



November 7, 2022

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Re: Nye County Proposed Parallel, Pre-Certification Hand Count Processes

On behalf of the Brennan Center for Justice at NYU Law¹ and the American Civil Liberties Union of Nevada, we write to express our concern about the ongoing and rapidly-changing proposals for a “parallel” hand count process conducted by the Nye County clerk.² There is no legal authority in Nevada for conducting such a process, and we encourage you to make clear that your office has not approved either of the two processes proposed by Clerk Kampf—one of which involves voters’ choices being read aloud, the other of which involves silent examination of ballots by talliers—regardless of whether they take place before or after the polls close on November 8, 2022.

We also urge you to make clear that, at this stage, it is impossible to approve any hand count process because Nevada law requires that counties submit and receive approval for procedures ensuring the security of ballots and the accuracy of voting at least 90 days before the election.³ Moreover, Nevada law does not permit Nye County to conduct a count of any sort outside of the central counting location, whether or not the requirement to submit a plan and have it approved has been met.⁴

¹ The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country’s system of democracy and justice. This letter of support does not purport to convey the views, if any, of the New York University School of Law.

² Compare Precinct Hand Count Procedures updated Nov. 4, 2022 with Nye County General Election 2022 Process, <https://www.nyecountynv.gov/DocumentCenter/View/41992/Item35> (presented as Agenda Item 35 at Nye County Board of Commissioners meeting Sept. 20, 2022).

³ Nev. Rev. Stat. § 293.247; Nev. Admin. Code 293B.040 (requiring the county clerk to submit to the secretary of state procedures to “ensure the security” of ballots, results cartridges, blank ballot stock, chain-of-custody documents, access controls, and other election materials and to “[i]dentify the person who is responsible for transporting the ballots, results cartridges and [verifiable paper records] from the polling place to the central counting place” at least 90 days before the election).

⁴ Nev. Rev. Stat. § 293.0335 (defining the “[c]entral counting place” as “the location designated by the county or city clerk for the compilation of election returns”); Nev. Rev. Stat. § 293B.354 (requiring the county clerk to specify the location of the central counting place by April 15, as well as “[a] procedure for the establishment of areas within . . . the central counting place” for public observation of the counting process).

Even if a “parallel” hand count of all ballots was permitted under Nevada law, any proposed hand count process at this stage would run afoul of a variety of Nevada statutes and regulations, each one of which contributes to both the perception of, and actual security and accuracy of, Nevada elections. Nevada voters have a constitutional right to accurate elections that a last-minute, cobbled together hand count process would violate.

These legal requirements are statutory and regulatory mechanisms by which the Nevada legislature and the Secretary have secured Nevada voters’ rights under the state Constitution.⁵ The Secretary has carried out her statutory duty to “adopt regulations, not inconsistent with the election laws of this State, . . . prescrib[ing] . . . [t]he procedures to be used to ensure the security of the ballots from the time they are transferred from the polling place until they are stored pursuant to the provisions of NRS § 293.391 or § 293C.390.”⁶ This duty, in turn, along with the statutory assurances of bipartisanship and state residency that are required of central counting boards and precinct election boards,⁷ secures Nevada voters’ rights under the state Constitution by ensuring that their ballots remain free from alteration or corruption, so that they can “have complaints about elections and election contests resolved fairly, accurately and efficiently as provided by law.”⁸

In particular, we urge you to make clear that it is too late to seek approval for any hand count process that begins prior to statewide certification of all contests on Nye County ballots, as well as prior to the expiration of time for any candidates or other interested parties to request a recount or to exhaust any legal remedies. The proposed counts pose too great a risk to ballot security, and consequently to Nevada voters’ rights under the state Constitution to the fair and accurate resolution of contests.

I. Factual Background

As you noted in your letter of November 4, 2022, Clerk Kampf’s second proposed hand count process does not sufficiently protect the custody, security, and integrity of paper ballots.⁹ Nevada voters have a right under the State constitution to ballots that “[a]ccurately record[] the voter’s preference” and to “have complaints about elections and election contests resolved fairly, accurately and efficiently as provided by law.”¹⁰

⁵ Nev. Const. art. 2, § 1A.11 (securing the right of voters to “have complaints about elections and election contests resolved fairly, accurately and efficiently as provided by law”).

⁶ Nev. Rev. Stat. § 293.247.

⁷ Nev. Rev. Stat. § 293.217 (providing that the “county clerk of each county shall appoint and notify registered voters to act as election board officers for the various polling places” and that “registered voters appointed as election board officers for any polling place must not all be of the same political party”); Nev. Rev. Stat. § 293B.360 (stipulating that special election boards must “represent all parties as equally as possible.”).

⁸ Nev. Const. art. 2, § 1A.11.

⁹ Email from Secretary of State to Mr. Kampf, Re: Compliance with Nevada Supreme Court Order Granting Motion for Clarification (Nov. 4, 2022).

¹⁰ Nev. Const. art. 2 § 1A.11.

As your office has noted, Clerk Kampf’s second proposed parallel hand count process does not provide the necessary level of ballot security.¹¹ Assurance of ballot security is needed to ensure Nevada voters’ rights under the state Constitution, particularly if it is implemented prior to the statewide certification of all contests that appear on Nye County ballots, or prior to the expiration of candidates’ and other interested parties’ time to request recounts or bring any other legal challenges to the outcomes. Paper ballots and the Voter Verified Paper Trail (VVPT) are the record of the voters’ will in Nevada.¹² They must be protected by sufficient security measures to ensure that voters and candidates can be confident that the ballots have not been altered intentionally or inadvertently, such as through stray marks or degradation of the paper caused by numerous parties’ handling.

However, Clerk Kampf has indicated to the press that he intends to move forward with a hand count soon,¹³ and based on information we have received from others, a hand count of all ballots will be conducted on November 9, 2022. We encourage you to make clear that the earlier process Kampf proposed on approximately September 20, 2022,¹⁴ which was enjoined by the Nevada Supreme Court,¹⁵ also fails to provide necessary assurances under the Nevada Constitution of paper ballot security. Indeed, any process proposed at this point would fail to provide the necessary protections, for at least the following five reasons.

II. Security and Legal Problems with a Hand Count Process

There are five legal problems with any proposed hand count process at this stage, each of which is a necessary component of security and accuracy—and the perception thereof—in Nevada elections. The legal standards that a last-minute hand count process fails to meet are crucial to ensuring that Nevada voters’ rights to accurate elections are preserved.

A. Nevada Law Prohibits a Count from Occurring Outside of the Central Counting Place.

First, Nye County cannot transport ballots from an approved central counting place to a second location to conduct a parallel count. Both Nye County’s earlier proposed process and the more

¹¹ From Secretary of State to Mr. Kampf, Re: Compliance with Nevada Supreme Court Order Granting Motion for Clarification (Nov. 4, 2022).

¹² Nev. Const. art 2, § 1A.1(b).

¹³ Colton Lochhead, “State Again Rejects Nye County Vote Hand-Counting Plan,” Las Vegas Review-Journal, Nov. 4, 2022, <https://www.reviewjournal.com/news/politics-and-government/state-again-rejects-nye-county-vote-hand-counting-plan-2670493/>.

¹⁴ Nye County General Election 2022 Process, <https://www.nyecountynv.gov/DocumentCenter/View/41992/Item35> (presented as Agenda Item 35 at Nye County Board of Commissioners meeting Sept. 20, 2022).

¹⁵ Am. Civil Lib. Union of Nev. et al. v. County of Nye, No. 85507, *Order Granting in Part Petition for Mandamus* (NV Oct. 21, 2022) and *Order Granting Motion for Clarification* (NV Oct. 27, 2022).

recent proposed process call for hand tallying of ballots in Pahrump, NV, where most of the county's population resides.¹⁶ Any revised proposed process will likely call for the same.

But Nevada law provides detailed security and chain-of-custody requirements for the packaging and delivery of ballots and election materials from polling places to the "central counting place" and stipulates that the central counting place is "the location designated by the county or city clerk for the compilation of election returns."¹⁷ Nevada law also requires that, by April 15 of a general election year, counties submit to the secretary of state for approval a plan identifying the central counting place for an election and "[a] procedure for the establishment of areas within . . . the central counting place" for public observation of the counting process.¹⁸

Nevada law, therefore, forbids Nye County from transporting ballots from the approved central counting place to Pahrump for a parallel count.

B. A Hand Count Would Violate Legal Requirements to Ensure Ballot Security and Voting Accuracy

Second, any hand count at this stage would violate Nevada's regulatory requirement that counties submit and receive approval for procedures ensuring the security of ballots and accuracy of voting. Nevada law¹⁹ requires clerks to submit, at least 90 days before the election, and the secretary to approve within 15 days, a plan to "ensure the security of the ballots" and other election materials and to ensure the accuracy of voting.

Clerk Kampf does not appear to have updated this plan within 90 days of the election, in writing, to prescribe (1) how the hand count will be conducted, (2) the security protocols that will protect the ballots against corruption given the significant numbers of additional people and the supplementary space needed to perform the hand count, (3) procedures to ensure the accuracy of the vote given the well-documented added risk of error from hand counts,²⁰ (4) who will be

¹⁶ Gabe Stern, "Nevada Officials Begin Unprecedented Hand Count of Ballots," Associated Press, Oct. 28, 2022, <https://apnews.com/article/2022-midterm-elections-nevada-voting-las-vegas-617fc7a37e9cd8d1a512e4fb7be77574> (describing first proposed process); Precinct Hand Count Procedures updated Nov. 4, 2022 (describing second proposed process).

¹⁷ Nev. Rev. Stat §§ 293.0335, 293.3625, 293B.330, 293B.340.

¹⁸ Nev. Rev. Stat. § 293B.354.

¹⁹ Nev. Rev. Stat. § 293.247; Nev. Admin. Code 293B.040.

²⁰ See, e.g., Stephen Ansolabehere et al., *Learning from Recounts*, 17 Election Law Journal 100 (2018), <https://www.liebertpub.com/doi/10.1089/elj.2017.0440> (concluding that "Scanning paper ballots produces a more accurate election night count than hand counting"); Stephen N. Goggin, et al., *Post-Election Auditing: Effects of Procedure and Ballot Type on Manual Counting Accuracy, Efficiency, and Auditor Satisfaction and Confidence*, 11 Election L.J. 36 (2012), <https://www.liebertpub.com/doi/10.1089/elj.2010.0098>; Stephen N. Goggin and Michael D. Byrne, *An Examination of the Auditability of Voter Verified Paper Audit Trail ("VVPAT") Ballots*, (2007), <https://accurate-voting.rice.edu/wp-content/uploads/2007/08/evt07-goggin.pdf> (finding hand counting audits conducted by a highly educated group of university students resulted in only 57.5% of participants' counts providing the correct election results).

responsible for the transport of ballots from the central counting place to Pahrump, NV, and (5) how security of the ballots will be ensured in transit and in storage in Pahrump.

The Secretary of State's office has not approved a plan for Nye County that properly "ensure[s] the security of the ballots" and the accuracy of the vote in the event that a hand count is conducted. Nevada law therefore prohibits Nye County from carrying out a parallel hand count of any form.

C. Proposed Hand Counting Processes Lack Assurances of Bipartisanship.

Third, both the earlier proposed process and the more recent proposed procedure fail to provide any commitment to the presence of counting and election board officers who are "not all [] of the same political party."²¹ Any proposed process that fails to make this commitment would be similarly flawed. The statutory requirement of bipartisanship for election board officers in precincts (where in-person votes would previously have been tallied by Direct-Recording Electronic equipment backed up by the Voter Verified Paper Trail (VVPT)), and for central counting boards, protects the public's right to and interest in an accurate election.²² It does so by providing confidence that more than one party is represented to guard against any manipulation, alteration, destruction, or loss of ballots or the VVPT. Yet the form that Mr. Kampf has made available for volunteers to sign up to participate in the process does not even ask for party affiliation, leaving it unclear how he would ensure that any overseeing board or its equivalent is not comprised of members who are all of the same political party.²³

D. Proposed Hand Counting Processes Fail to Assure Ballot Security, And Specifically Fail to Protect Against Ballot Alteration.

Fourth, both the earlier proposed process and the more recent proposed process fail to explain or provide any procedures for ensuring that markings on ballots are not altered or added during the process, for example, by restricting writing instruments to only red or similarly colored pens in the rooms where ballots are handled, inspected, or counted. Any process that fails to explain how only red or similarly colored pens will be present near ballots would be similarly flawed. Indeed, it appears that when the earlier hand count process was implemented for two days in October, observers were permitted in the rooms with blue pens.²⁴ It also appears that one of Mr. Kampf's

²¹Nev. Rev. Stat. § 293.217.

²² Nev. Const. art. 2, § 1A.11.

²³ Nye County Ballot Hand Count Volunteer Application, <https://www.nyecountynv.gov/236/ELECTIONS>.

²⁴ Gabe Stern, "Nevada ACLU Requests Investigation of Allegations of Partisan Hand Count," Associated Press, Nov. 3, 2022, <https://apnews.com/article/2022-midterm-elections-nevada-biden-cabinet-7d4fe80341c071448ada2c7466c5b1e1;@atharesq>, Twitter (Oct. 26, 2022, 7:55PM) <https://twitter.com/atharesq/status/1585419879129092096> (posting image of ACLU observer notes made in blue pen).

volunteers who had a prominent role in overseeing the process was permitted to roam freely, armed, and approached observers and was in close proximity to them. Yet she was also permitted to approach and be near talliers and readers, and even to read out ballot choices herself.²⁵ We are not aware of any written procedure for how to ensure that someone in her position does not intentionally or inadvertently come into possession of a blue or black pen while interacting with an observer, and then intentionally or inadvertently alter ballots that she comes to contact with.

E. Proposed Hand Counting Processes Fail to Ensure that Only Nevada Voters Count Ballots.

Fifth, there have been indications on a public email listserv that individuals are planning to arrive in Nye County from out of state and participate in the hand count process.²⁶ Neither the earlier plan nor the more recent plan commit to ensuring that only Nevada registered voters participate in the parallel hand count process. Indeed, the form that Mr. Kampf has made available to sign up to be a volunteer asks whether volunteers are registered in Nye County, but does not inform those who are not registered in the county or even the state that they are ineligible.²⁷ Statutory requirements that those who serve on an election board or central counting board²⁸ must be Nevada voters protect the public's right to and interest in an accurate election.

Any processes that involve the examination of ballots by workers or volunteers, especially any processes that take place before all candidates' and interested parties' rights to legal remedies have been exhausted, must comply with security measures and written notice and approval of those measures. Otherwise, Nevada voters' rights to accurate elections could be violated by insecure procedures that risk the integrity of paper ballots—the true record of the voters' will.²⁹

Of course, emergencies and other exigent circumstances can require plans to change, as provided for by regulations that call for contingency plans in the event that the central count location and

²⁵ Stern, *supra* note 24.

²⁶ Email from Clint Curtis to electionintegrity-join@citizenoversight.org, Nov. 4, 2022 (available upon request).

²⁷ Nye County Ballot Hand Count Volunteer Application <https://www.nyecountynv.gov/236/ELECTIONS>.

²⁸ Nev. Rev. Stat. § 293.217 (providing that the “county clerk of each county shall appoint and notify registered voters to act as election board officers for the various polling places” and that “registered voters appointed as election board officers for any polling place must not all be of the same political party”); Nev. Rev. Stat. § 293B.360 (stipulating that special election boards must “represent all parties as equally as possible.”).

²⁹ Nev. Const. art. 2, § 1A (securing voters' right to “receive and cast a ballot that . . . [a]ccurately records the voter's preference in the selection of candidates.”).

central count equipment cannot be used.³⁰ But no such exigency exists that justifies departure from the security and accuracy plans and notice required by law.

If in spite of these legal and security concerns the Nye County clerk moves forward with a parallel hand count process for which there is no legal authority, we may seek recourse elsewhere, including in the courts.

Sincerely,

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³⁰ Nev. Admin. Code R091-21 §1 (providing that at least 60 days before the election each county clerk shall submit to the secretary of state a “written contingency plan for the tabulation of ballots in the event that the county experiences a loss of the central counting equipment or the use of the central counting place” and that “[i]f the county clerk invokes this contingency plan, the county clerk must notify the Secretary of State in writing not later than 12 hours after doing so.”).