners Special Meeting* (July 9, 2024), <https://www.youtube.com/watch?v=ardUI-NfHiU>, at 3:57:45-3:58:53. Their refusal to certify the election results defies their duties under Nevada law and concurrently threatens to derail the election process in Nevada. No discretion to certify exists, and a board of county commissioners must certify election results by the statutory deadlines outlined in the Nevada Revised Statutes.

The issues stemming from the inactions of the County Commission are of significant public importance. The County Commission’s refusal to certify the election results disenfranchises every voter in Washoe County and imposes delays in post-election processes that impact the entire state of Nevada. The inactions of the County Commission violate procedural requirements under Nevada law and severely undermine the ability for certification to occur at the state level. “Voters have a compelling interest in the way elections are run,” and “because the votes in a Nevada County count toward statewide election contests and ballot matters, and

concerns that threaten the validity of that election process impact the citizens of this state in general,” *ACLU of Nev. v. Cnty. of Nye*, 519 P.3d 36 (Nev. 2022) (unpublished) citing *State of N.M. ex rel. League of Woman Voters v. Herrera*, 203 P.3d 94, 97 (N.M. 2009) (‘Determining the validity of individual votes is of unquestionable importance’) the issues presented are of extreme public interest that requires an early determination for future guidance. See *We the People Neu. v. Miller*, 124 Nev. 874, 880, 192 P.3d 1166, 1170 (2008) (allowing for public policy, urgency, and necessity factors in deciding to consider a writ petition that "raises issues of significant magnitude" and "potentially has an impact on this year's election as well as future general elections").

Not only is clarification regarding the role of the County Commission in election certification important for determining the votes cast in the 2024 Primary Election, but it will also undoubtedly have an impact in the 2024 General Election, and any nuances in the law that leave open the possibility that legitimate votes won't be counted will have grave consequences on a national scale. It is critical for the Court to provide guidance here or there remains a grave risk the General Election of 2024 will turn into an extended crisis should other counties seek to circumvent Nevada law. Establishing clear guidance on the process for certification by the County Commission is of paramount importance in the instant matter. *ACLU of Nev.*

*v. Cnty. of Nye*, 519 P.3d 36 (Nev. 2022) (unpublished) citing *State of N.M. ex rel. League of Woman Voters v. Herrera*, 203 P.3d 94, 97 (N.M. 2009) “Establishing clear rules, prior to election day, as to how such validity is to be established is of equal, if not greater, importance.”).

## ARGUMENT

### **I. The Nevada Legislature has prescribed specific processes for certification of election results and set limitations on the County Commission’s authority to conduct a canvass of the returns.**

The election certification process, alternatively referred to as a “canvass of the returns”, is a statutory process by which election officials review election results, note any clerical errors, and declare official results. NRS 293.032. The specifics of how the process is to be conducted is set forth in NRS 293.387:

1. As soon as the returns from all the precincts and districts in any county have been received by the board of county commissioners, the board **shall** meet and canvass the returns. The canvass **must be completed** on or before the 10th day following the election.
2. In making its canvass, the board shall:
  - (a) Note separately any clerical errors discovered; and
  - (b) Take account of the changes resulting from the discovery, so that the result declared represents the true vote cast.(emphasis added).

Accordingly, a Board of County Commissioners, including the Washoe County Board of Commissioners, is limited to reviewing ballots for clerical errors

and taking those errors into account before certifying. They are obligated to meet, canvass the returns, and complete certification before the tenth day following the election. If a recount is requested and conducted, the County Commission is required to canvass the results within 5 working days after completion of the recount. NAC 293.365. No additional timelines for certification are permitted under the NRS or NAC.

Here, the County Commission is limited to these powers granted to it by the Legislature. No provisions grant county commissions, responsible for the ministerial task of certification, the legal authority to determine what constitutes a vote or the process by which the counts must be conducted. On the contrary, the Legislature has delegated these powers to the counting board and the county clerks and county registrars, and verifications of the validity of votes happen in advance of a board of county commissioners receiving the election results. *See* NRS 293.363 (“When the polls are closed, the counting board shall prepare to count the ballots voted. When it has been ascertained that the number of ballots agrees with the number of names of registered voters shown to have voted, the County Commission shall proceed to count. If there is a discrepancy between the number of ballots and the number of voters, a record of the discrepancy must be made.”); NRS 293.367 (outlining standards for rejecting ballots and regulations for counting ballots by the election

board); NRS 293.370 (outlining procedure for completion of tally lists by the counting board officers); and NAC 293.480 (requiring county clerks to conduct risk limiting audits of election results)<sup>1</sup>.

There remains a strict statutory prohibition in Nevada on withholding certification “from the person having the highest number of votes for the office because of any contest of election filed in the election or any defect or informality *in the returns* of any election, if it can be ascertained with reasonable certainty from the returns what office is intended and who is entitled to the certificate or commission.” NRS 293.397. (emphasis added). This confines a board of county commissioners to reviewing clerical errors as they appear on the face of the *returns*, not the process of the election.

**II. Certification is a ministerial duty, and refusal by the Board of County Commissioners to perform the duty imposed contradicts established case law and violates NRS 293.387 and NAC 293.365.**

Like Nevada, other states have faced instances of county board or commissions refusing to certify elections on time, if at all. In those jurisdictions,

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<sup>1</sup> NAC 293.480 was effective through December 31, 2023, however, the Nevada Secretary of State set forth similar requirements for any risk-limiting audit conducted on or after January 1, 2024. *See Adopted Regulations of the Nevada Secretary of State*, LCB File No. R011-23 (Sep. 18, 2023).

courts have consistently held that the process of certification is a ministerial act with no discretion to certify election results.<sup>2</sup>

After the 2022 general election, a Board of County Supervisors in Cochise County, Arizona voted 2-1 against certifying that county's election returns. V. Compl. for Special Relief, *Hobbs v. Crosby et al*, No. CV202200553 (Super. Ct. Az. 2022). The two Supervisors who voted against certification noted concerns, without evidence, that widespread voter fraud had occurred. *Id.* Arizona law requires the Board of County Supervisors to “meet and canvass the election not less than six days nor more than twenty days following the election.” ARS. § 16-642(4). In that matter, Superior Court Judge Casey McGinley ordered that the supervisors certify the

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<sup>2</sup> See *Ex parte Krages*, 689 So. 2d 799, 805 (Ala. 1997) (Supreme Court of Alabama noting that “[t]he duty to canvass election returns and certify a winner is ministerial in nature” and explaining that, in a situation where the law required a municipal governing body to canvass election returns and issue a certificate of election, “the judiciary may not order a municipal governing body to disobey or disregard its clearly expressed statutory duty”); *Weldon v. Sanders*, 655 P.2d 1004, 1009 (N.M. 1982) (Supreme Court of New Mexico holding that “canvasses conducted in violation of mandatory provision [sic] of the Election Code are nullities” and affirming conclusion that the election should be decided on the basis of precinct returns only); *Whited v. Fugate*, 94 S.E.2d 292, 294–95 (Va. 1956) (Supreme Court of Virginia remanding with instructions to grant mandamus instructing election officials to count and report the number of votes received by the candidates); *Jones v. Lawless*, 288 S.W.2d 324, 326 (Ark. 1956) (Supreme Court of Arkansas holding that “the only power and duty vested in the County Court was merely to canvass these returns and certify the results[, so it] could not go behind the returns and inquire into the qualifications of the electors.”

election because they had a “non-discretionary” duty to carry out the certification, and any concerns supervisors or the public may have about vote-tallying machines were “not a reason to delay the canvass” of the results. *See* Final Judgment Under Rule 54(b), *AZ Alliance of Ret. Americans, Inc. et al. v. Crosby, et al.*, CV202200552 (AZ Jan. 27, 2023); *See also* YouTube, 12News, *Cochise County officials court hearing about lawsuit over refusal to certify election* (Dec. 1, 2022), <https://www.youtube.com/watch?v=vd6c2UsPKa0>, at 1:01:55-1:03:21.

In New Mexico, county canvassing boards must meet to approve the report of the canvass of the returns and declare the results no sooner than six days and no later than ten days from the date of the election.” NMSA 1978, Section 1-13-13(A). After the 2022 Primary Election, the Otero County Commission met and voted not to certify the election results. Emergency Verified Petition for Writ of Mandamus to Compel Certification of Election Results, *N.M. Sec’y of State v. Otero Cnty. Comm’n*, No. S-1-SC-39426 (N.M. June 14, 2022). The New Mexico Secretary of State sued arguing that the Canvassing Board has a mandatory, nondiscretionary duty to certify the 2022 primary election results pursuant to New Mexico law, and that it is limited to reviewing discrepancy within the election returns and the precinct itself. *Id.* The New Mexico Supreme Court granted the Secretary of States’ Petition and ordered the Canvassing Board to comply with its non-discretionary duties set

forth in the New Mexico statute so the Secretary of State could fulfill her obligations in certifying election results on behalf of the state. Order Granting Writ of Mandamus, *N.M. Sec’y of State v. Otero Cnty. Comm’n*, No. S-1-SC-39426 (N.M. June 15, 2022).

This Court has relied on case law from neighboring states, including Arizona, when dealing with matters of first impression. *See Foley v. Kennedy*, 110 Nev. 1295, 1301, 885 P.2d 583 (1994) (following the holding of the Arizona Supreme Court that the legality of holding an election is a judicial question to be decided according to the requirements of the constitution; *See also Heller v. Legislature of Nev.*, 120 Nev. 456, 467, 93 P.3d 746 (2004) (relying on a ruling of the Utah Supreme Court to determine whether a legislative body’s decision to admit or expel a member is unreviewable in the courts). Like the Courts’ interpretation in *Otero* and *Crosby*, the plain reading of the statutory language in NRS 293.387 renders a County Commission’s duty to certify mandatory and non-discretionary. As discussed above, Nevada law does not grant County Commissions discretion in certifying election results or creating its own timelines for certification. Rather, state law mandates that certification occurs within ten days of the election, or five days after a recount concludes. NRS 293.387; NAC 293.365.

The concerns raised by Commissioners Andriola, Clark, and Hermann about possible inaccuracies in voting machines and “things need[ing] to change at the Legislature,” *Bd. of Cnty. Comm’rs Special Meeting* (July 9, 2024), at 3:51:26, do not support a blatant violation of Nevada law, which provides a definitive deadline for the County Commission to certify the election results. Empowering the County Commission to be able to refuse to carry out the mandated certification would allow county commissions to circumvent the will of Nevada voters or otherwise hold an election process figuratively hostage. This is particularly true when the County Commission is tasked with certifying election results in which they are a candidate.

In all, the duty of the County Commission to certify election results is one of form rather than one of substance, and refusing to certify election results violates NRS 293.387, NAC 293.365, and clearly established precedent on the issue.

### CONCLUSION

Based upon the above, this Court should grant the Petition for a Writ of Mandamus and order the Washoe County Board of Commissioners to certify the results of the recount of the 2024 Primary election.

DATED this 12th day of July 2024.

Respectfully submitted:

**AMERICAN CIVIL LIBERTIES  
UNION OF NEVADA**

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## CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this amici brief, 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 Times New Roman.

Finally, I hereby certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) 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 contains 2,326 words.

DATED this 12th day of July 2024.

Respectfully submitted:

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UNION OF NEVADA**

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## CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 12<sup>th</sup> day of July 2024. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD  
LAENA ST-JULES  
DEVIN A. OLIVER  
GREGORY D. OTT

/s/Suzanne Lara  
An employee of ACLU of Nevada

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