

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.

Electronically Filed
Oct 20 2022 08:08 AM
Elizabeth A. Brown
Clerk of Supreme Court
Case No.: 85507

REPLY TO RESPONSE TO EMERGENCY PETITION FOR WRIT
OF MANDAMUS

Sadmira Ramic, Esq.
Nevada Bar No.: 15984
Christopher M. Peterson, Esq.
Nevada Bar No.: 13932
Sophia A. Romero, Esq.
Nevada Bar No.: 12446
**AMERICAN CIVIL
LIBERTIES
UNION OF NEVADA**

601 S. Rancho Dr., Suite B-11
Las Vegas, Nevada 89106
Telephone: (702) 366-1536
Facsimile: (702) 366-1331
Email: ramic@aclunv.org
Email: peterson@aclunv.org
Email: romero@aclunv.org

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF CONTENTSii

TABLE OF AUTHORITIES..... iii

INTRODUCTION..... 1

ARGUMENT 4

I. Petitioners have the right to challenge whether Nye County’s election procedures violate Nevada law by petitioning this Court for a writ of mandamus. 4

II. The harms that Petitioners seek to prevent are sufficiently concrete to warrant a judicial review and are not mere speculation. 7

III. Requiring a voter to have a “special need” or need “special assistance” prior to providing access to a voting machine violates Nevada law...... 9

IV. Even if this Court accepts Respondents’ factual representations, Respondents’ hand count procedures will reveal election results prior to the close of the polls on election day. 10

CONCLUSION..... 15

VERIFICATIONviii

CERTIFICATE OF COMPLIANCE.....ix

CERTIFICATE OF SERVICExi

TABLE OF AUTHORITIES

Constitutional Provisions

Nev. Const. art 2 § 1A(11)	4
Nev. Const. art. 2 § 1A	1, 2, 4, 7, 10
Nev. Const. art. 2 § 1A(9)	10

Cases

<i>Allstate Ins. Co. v. Thorpe</i> , 123 Nev. 565, 572, 170 P.3d 989, 994 (2007)	6
<i>Am. Forest & Paper Ass'n v. United States EPA</i> , 137 F.3d 291 (5 th Cir. 1998).....	8
<i>Baldonando v. Wynn Las Vegas, LLC</i> , 124 Nev. 951, 194 P.3d 96 (2008)	6
<i>Child v. Lomax</i> , 124 Nev. 600, 188 P.3d 1103 (2008).....	5
<i>Herbst Gaming, Inc. v. Heller</i> , 122 Nev. 877, 141 P.3d 1224 (2006)	7
<i>Lorton v. Jones</i> , 130 Nev. 51, 322 P.3d 1051 (2014)	5
<i>Miller v. Burk</i> , 124 Nev. 579, 188 P.3d 1112 (2008).....	5

Statutes

NRS 293.269927	13, 14
NRS 293.269927(3)(b)	13
NRS 293.269927(7)(b)	13
NRS 293.269927(8).....	14
NRS 293.269935	4, 7, 11, 12

NRS 293.277	3, 4, 7, 13
NRS 293.285	4, 7, 14
NRS 293.285(2).....	14
NRS 293.3606	4, 7, 11, 12
NRS 293.8874	7
NRS 293B.353	12

INTRODUCTION

Petitioners request an emergency writ to prevent Nye County from implementing election procedures that violate Nevada constitutional and statutory provisions governing elections in this state, and federal law.

Despite Respondents' claims to the contrary, Petitioners have standing to seek relief from this Court. Petitioners have a right under the Nevada Constitution's Article 2, Section 1A to have their complaints about elections resolved fairly, accurately, and efficiently yet have no other means besides a petition for writ of mandamus to seek redress. There is also well-established precedent of this Court granting petitions filed by private parties challenging violations of Nevada's election laws.

Petitioners seek relief from harms that are sufficiently concrete to warrant judicial review. Petitioners are not engaging in speculation: a government official has formally announced how he intends to carry out his duties under law in relation to the 2022 general election, the practices described in the official's statement undeniably violate Nevada's election laws, and the intended implementation will have an immediate impact on the Petitioners. Furthermore, that official, Mark Kampf, has not

repudiated his remarks, even in the declaration he has offered to this Court.

Respondents either mischaracterize or misunderstand Petitioners' legal arguments. First, Article 2, Section 1(A) requires that all voters have equal access to Nevada's election system. Whether Nye County discriminates based upon "special needs" or a voter's desire for "special assistance", limiting access to voting machines to some voters but not others violates the Nevada Constitution. Second, by starting the hand count before the polls close on election day and providing access to the general public, who will hear the reading of each selected candidate of each race for each ballot, Nye County is necessarily disseminating restricted information to the public in violation of Nevada law. Finally, Respondents now attempt to provide an alternative meaning to Kampf's plan, but no matter how Respondents attempt to frame Kampf's statements, requiring voters to provide identification, a term with

specific meaning under Nevada law,¹ to verify their signatures violates Nevada law.

Petitioners have offered a complete copy of Kampf's Powerpoint presentation into the record and cited to where the videorecording of Kampf's oral presentation is available along with time stamps denoting the beginning and end of the presentation.² Respondents have in turn claimed that Petitioners are asking this Court to "hunt for truffles" when providing the complete record of Kampf's statements,³ and accused Petitioners of taking Kampf's words out of context when offering specific citations and timestamps.⁴ Regardless what spin Respondents put on the facts in this case, the record speaks for itself.

¹ See NRS 293.277 outlining forms of "identification" including a driver's license, military ID, and an identification card issued by the Department of Motor Vehicles.

² See Petition at 5, n. 6.

³ See Answer at 5, 13.

⁴ See Answer at 6, 11, 12, 16.

ARGUMENT

I. Petitioners have the right to challenge whether Nye County's election procedures violate Nevada law by petitioning this Court for a writ of mandamus.

Under the Nevada Constitution, as a voter and an entity authorized to represent voters, Petitioners have “the right to have complaints about elections and election contest resolved fairly, accurately, and efficiently as provided by law.”⁵ Petitioners have no administrative remedy under statute to address their complaints regarding Nye County's violations of Article 2, Section 1A of the Nevada Constitution, NRS 293.3606, NRS 293.269935, NRS 293.285, or NRS 293.277.⁶ As they have no other means to seek redress, Petitioners may seek to have their complaints regarding the administration of the election resolved through a petition to this Court for a writ of mandamus.

This Court's precedents support Petitioners' position. On multiple occasions, this Court has held that a petition for a writ of mandamus is

⁵ Nev. const. art 2 § 1A(11).

⁶ While Respondents claim that “the ACLU could have sought administrative relief with Nevada Secretary of State's Office but declined to do so,” they have cited no legal authority to support this position as none exists. Answer at 7, n. 19.

the proper mechanism for a private party to challenge a violation of Nevada’s election laws.⁷ The Court accepted such petitions before the ratification of Article 2, Section 1A of the Nevada Constitution in 2020,⁸ and this Court has even entertained petitions when administrative remedies *were* available to a petitioner and Nevada law explicitly authorized government officials, but not private parties, to enforce the provision in question.⁹ Here, as noted previously, Petitioners have no administrative remedies available, further supporting their right to seek relief through a petition for writ of mandamus.

Finally, even if Petitioners did not have the constitutional right to have their complaints resolved, Respondents misinterpret this Court’s

⁷ See *Lorton v. Jones*, 130 Nev. 51, 55–56, 322 P.3d 1051, 1053–54 (2014); *Child v. Lomax*, 124 Nev. 600, 605–06, 188 P.3d 1103, 1106–07 (2008); *Miller v. Burk*, 124 Nev. 579, 587–88, 188 P.3d 1112, 1117–19 (2008).

⁸ See *Id.*

⁹ See *Lorton*, 130 Nev. at 55–56 (petitioner could seek administrative relief pursuant to NRS 293C.186 through the city clerk and only the city attorney could file a legal challenge before a court); *Child*, 124 Nev. at 605–06 (petitioner could seek administrative relief pursuant to NRS 293.182 through the “filing officer” but only the Attorney General or district attorney could petition a court of competent jurisdiction under statute); *Miller*, 124 Nev. at 587–88 (petitioner had administrative remedies available through NRS 293.182).

holdings in *Baldonando* and *Allstate Ins. Co.*, in claiming that the Legislature preempted Petitioners from seeking relief as private parties solely by authorizing the Secretary of State to enforce NRS Title 24.¹⁰ When this Court determined that the Legislature did not intend to create a private cause of action under a particular statute because enforcement had been delegated to a state agency in *Baldonando* and *Allstate Ins. Co.*, the Court did so because the Legislature provided adequate administrative remedies for violations of those statutes.¹¹ Unlike the statutory provisions at issue in *Baldonando* and *Allstate Ins. Co.*, NRS

¹⁰ Answer at 7.

¹¹ Both *Baldonando* and *Allstate* involved statutory provisions where administrative remedies were explicitly provided under statute. See *Baldonando v. Wynn Las Vegas, LLC*, 124 Nev. 951, 960, 194 P.3d 96, 102 (2008) (“We conclude that, in light of the statutory scheme requiring the Labor Commissioner to enforce the labor statutes *and the availability of an adequate administrative remedy for those statutes' violations*, the Legislature did not intend to create a parallel private remedy for NRS 608.160 violations.”) (emphasis added); *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 572, 170 P.3d 989, 994 (2007) (“[B]ecause the Doctors' allegations in this matter relate to the Commissioner's enforcement of Nevada insurance law, *and because the Legislature has set forth a comprehensive statutory scheme to remedy any failure of the Commissioner to act in accordance with statutory duties*, we conclude that the NDOI has exclusive original jurisdiction over this matter and any matter in which, like here, a party seeks to ensure compliance with the Insurance Code.”) (emphasis added).

Title 24 does not offer any mechanism for a voter to seek redress from the Secretary of State for violations of Article 2, Section 1A of the Nevada Constitution, NRS 293.3606, NRS 293.269935, NRS 293.285, NRS 293.8874, or NRS 293.277. Coupling this lack of an administrative remedy with a voter’s right to “to have complaints about elections and election contest resolved fairly, accurately, and efficiently as provided by law” under the Nevada Constitution, Nevada law necessarily authorizes Nevada voters to seek redress for violations of Nevada election laws pursuant to a petition for writ of mandamus.

II. The harms that Petitioners seek to prevent are sufficiently concrete to warrant a judicial review and are not mere speculation.

A justiciable controversy exists when the harm alleged is “sufficiently concrete,” and while the harm “must be probable for the issue to be ripe for judicial review,” such the harm does not need to have been suffered for that review to occur.¹²

While Respondents claim that the harms at issue are “speculative”, this characterization is inaccurate. When a government official formally

¹² *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 887, 141 P.3d 1224, 1231 (2006).

announces how he intends to carry out his duties under law, the practices described in the official's statement undeniably violate the law, and the intended implementation will have an immediate impact on the Petitioners, the harm is sufficiently concrete to warrant judicial review.¹³

As Nye County's interim clerk, Kampf is the government official tasked with carrying out the County's 2022 election. Kampf made a formal presentation on September 20, 2022, before the Nye County Board of Commissioners describing the process that he intended to use during the upcoming general election. During that presentation, Kampf made a number of representations about how he intended to run the 2022 general election in Nye County, representations which were recorded and made publicly available on the Nye County Board of Commissioners website. A copy of Kampf's PowerPoint presentation was also provided.¹⁴ Petitioners' petition is based upon that presentation as neither Kampf

¹³ See *Am. Forest & Paper Ass'n v. United States EPA*, 137 F.3d 291 (5th Cir.1998) ("Permit holders' imminent need to comply, coupled with EPA's frank announcement of its intentions, belies the agency's claim that any injury is speculative.").

¹⁴ Nye County Board of Commissioners. *Nye County Board of Commissioners Agenda*. <https://www.nyecountynv.gov/DocumentCenter/View/41992/Item35>.

nor Nye County have made any public statements either correcting or contradicting Kampf's previous representations.

Kampf made his presentation to the Nye County Commission on September 20, 2022 and with early voting imminent, Kampf has made no other formal statements regarding how he intends to carry out the Nye County election. Respondents' claims that Petitioners' alleged harms are "speculative" either understates the concrete details that Kampf provided during that presentation or suggests that Kampf's statements are inconsistent. If Nye County voters, and this Court, cannot rely on the county clerk's formal representations about concrete and specific changes to the election process weeks before the process is to be implemented, that prospect is concerning, and intervention is required.

III. Requiring a voter to have a "special need" or need "special assistance" prior to providing access to a voting machine violates Nevada law.

Respondents misunderstand Petitioners' argument regarding the "special needs" limitations that Respondents intend to impose on Nye County's voting machines. The Nevada Constitution requires that all voters have "equal access to the elections system without discrimination,

including, without limitation, discrimination based on the basis of race, age, disability, military service, employment or overseas residence.”¹⁵

Though they offer varying accounts regarding what the limitations will be, Respondents do not deny that access to the voting machines will be limited either based on “special needs” or voters who seek “special assistance.”¹⁶ These limitations violate Nevada law because they discriminate between voters, and discrimination of any type is prohibited pursuant to the plain language of Article 2, Section 1A. Under the Nevada Constitution, if a voting machine is available to some voters, then all voters must have access to voting machines and be permitted to use the machine if it is their preference, regardless the source of that preference.

IV. Even if this Court accepts Respondents’ factual representations, Respondents’ hand count procedures will reveal election results prior to the close of the polls on election day.

In regards to in-person observations, Respondents err in arguing that the “Processing and County Ballots Observer Acknowledgement”

¹⁵ Nev. Const. art. 2 § 1A(9).

¹⁶ Answer at 11.

form the observers will be required to sign prior to viewing the live hand count will prevent the release of election results to the public.¹⁷ First, nothing in the Acknowledgement discusses the dissemination of what the observer heard during the hand count, let alone bars them from disseminating that information.¹⁸ After all, the role of the observer is to share their observations with the wider public.

Second, and perhaps more important, dissemination of information to the observer *themselves* is “disseminat[ing] to the public information relating to the 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. Neither NRS 293.3606 or NRS 293.269935 requires that the relevant information be widely distributed; under a plain reading, any dissemination to the public violates Nevada law.¹⁹ And as explicitly

¹⁷ Answer at 10.

¹⁸ Resp’t App. RA 047-048. While the form does require the individual signing the form to ‘not to violate anything in Title 24’ it does not denote what constitutes a violation or that a dissemination of information would be a violation. It is completely unreasonable for an observer to know every provision in the six-chapter title in order not to commit a violation.

¹⁹ Indeed, NRS 293.269935 specifically states “any person who disseminates 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

stated in NRS 293B.353, observers signing the Secretary of State's Acknowledgement form are still "members of the general public"; any information conveyed to these observers is, according to a plain reading of the text, disseminated to the public in violation of NRS 293.3606 and NRS 293.269935.

Finally, on September 20, 2022, Respondent Kampf clearly stated that he intended to "livestream", which is a live, public broadcast via the internet, the hand counting procedure, where the ballot results would be read aloud, thereby providing election results in advance of election day²⁰ Notably, Respondent Kampf does not state in his declaration that he has abandoned this plan.²¹

V. Nye County's signature verification procedures violate Nevada law.

When a mail in ballot is processed by the clerk, clerks are required to check the signature used for the mail ballot against all signatures of

cast on the day of the election is guilty of a misdemeanor (emphasis added).

²⁰ Nye County Streaming Media Archive. *Board of County Commissioners Regular Meeting*. (Sept. 20, 2022) at 2:01:20-2:01:46, available at http://nyecounty.granicus.com/ViewPublisher.php?view_id=4.

²¹ Resp't App. RA 043.

the voter available in the records of the clerk.²² If at least two employees in the office of the clerk believe there is a reasonable question of fact as to whether the signature used for the mail ballot matches the signature of the voter, the clerk must contact the voter and ask the voter to confirm whether the signature used for the mail ballot belongs to the voter.²³ If there is a reasonable question of fact as to whether the signature used for the mail ballot matches the signature of the voter, the voter can prove their identity by any of the three options: 1) answering questions from the election board officer covering the personal data which is reported on the application to register to vote; or 2) providing the election board officer, orally or in writing, with other personal data which verifies the identity of the voter; or 3) providing the election board officer with proof of identification as described in NRS 293.277 other than the registration card issued to the voter.²⁴

When a voter casts their ballot in-person, they provide a signature to the election worker prior to voting. If it is determined that their

²² NRS 293.269927.

²³ NRS 293.269927(3)(b); NRS293.269927(7)(b).

²⁴ NRS 293.269927(8).

signature does not match the signature the election worker has on file, under NRS 293.285(2), similarly to NRS 293.269927(8), the voter can prove their identity using any of the three options listed above.

On September 20, 2022, Mark Kampf stated that “if the signature or address verification fails, we have a right to ask for identification.”²⁵ At no point during his presentation does Kampf reference the other options available to the voter to prove their identity. Respondents argue that Kampf’s statement that there will be “no prompting of voter identification information,” insinuates that Nye County voters will be afforded the opportunity to provide personal information as a form of identification. However, this reading between the lines cuts against the clear statement of Kampf that the voter will have to show identification if signature or address verification fails, and Kampf has not indicated that this insinuation is correct in his declaration provided to this Court.²⁶ Given this explicit statement, such actions violate NRS 293.269927 and NRS 293.285.

²⁵ *Board of County Commissioners Regular Meeting* (Sept. 20, 2022), *infra* at 10, n. 15, at 2:02:05-2:02:13.

²⁶ Resp’t App. RA 043.

CONCLUSION

During his presentation to the Board of Commissioners on September 20, 2022, Kampf clearly stated his process for administering the 2022 general election. As much as Respondents attempt to give hidden meaning and intentions to those statements, those statements are clear on their face, and the process described violates Nevada law and the Nevada Constitution. The intended implementation will have an immediate impact on the Petitioners, and no administrative remedies exists for Petitioners to seek relief. Petitioners respectfully request the relief sought pursuant to their petition.

DATED this 20th day of October 2022.

Respectfully submitted:

**AMERICAN CIVIL LIBERTIES
UNION OF NEVADA**

/s/ Sadmira Ramic _____

Sadmira Ramic, Esq.

Nevada Bar No.: 15984

**AMERICAN CIVIL LIBERTIES
UNION OF NEVADA**

601 South Rancho Drive, Suite B-11

Las Vegas, Nevada 89106

Telephone: (702) 366-1536

Facsimile: (702) 366-1331

Email: ramic@aclunv.org

Counsel for Petitioners

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 Reply to Response to Petition for Writ of Mandamus 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 20th 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.

The remainder of this page intentionally left blank.

Finally, I hereby certify that this brief complies with the type-volume limitations of NRAP 21(d) 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 contains 2,795 words.

DATED this 20th day of October 2022.

Respectfully submitted:

**AMERICAN CIVIL LIBERTIES
UNION OF NEVADA**

/s/ Sadmira Ramic

Sadmira Ramic, Esq.

Nevada Bar No.: 15984

Christopher M. Peterson, Esq.

Nevada Bar No.: 13932

Sophia A. Romero, Esq.

Nevada Bar No.: 12446

**AMERICAN CIVIL LIBERTIES
UNION OF NEVADA**

601 South Rancho Drive, Suite B-11

Las Vegas, Nevada 89106

Telephone: (702) 366-1536

Facsimile: (702) 366-1331

Email: ramic@aclunv.org

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2022, I electronically filed the foregoing in accordance with the Nevada Supreme Court's electronic filing system and consistent with NEFCR 9.

Participants in the case who are registered with this Court's electronic filing system will receive notice that the document has been filed and is available on the Court's electronic filing system.

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

Harry L. Arnold
harnold@maclaw.com

Brian R. Hardy
bhardy@maclaw.com

/s/ Christopher Peterson

Christopher Peterson

An employee of the ACLU of Nevada

s