SUPREME COURT CASE NO. 71204

IN THE SUPREME COURT OF THE STATE OF NEVADA

DIANA V. ORROCK, BLAIN K. JONES, MARY ROONEY

Petitioners

vs.

THE HONORABLE MICHELLE LEAVITT, Eighth Judicial District Court of Clark County Nevada

Respondent,

DAVID GARDNER, DEREK W. ARMSTRONG, AND NICHOLAS D. PHILLIPS, Real Parties in Interest,

Respondents,

And

The Clark County Registrar of Voters, JOE P. GLORIA, and the Clark County Clerk, LYNN GOYA, Real Parties in Interest,

Respondents.

From the Eighth Judicial District Court, Clark County, Nevada

Case No.: A-16-739146-C

ANSWER TO EMERGENCY PETITION FOR WRIT OF MANDAMUS

DANIEL H. STEWART, ESQ.
Nevada Bar No. 11287
DHS LAW, LLC
9525 Hillwood Drive. Ste. 140
Las Vegas, NV 89134
(702) 622-6028 (Phone)
(702) 442-7818 (Fax)
Attorney for Real Parties in Interest
David Gardner, Derek Armstrong,
and Nicholas Phillips

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

ANSWER TO EMERGENCY PETITION FOR WRIT OF MANDAMUS

I. INTRODUCTION

Respondents Assemblyman David Gardner ("Gardner") from Assembly District 9 ("AD 9"), Assemblyman Derek Armstrong ("Armstrong") from Assembly District 21 ("AD 21"), and Nicholas Phillips prevailing Republican candidate for Assembly District 41 ("AD 41") (referred to collectively as "Elected Respondents"), hereby Answer the Emergency Petition for Writ of Mandamus (the "Petition") filed by Diana V. Orrock ("Orrock"), Blain K. Jones "(Jones"), and Mary Rooney ("Rooney") (referred to collectively as "Petitioners") and ask that it be denied for the following reasons:

1. Judge Leavitt did not err in her interpretation of the relevant statutes;
2. Judge Leavitt did not abuse her discretion when, after a nearly ten hour hearing, she ruled that Petitioners had not met their evidentiary burden of proving possible voting machine malfunctions that affected the election;
3. There is no legal authority to use election contests to order a new election, and, even if there were, it would be impossible at this point;
4. Petitioners are improperly using the contest process to avoid the established procedures and costs that come with a recount.

Although Elected Respondents are not concerned that an audit of the paper voting records will somehow show that they did not win their primaries, they have opposed and continue to oppose Petitioners' demands. They disagree that there is any evidence that there was anything unusual or suspicious about the election process or results. And during the daylong evidentiary hearing, Petitioners did not make even a minimal factual showing that would justify a costly and time-consuming inspection of the voting record.

Elected Respondents believe that these election contests are little more than a convenient (if improper) front to push public policies that Petitioners already support. They did not trust Clark County's election process before the votes were counted; they do not trust it now. But mere personal or ideological suspicion of both the people and procedures that govern our elections do not, by themselves, provide a sturdy foundation for judicially decided elections. If Petitioners want to change public policy, they should work to pass new laws rather than fight to undo lost elections.

Moreover, there is simply no legal authority to use an election contest to call for a new election (in three primaries only), much less any reality that a new primary election could occur at this stage of the electoral calendar. It is one thing to demonstrate a lack of an adequate remedy at law; it is another to demand the impossible.

Simply put, Elected Respondents respectfully request that this Court deny the Petitioners' Requests and allow Elected Respondents to focus on campaigning in the rapidly approaching general election.

II. STATEMENT OF FACTS

On June 14, 2016, after the votes had been counted, Gardner, Armstrong, and Phillips all won their respective primaries by comfortable margins. The results:

1. Gardner 803 votes (45.52%)/Orrock 661 votes (37.47%)
2. Armstrong 1,179 votes (55.25%)/Jones 955 votes (44.75%)
3. Phillips 934 votes (54.21%)/Rooney 789 votes (45.79%)

(*See* **Real Parties in Interest, The Clark County Registrar of Voters, Joe P. Gloria and the Clark County Clerk, Lynn Goya's Appendix Vol. 1 Doc. No. CC0021-CC0023**.)

These three races were just a few of many that voters decided this past June. There were also heated primaries (Democrat, Republican and Non-partisan) in judicial, other assembly, state senate, congressional, and U.S. Senate races. All told, 143,819 voters cast primary ballots in Clark County. And at no point during the voting and the counting process were there any reports of any machine failures, irregularities, or complaints. The elections at issue here were not close, and by all accounts they functioned without a hitch. Other than six losing Republicans

candidates for Assembly, no one else has contested the results.

For some time, Petitioners and their supporters have tried to make an issue out of the alleged lack of security and integrity of Nevada's electoral system. During the 2015 Legislative Session, supporters including Colonel Robert E. Frank, USAF (Retired) proposed Assembly Bill 209, which would have made mandatory the type of audit Petitioners now seek. (*See* Real Parties In Interest David Gardner, Derek Armstrong, and Nicholas Phillips's Appendix ("ER Appendix") **Exhibit "1", at Doc. Nos. ERA00001-00035.** These are public records, of which this Court can take judicial notice. Elected Respondents also included the bill text as Exhibit 2 to their Response to Statement of Contest filed with the lower court.)

AB 209 did not make it out of the Assembly, so post-election audits became a campaign theme during the 2016 Republican Primary. Petitioners all shared a campaign platform called the "Contract with Nevada" that specifically included a promise "to require an integrity and security audit of all electronic voting machines to ensure that there is no fraud or capability to commit fraud during the voting process." (Id., ER Appendix **Exhibit "2", at Doc. Nos. ERA00036-00038.** These documents were attached as Exhibit 4 to Elected Respondents' Response to Statement of Contest filed with the lower court.) Petitioners also promised to "work to implement those 'acts' listed within [the Contract with Nevada]." (Id.)

Petitioners all signed the "Contract with Nevada." (Id.)

After losing their respective primaries, Petitioners filed election contests claiming rights to the very audits that they had pledged to "implement" if elected. As part of the contests, Petitioners and their supporters established a "Go Fund Me Account" titled "Audit Nevada's Voting System" in order to raise money to pay the legal fees in this matter. https://www.gofundme.com/2ek7d9w (Id., ER Appendix **Exhibit "3", at Doc. Nos. ERA00039-00043**. These documents were attached as Exhibit 3 to Elected Respondents' Response to Statement of Contest filed with the lower court.) They stated that this was "the first time we have a real opportunity to open and audit all aspects: voting machines, paper records, software, firmware, tabulating processes, chain of custody, and source data and more." (Id.) They also said "5 Candidates have stepped up and they need our help to finally examine the electronic voting system in Nevada." (Id.)

It is apparent that Petitioners are using the contest process to accomplish what they have been unable to accomplish legislatively or politically. Hence, the vague claims about possible computer malfunctions, and the demand for an audit. Yet these contests are void of any of the standard allegations that usually accompany complaints about voting machines. There are no allegations that any voter had any problems voting, or that the machines somehow failed to record their votes. There are no reports of any voters discovering or complaining that the

selections they made on the voting machine differed from paper record they reviewed before finally casting their ballot.

Instead, Petitioners allege the following:

1. Personal conversations with Nevadans. (Writ, at 3:3-18.)
2. Undisclosed, "changes" to the voting systems caused the malfunction. (Id., at 4:10-23.)
3. Election results not squaring with exit polling. (Id., at 7:17-22.)
4. Anomalies when results were reported. (Id., at 7:25-8:21.)
5. Insecurities in the Clark County election system. (Id., at 9:6-12:17.)

To support these allegations, Petitioners offered their own testimony and the alleged expert reports and testimony of Mr. Tony Dane and Colonel Robert E. Frank, USAF (Retired).

On July 25th, 2016, the parties gathered for a hearing to decide the merits of Petitioners' contests. The hearing began in the morning and ran into the early evening. Counsel for all sides called their own witnesses and crossed examined others. Judge Leavitt heard all of the evidence, ruled on objections, and even allowed closing arguments. She then decided that Petitioners had "failed to present sufficient evidence to justify this Court to order an inspection of the ballots by Petitioners pursuant to NRS 293.391." (See **Exhibit "9" to Petitioners' Appendix, at Doc. Nos. 0186**.)

III. LEGAL ARGUMENT

1. Standard Of Review

"This court may issue a writ of mandamus to enforce 'the performance of an act which the law especially enjoins as a duty resulting from an office . . . or to compel the admission of a party to the use and enjoyment of a right . . . to which he is entitled and from which he is unlawfully precluded by such inferior tribunal.'" *Office of the Washoe County DA v. Second Judicial Dist. Court,* 116 Nev. 629, 635, 5 P.3d 562, 566 (2000) (quoting NRS 34.160) "Mandamus will not lie to control discretionary action . . . unless discretion is manifestly abused or is exercised arbitrarily or capriciously." *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 604-05, 637 P.2d 534, 536 (1981)(citing *Gragson v. Toco*, 90 Nev. 131, 520 P.2d 616 (1974); *Henderson v. Henderson Auto*, 77 Nev. 118, 359 P.2d 743 (1961)).

2. Election Contests

Under the guise of a rather straightforward election contest, Petitioners seek multiple remedies, none of which really relate to the contest process established by statute.

First, they want to inspect and audit "the paper printouts which were created at the time just before the voters cast their ballots on the voting machines provided." (Writ., at 2:1-2.) Not only do Petitioners believe that such an audit will

conclusively determine "that a malfunction or some yet unknown cause occurred to the voting hardware, software, business, process and electronic reporting systems used by the State and/or Clark County to accept, create, record and remove votes" (Id., at 5:10-12.), but also that it will "clear up and verify any doubts of the integrity of the canvass and the entire computer Voting System and procedures." (Id., 5:28-6:1.)

Second, they want to compare the paper records with the reported records. What they want from that comparison, however, is not clear. On one hand they believe it might show that the electronic record does not match the paper record (presumably showing that Petitioners actually won) (Id., at 2:1-2., and 6:8-11). On the other hand, they believe that after reviewing the records "the results of the primary election in these districts" will be "inconclusive."[1] (Id., at 13:7-8.)

Third, because they believe that auditing the voting record will lead to "inconclusive" results, they want new primary elections. (Id., at 13:9, and 15:1-2.)

Notably absent from the requested relief is any demand that this Court declare Petitioners' the real winners of the primary election. Such an absence is not odd given that Petitioners left it out of their arguments in the lower court as

[1] It is hard to even know what this means. Surely, a review of the paper records will still provide a conclusive tally in votes for each race. If the electronic record and the paper record do not match, then the argument is over which record matters most. There is no reason or authority to declare a possible mismatch as evidence of an "inconclusive" result.

[2] To the extent that this Court is interested in looking at polls, Elected Respondents

well. But it is telling, since Nevada election contests are mostly, if not exclusively, concerned with deciding an electoral victor.

Election contests serve a specific statutory purpose. They allow losing primary candidates to claim and prove that they are the real winners of the primary election. The law then empowers judges to decide and possibly change the results of the election if the evidence so dictates. Contests are not recounts, however, and should a losing candidate really want a recount they must use the established recount process governed by NRS 293.403 through NRS 293.405.

In other words, courts can confirm the results of the election, or declare new winners if the evidence shows that someone else actually received the most votes. There is, however, no statutory authority for using an election contest to order a new election. In fact, ordering a new election discords with the plain purpose of the election contest whereby courts adjudicate contests based on a review of the evidence from the *past* election.

In fact, NRS 293.417(4), which Petitioners rely upon but misidentify as NRS 493.420(4) (Writ, at 12:20-27) shows that even when an election is annulled or set aside without a declared winner, the court must order an office vacancy rather a new election.

There appears to be but one statutory vehicle for a new election, and it is completely inapplicable to this case. NRS 293.465 provides a safeguard for voters

in case catastrophe hits their polling location, such as power outage, fire, or other disaster.

> If an election is prevented in any precinct or district by reason of the loss or destruction of the ballots intended for that precinct, or any other cause, the appropriate election officers in that precinct or district shall make an affidavit setting forth that fact and transmit it to the appropriate board of county commissioners. Upon receipt of the affidavit and upon the application of any candidate for any office to be voted for by the registered voters of that precinct or district, the board of county commissioners shall order a new election in that precinct or district.

Nev.Rev.Stat. § 293.465.

In the days before early voting, voters had one shot, at one location to vote, so legal protections had to be built into the law. But on both a factual and procedural basis, NRS 293.465 has absolutely nothing to do with the allegations here. There are no allegations that anyone was "prevented" from voting, these new elections are passed on precincts and polling locations not races, and it is the County Commission not the courts that has the power to order a new election.

Regardless of the available remedies, however, Petitioners still failed to meet their legal and evidentiary burdens.

A. Legal Burden

NRS 293.410(1) states that a "statement of contest shall not be dismissed by any court for want of form if the grounds of the contest are alleged with sufficient

certainty to inform the defendant of the charges the defendant is required to meet." The statutes do not define "sufficient certainty," nor is there any case law interpreting the standard in the context of an election contest. Yet this Court has used the term "sufficient certainty" to test the merits of a legal pleading. *See Application of Filippini*, 66 Nev. 17, 30, 202 P.2d 535, 541 (1949) ("It is a well-recognized rule of pleading that whatever is alleged in pleading must be alleged with sufficient certainty to apprise the opposite party of what he is required to meet on the trial, and the court of the issue presented." *Brown v. Charleston Hill Nat'l. Mines*, 50 Nev. 104, 112, 256 P. 1058, 1061 (1927)). And even though the Nevada Rules of Civil Procedure have been changed since *Filippini*, the "sufficient certainty" test is compatible with the pleading standards set by N.R.C.P. 12(b)(5). As such, courts should evaluate Statements of Contest in the same way they would evaluate any other civil complaint, and dismiss them if they fail to state a claim upon which relief can be granted.

When it comes to dismissal standard set by N.R.C.P. 12(b)(5), courts must accept Petitioners factual allegations as true, but "the allegations must be legally sufficient to constitute the elements of the claim asserted." *Sanchez v. Wal-Mart Stores, Inc*. 125 Nev. 818, 824, 221 P.3d 1276, 1280 (Nev. 2009) (citing *Malfabon v. Garcia*, 111 Nev. 793, 796, 898 P.2d 107, 108 (1995)). "'A complaint will not be dismissed for failure to state a claim unless it appears beyond a doubt that the

plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief.'" *Blackjack Bonding v. City of Las Vegas Municipal Ct.*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000) (quoting *Simpson v. Mars Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997).

Although Elected Respondents moved and argued for dismissal based on N.R.C.P. 12(b)(3), (4), and (5), Judge Leavitt allowed the Petitioners a full evidentiary hearing. And it was at the conclusion of that hearing, that Judge Leavitt then ruled that Petitioners failed to meet their evidentiary burden.

B. Evidentiary Burden

Although the statutes do not specifically announce the evidentiary burden of proof to obtain a court order allowing a full audit of the voting machines and records, there is no reason to assume it is minimal or non-existent. To do otherwise would create an automatic right to an audit for any losing candidate who merely alleges possible victory. No such right exists in Nevada law. Nevada's carefully circumscribed laws for handling election data, recounts, contests, and re-votes demonstrate that Petitioners must not only follow established procedure before a court may orders an audit, but they must also meet some evidentiary burden.

Such a burden, even if minimal, makes sense. There is a limited amount of time between the primary and general elections. Ballots have to be printed, sample ballots have to be mailed, voting locations need to be selected and staffed, and

candidates have to campaign. If every losing candidate had the right to request an audit by right simply by claiming unspecified machine "malfunctions," Nevada's ability to properly run a general election could be jeopardized. The Nevada Legislature recognized the potential for abuse, and provided an orderly post-election dispute process. There is nothing in the statutes to indicate that the Legislature intended election contests to function as an open evidentiary door for fishing expeditions into otherwise confidential voting records.

Petitioners already know that there is non-minimal hurdle to clear before a court can order an audit. As mentioned above, they supported legislation in 2015, and when that failed, they promised to "implement" post-election audits if they were elected.

Therefore, Judge Leavitt did not err when she read an evidentiary burden into NRS 293.391(4) and (5). Further, she exercised sound discretion in hearing, weighing, and ultimately ruling on Petitioners' evidence. At the end of the daylong hearing, Petitioners' only real evidence for voting machine malfunctions was little more than personal expectations and exit polls.

i. Petitioners' allegations and evidence for "changes" to Clark County's voting systems are insufficient

Petitioners claim that Defendant Clark County made "changes" to the voting systems that were not disclosed prior to the election. Even if that is true (it is not), Petitioners do not say how those changes could have possibly (and negatively)

affected only those few losing Republican Assembly candidates who ran on the same platform, employed the same strategy, and hired the same consultants. Of all the races decided in June, these alleged "changes" somehow targeted only anti-tax Republican candidates for the Assembly who promised to "implement" mandatory post-election audits.

Moreover, none of Petitioners' witnesses (including the allowed and offered expert witnesses) even testified about the alleged "changes" or how that could have affected any races. It is not even clear that Petitioners or their witnesses even comprehend what these "changes" did or did not do.

ii. Petitioners' allegations about issues, and conversations with voters are meaningless

Petitioners believe in malfunctioning voting machines because they contend that the issues that allegedly mattered to voters favored them. (*See* Writ, at 3:3-17.) Given these "facts", Petitioners distrust the election results. But this "evidence" is completely meaningless, since there is no way to verify the claims, or how many of the people they allegedly spoke to or polled were registered Republicans in ADs 9, 21, and 41 who actually voted for Petitioners.

iii. Petitioners' exit polls are not enough

Although Petitioners and Mr. Dane testified about exit polls that supposedly showed Petitioners winning, the polls themselves were not part of Mr. Dane's report. Furthermore, Mr. Dane testified about the alleged historical accuracy of his

exit polls, but he did not provide any of those polls in his report. Nevertheless, the idea that exit polls (or any polls) alone can serve as evidence of voting machine malfunctions is untenable. There is absolutely no way to verify the accuracy of polls already completed. At best, one could attempt to recreate the polls, but a recreated poll will never be the same as the original. What's more, polls appear to have been getting less reliable. (*See* ER Appendix **Exhibit "4", at Doc. Nos. ERA00044-00049.** These documents were attached as Exhibit 9 to Elected Respondents' Response to Statement of Contest filed with the lower court.)

Under Petitioners' apparent reading of the law, Mitt Romney could have demanded an audit and a possible re-vote in Nevada simply because Gallup (a very trusted poll) had him winning nationally by one point and he ended up losing by almost four points, which was outside Gallup's margin of error. (*See* ER Appendix **Exhibit "5", at Doc. Nos. ERA00050-00053.** These documents were attached as Exhibit 10 to Elected Respondents' Response to Statement of Contest filed with the lower court.) Nonsense. There is no legal or factual authority supporting such a radical idea that poll failure is evidence of election failure.[2]

/ / /

[2] To the extent that this Court is interested in looking at polls, Elected Respondents submitted their own polls in their papers in the lower court. Those polls had Elected Respondents winning (*See* ER Appendix **Exhibit "6", at Doc. Nos. ERA00054-00065.** These documents were attached as Exhibit 11 to Elected Respondents' Supplemental Response to Statement of Contest filed with the lower court.)

iv. Mr. Dane's report and testimony should not have been allowed

a. Tony Dane was not a qualified expert

NRS 293.417(1) allows courts to adjudicate election contests "from the evidence." As such, the rules of evidence still apply.

Petitioners believe that Elected Respondents won their elections because of malfunctions to the voting machines. Thus, the only question that matters is whether there were any such malfunctions. And while Mr. Dane may be an expert on certain types of telephonic polling (Elected Respondents do not actually concede that), there is nothing in his background, and certainly nothing in his "report" to indicate that he is an expert when it comes to voting machines. In fact, the best evidence of his lack of relevant expertise is the report itself, which is rife with errors and faulty assumptions (see below). Therefore, it was improper to allow him to opine on the central questions in this case, and it is equally improper to rely on his report deciding this Writ.

Moreover, Mr. Dane does not fit the mold of your average expert. He was Petitioners' consultant, and a percipient witness. His exit polls, and his counsel to Petitioners were in controversy, and it was inappropriate to allow Mr. Dane to offer supposedly expert opinion on his own work.

In addition, Mr. Dane has also recently been indicted for, among other things, perjury and illegally wiretapping Armstrong's phone (See ER Appendix

Exhibit "7", at Doc. Nos. ERA00066-00073. These documents were attached as Exhibit 1 to Elected Respondents' Response to Statement of Contest filed with the lower court.), which should have disqualified him from offering expert opinion in a matter involving Armstrong.

Simply put, Mr. Dane does not have the requisite knowledge or skill to offer expert opinions in these matters, and, even if he did, his undisputable bias should have disqualified him.

b. Mr. Dane's report is unreliable.

Again, the rules of evidence apply, and under no standard does Mr. Dane's report meet the test of acceptable expert work product. In addition to the errors pointed out by Respondent Clark County, consider all of the following:

1. He included no work file or records.
2. He cited to no authority but his own.
3. He relies on exit polls that he conducted but failed to actually include any records of the polls, including necessary data such as polling universes, scripts, or methodology. All he provides is an alleged summary of hearsay statements from voters (possibly compiled by employees) that Elected Respondents do not know, nor can they cross-examine.
4. He fails to include any baseline data to help explain the alleged

"anomalies." If these races did include anomalies, surely a look at other 2016 primary races, or historical data from past races in ADs 9, 21, and 41 would show it. But Mr. Dane offers none of that, only his word that the numbers in these races are outliers.

5. He does not look at mail ballots, claiming there were too few people who voted by mail. Yet the number of people who voted by mail is actually larger than the sample size of his exit polls.

6. His results-driven analysis does not even allow for other, more logical explanations for the data he finds concerning. For instance, campaigns target certain people, certain voters, and certain precincts all the time. They may even have special ties to certain precincts (home, work, church, family, friends). And yet Mr. Dane believes that the only explanation for swings in certain precincts is machine malfunctions.

7. He proves too much. AD 9, 21, and 41 voters (Republican, Democrat, and Non-partisan) cast their votes in multiple races, and based on Mr. Dane's analysis, ***all*** of these results are suspect.

These are just some of the reasons why Judge Leavitt ruled against Petitioners even after improperly allowing Mr. Dane's testimony and report into evidence.

v. Petitioners are actually alleging human malfeasance rather than machine malfunctions

One of the reasons that Petitioners' so-called "evidence" is poor fit for their accusations is because Petitioners are not really alleging mere machine malfunctions. Taking Petitioners' allegations at face value would mean that all of the voting machines in Clark County suffered critical errors that only harmed one slate of candidates in one slate of races. Somehow the machines targeted only those candidates who were running on a platform of, among other things, mandatory post-election audits.

The only way Petitioners' allegations make any sense is if they include a human element; an intentional act done for an intentional reason. And buried in Mr. Dane's report is just such an accusation. He claims that "the final outcome was predetermined, and numbers were just filled in to match the totals." (*See* Appendix to Emergency Writ **Doc. Nos. 0060**.)

Elected Respondents actually agree with the logic of Mr. Dane's argument, even as they strenuously disagree with its substance. Absent human mischief, it is simply impossible for machine malfunctions alone to cause the errors Petitioners' allege. The problem for Petitioners is that they have not alleged or attempted to prove any malfeasance on the part of any election officials. NRS 293.410 specifically allows election contests when those running the elections engage in misconduct. *See* NRS 293.410(a) and (d). But Petitioners chose to contest the

elections on the grounds of possible machine error, not human error.

3. A New Primary Election Is Impossible

As mentioned above, there is no legal authority to use an election contest to demand a new election. But even if this Court thought otherwise, there is simply no way a new election can occur. In order to have a full and fair primary election it would have to run like a normal primary election with sample ballots, two weeks of early voting, ample time to request and return absentee ballots, and voting locations open and running all across Clark County. New ballots would have to be finalized and sent to Nevadans serving in the military outside of Nevada, with an explanation as to why they need to vote again. Then the results would have to be finalized and a canvass held all in time to prepare for and distribute the general election ballot prior to voting. And early voting in the 2016 general election begins October 22, 2016.

At a minimum, a new primary election right on the heels of the general election would cause widespread voter confusion that would affect all general election races. And what is to stop other losing primary candidates from demanding inclusion on the new ballot? If machine malfunctions affected one race, they are likely to have affected more.

It is, quite frankly, impossible for there to be a new primary election for these three races this late in the electoral calendar.

4. Petitioners Are Really Asking For A Recount

Despite basing these contests on supposed machine malfunctions, Petitioners are not actually claiming that voters were unable to cast their votes on the machines. They believe the machines' paper record is completely accurate (or at least they did when the filed their operative pleadings). It is not the voting process itself that they are challenging, but the *counting* process. They believe that the machines improperly counted the votes and that a comparison of the machines' paper record will prove that.

What they are actually asking for is a recount, and there is a set statutory process for recounts that not only insure accuracy and fairness but also make the challenger bear both the costs and the risk. *See* NRS 293.403 through NRS 293.405. By restyling a recount request as an election contest, Petitioners seek to evade the recount burdens set by statute. Should this Court give Petitioners what they ask for, the recount process will be rendered superfluous. Losing candidates could get the recount they want for free whenever they claim to be surprised by election results.

5. Judgment Should Be Entered Against Petitioners For Elected Respondents' Reasonable Fees And Costs

NRS 293.420 states that if "a contest proceeding is dismissed for insufficiency of the statement of contest or for want of prosecution, or if the district court confirms the election, judgment shall be rendered for costs in favor of the

defendant and against the contestant." Furthermore, Petitioners had no reasonable ground to bring these contests. In order to deter similar bad-faith election contests, this Court should award Elected Respondents their reasonable attorney's fees pursuant to NRS 18.010(2)(b).

III. CONCLUSION

For the above-stated reasons, Defendants respectfully asks this Court to deny Petitioners' Emergency Writ.

Dated: September __, 2016 **DHS LAW, LLC**

By: /s/ Daniel H. Stewart_____
Daniel H. Stewart
NV Bar No. 11287
9525 Hillwood Drive Ste. 140
Las Vegas, NV 89134
Phone: (702) 622-6028
Fax: (702) 442-7818
Attorney for Real Parties in Interest David Gardner, Derek Armstrong, and Nicholas Phillips

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Answer 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 in 14 pt. Times New Roman font.

2. I further certify that this brief complies with the page- or 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 4,946 words.

3. Finally, I hereby certify that I have read this appellate 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, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or 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.

Dated: September 27, 2016 **DHS LAW, LLC**

By: /s/ Daniel H. Stewart_____

Daniel H. Stewart
NV Bar No. 11287
9525 Hillwood Drive Ste. 140
Las Vegas, NV 89134
Phone: (702) 622-6028
Fax: (702) 442-7818
Attorney for Real Parties in Interest David Gardner, Derek Armstrong, and Nicholas Phillips

CERTIFICATE OF SERVICE

Pursuant to NRCP5(b), I hereby certify that on this 27th day of September 2016, I served a copy of the foregoing **ANSWER TO EMERGENCY PETITION FOR WRIT OF MANDAMUS** as follows:

Electronic Service – via the Court's electronic service system

Joel F. Hansen
Cooper Levensen
1835 Village Center Drive
Las Vegas, NV 89134
jfhansen@cooperlevenson.com
Attorney for Petitioners

Mary-Anne Miller
County Counsel Civil Division
Officer of the District Attorney
500 S. Grand Central Pkwy.
Las Vegas, NV 89155
Mary-anne.miller@clarkcountyda.com
Attorney for Defendants
Clark County, Joe Gloria, and
Lynn Goya

Executed on September 27, 2016 at Las Vegas, Nevada.

/s/ Daniel H. Stewart
An Employee of DHS Law, LLC