IN THE SUPREME COURT OF THE STATE OF NEVADA

Jesse Law, an individual; Michael McDonald; an individual; James DeGraffenreid III, an individual; Durward James Hindle III, an individual; Eileen Rice, an individual; Shawn Meehan, an individual, as candidates for presidential electors on behalf of Donald J. Trump, Appellants, vs. Judith Whitmer, an individual; Sarah Mahler, an individual; Joseph Throneberry, an individual; Artemesia Blanco, an individual; Gabrielle D'Ayr, an individual; and Yvanna Cancela, an individual, as candidates for presidential electors on behalf of Joseph R. Biden, Jr., Respondents.	Case No. 82178 First Judicial District Court Case No.: 20 OC 001631B (Assigned to Judge James T. Russell)

APPELLANTS' OPPOSITION TO DEFENDANTS-APPELLEES' MOTION FOR SUMMARY AFFIRMANCE BY DECEMBER 8, 2020

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I. INTRODUCTION.

Respondents' Motion for Summary Affirmance by December 8, 2020 ("Motion") should be denied for several reasons. First, justice requires that Appellants be afforded reasonable due process and the right to adequately brief and argue the multiple errors by the District Court. Second, this Court should not entertain Respondents' efforts to wield the "safe harbor" date of December 8, 2020 as a mechanism to circumvent Appellants' constitutional rights. Appellants acted expeditiously and it was the District Court that resisted an earlier trial date. Finally, contrary to what Respondents assert, the instant appeal is not frivolous. The record and argument will establish that the District Court made clearly erroneous findings of facts and conclusions of law, fundamentally misunderstood and misinterpreted the Nevada election contest law and improperly neglected to weigh and consider substantial evidence of over 130,000 illegal and improper ballots that were counted by Clark County.

Contrary to Respondents' hyperbole, Appellants are not seeking to disenfranchise anyone, let alone millions of Nevada voters. Disenfranchisement is preventing or discouraging people from voting. No Nevadan was prevented from voting, rather tens of thousands of illegal or improper votes were counted. *Purcell v. Gonzalez,* 59 U.S. 1, 127 S.Ct. 5 (2006). Appellants are seeking to enforce the Nevada election contest law, adopted as part of the very election code that

enfranchises Nevadans, and which expressly provides for the nullification of an election when widespread malfeasance, errors and voting irregularities cause tens of thousands of illegal or improperly counted votes to cast reasonable doubt on the fairness of the election.

II. THERE IS NO LEGAL BASIS FOR RESPONDENTS' REQUEST TO DENY APPELLANTS THEIR DUE PROCESS RIGHTS IN OBTAINING MEANINGFUL APPELLATE REVIEW.

Citing NRAP 2, Respondents ask this Court to summarily affirm the disposition of this election contest in the District Court without any briefing on the merits, and before the record on appeal has even been *transmitted* to this Court, let alone reviewed. Respondents' request has no legal support and violates the due process rights of Appellants.

Respondents rely on *Cook v. Maher*, 108 Nev. 1024, 1026, 842 P.2d 729, 731 (1992), n. 1, in support of their baseless request; however, Respondents' reliance is misplaced. In *Cook*, this Court summarily affirmed a decision of the district court that "turn[ed] upon [its] resolution of a single, purely legal issue[,]" only after the Court had received and reviewed the record, and after the parties had "adequately apprised this court of the uncontested facts and their respective legal contentions." *Ibid.* Over 40 days elapsed between the request for summary affirmance and the ultimate decision in that case. *Ibid.* No such facts exist in the case at bar given that no record has been transmitted, no briefs have been filed, no hearing before this

Court has been held, and only 4 days have elapsed since the District Court rendered its decision.

Respondents' reliance on *Nev. Pol'y Rsch. Inst. v. Clark Cnty. Reg'l Debt Mgmt. Comm'n*, No. 61560 (Nev. Aug. 24, 2012) is equally misplaced. In that case, the Court received and reviewed the record and also *conducted a hearing before the full court* before issuing its affirmance order. Furthermore, the motion for summary affirmance was ruled on only "with the acknowledgement of the parties." *Id*. at n. 2. Again, no such facts exist before this Court.

Finally, Article 1, § 8 of the Nevada Constitution states: "No person shall be deprived of life, liberty, or property, without due process of law." The Due Process Clause requires notice and an opportunity to be heard before the government deprives any person of his or her rights under Article I. *Maiola v. State*, 120 Nev. 671, 99 P.3d 227 (2004); *Schrader v. Third Judicial Dist. Ct. in & for Eureka Cty.*, 58 Nev. 188, 73 P.2d 493, 497 (1937); *Pershing v. Reno Stock Brokerage Co*., 30 Nev. 342, 96 P. 1054 (1908). Similarly, the United States Constitution mandates that states guaranty those same due process protections. U.S. Const. amend. XIV, § 1. Nevada affords its litigants the constitutional right of appeal. Nev. Const., art. VI, § 4. Thus, Appellants' due process rights on appeal apply with the same vigor as they did at the district court level. *See id.*; *see also, e.g. Daniel v. State*, 119 Nev. 498, 508, 78 P.3d 890, 897 (2003).

III. THE "SAFE HARBOR" DATE OF DECEMBER 8, 2020 DOES NOT JUSTIFY THE DENIAL APPELLANTS' DUE PROCESS RIGHTS.

This Court should not unduly rush or otherwise dismiss the Appeal because of the misunderstood "safe harbor" provision in 3 U.S.C. § 5. The 2020 Electoral College is set for December 14, 2020. Section 5 includes a "safe harbor" for states that resolve election disputes six days prior to the Electoral College. In those instances, Congress treats as conclusive each state's determination of its electors. The "safe harbor" deadline is not a Federal requirement placed on states, rather it is a rule for Congress when counting electoral votes. *Bush v. Gore*, 531 U.S. 98, 130, 121 S. Ct. 525 (2000).

In the underlying litigation leading to *Bush*, the appellant argued that failure to meet the "safe harbor" risked the electors not participating in the Electoral College. The argument was correctly disposed of in *Bush v. Gore* and is no basis for this court to misconstrue the "safe harbor" provision. When the issue came before the Supreme Court, [1] the court made it clear that the safe harbor is for Congress. *Id.* at 113. The Court further observed that absent specific state laws implicating 3 U.S.C. §5, the safe harbor provision "did not impose any affirmative

[1] According to Justice Ginsburg, in her dissent, the day which has "ultimate significance" under federal law, is "the sixth day of January," the date set by 3 U.S.C. § 15 on which the Senate and House determine "the validity of electoral votes." Bush v. Gore, 531 U.S. 98, 144. That is the first date on which any electoral votes are actually counted.

duties" on states. *Ibid*. [2]

While it provides a benefit to the states, there is no authority for any court to modify the timing of an election contest to accommodate a "safe harbor" date. Nor was it intended to be "the end point for state-conducted election contests."[3] The safe harbor only provides a date for the conclusive congressional recognition of electors – a designation not needed or required for a state to successfully send its electors to the Electoral College. This is a rule for Congress, not a judicially enforceable rule.[4]

In presidential election contests, there may be a natural tension between affording reasonable due process to the Appellants to mount the challenge and allowing the Respondents to take advantage of the safe harbor. When the Appellants act with dispatch and comply with the election contest statutory deadlines, however, the due process rights of the Appellants must certainly take precedence. That is the case here. The Appellants filed the Statement of Contest within the statutory deadline and then immediately attempted to push the case to discovery and trial as soon as possible. Appellants (not Respondents) even filed an ex parte application in

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[2] *See* Derek T. Muller, *Restraining Judicial Application of the "Safe Harbor" Provision in the Electoral Count Act*, 81 Ohio St. L.J. Online 221, 224 (2020).

[3] Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 Fla. L. Rev. 541, 593 (2004).

[4] Congressionally approved deadlines will also not be dispositive in this case because the district court awarded Respondent's their costs. Aside from the myriad of other reasons discussed in this brief, this Court must resolve the appeal on its merits to determine whether the award of costs was appropriate.

an effort to force the District Court to expedite the trial of this matter and avoid this safe harbor argument. It is unfair and unjust to deny Appellants their due process rights to properly brief the numerous errors by the District Court. That the safe harbor date will pass before this matter can be fairly adjudicated by the Nevada Supreme Court is unavoidable, yet not dispositive. Appellants should not be penalized for the District Court's failure to expeditiously set this matter for hearing.

IV. APPELLANTS WILL BRIEF AND ARGUE MULTIPLE BONA FIDE ISSUES OF ERROR IN THE PROCEEDINGS BELOW.

Appellants intend to brief and argue *at least* the following five (5) bona fide and substantive issues of error by the District Court:[5]

A. The District Court Erred by Conflating the Two Alternative Election Contest Grounds Enumerated in NRS 293.410(2)(c).

Appellants were required to demonstrate that illegal or improper votes were cast and counted "in an amount that is equal to or greater than the margin between the contestant and the defendants" *or* "otherwise in an amount sufficient to raise a reasonable doubt as to the outcome of the election." NRS 293.410(2)(c). The disjunctive use of the word "or" means that one of the two is sufficient and both are

[5] Given the ten page limit in the instant Opposition (*see* NRAP 27(d)(2)), Appellants cannot elaborate on the merits of each referenced claim. Appellants will fully brief each of these issues in their Opening Brief which will dispositively show that each of the district court's basis for judgment was in error. To short-circuit this appeal by not allowing Appellants the full opportunity to present these arguments and without fully considering the relevant parts of the district court record would deny the Appellants their due process right to appellate review.

not necessary. Therefore, Appellants were required to demonstrate that either: (1) 33,596 illegal or improper votes were improperly counted, or (2) a "sufficient" amount of illegal or improper votes were improperly counted such that "a reasonable doubt as to the outcome of the election" exists. Neither requires a determination for whom the votes were cast. The District Court erred by failing to consider whether Appellants' evidence satisfied either test, and specifically the latter test, and instead, reached its conclusions based solely on Appellants' purported failure to prove that more than 33,596 votes for Vice-President Biden were improperly counted. This holding ignores Nevadans' right to cast a secret ballot and misapprehends the clear intend of the contest statute: if the will of the voters is reasonably in doubt due to legal problems with the election process, nullifying the doubtful election result actually ensures government by consent and the right to vote.

B. The District Court erred in its Application of Issue Preclusion With Respect to Appellants' claims.

Despite the fact that the pertinent order from a prior case was silent on multiple elements of Appellants' claims, the District Court incorrectly determined that Appellants' claims on two issues were barred by the doctrine of issue preclusion. This was a misapplication of the law. It is for this Court, and only this Court, to determine whether AB 4 permits the Agilis machine to perform mail-in-ballot signature verification without any human involvement.

C. The District Court Erred by Ignoring Clark County's Failure to Comply with the Express Signature Verification Requirements of NRS 293.8874.

Regardless of whether this Court concludes that the Agilis machine is entitled to perform signature verification without human review, the Agilis machine and Clark County were never exempted from complying with the express signature verification requirements of Nevada law. NRS 293.8874(1)(a) mandates that mail-in-ballot signatures be checked against "*all* signatures of the voter in the records of the clerk." It is undisputed that the Agilis machine is incapable of comparing the ballot signature to more than one signature on file. Consequently, the Agilis machine verified signatures on over 130,000 ballots by comparing the signature to only one signature on file, rather than "all signatures of the voter in the records of the clerk." As a result, all of these ballot signatures were improperly verified and are invalid.

This signature validation violation also occurred with respect to the Clark County election personnel who approved tens of thousands of additional ballots without comparing the ballot signature against all signatures in the records of the clerk. The District Court completely ignored these facts and entirely failed to discuss these blatant statutory violations.

D. The District Court Erred by Applying a "Clear and Convincing" Burden of Proof Rather than a "Preponderance of the Evidence" Burden of Proof.

Clear and convincing evidence was not the Appellants' burden of proof in the

proceedings below. Indeed, the statutes related to election contests contemplate negligence and malfeasance (which require a preponderance of the evidence burden of proof) rather than intentional and fraudulent conduct (which require the higher clear and convincing standard). Despite this, the District Court utilized the higher standard while simultaneously claiming that Appellants would have lost even if it had applied a preponderance of the evidence standard. This District Court's casual comment that Appellant's also failed to meet the preponderance burden did not cure the District Court's application of the incorrect burden of proof.

E. The District Court Erred in Rejecting, Ignoring and Otherwise Failing to Consider Significant Relevant and Admissible Evidence Submitted by Appellants.

The District Court's Order is silent on the evidence submitted by Appellants because the District Court improperly ignored and failed to consider most, if not all, of Appellants' evidence. In particular, the Court improperly ignored the testimony of Appellants' expert witnesses—Scott Gessler, Jesee Kamzol, and Michael Baselice. These three witnesses were highly qualified, grounded their opinions in sound scientific methodologies, and offered valuable expert testimony based on decades of experience and research.

Mr. Gessler provided unrefuted and persuasive testimony that the rejection rate for mail in ballots was uncredible and should have been at least 4% (26,800 ballots), and not the mere 1% rate in 2020. Mr. Kamzol's data analysis, which

compared Nevada's official voter files with other verifiable data sets, showed invalid ballots of various universes of data, showing a total of 130,709 unique instances of illegal and ineligible voting. Mr. Baselice supervised an extensive phone survey of Nevadans who voted by mail and concluded that thousands of those alleged voters did not cast ballots.

Despite this, the District Court improperly concluded that *all* of Appellants' experts' testimony was irrelevant or of little evidentiary value, while simultaneously stating that *all* of Respondents' experts' testimony was persuasive and of significant evidentiary value. This is particularly problematic given that Respondents' expert did not understand the difference between allegations and evidence, applied the wrong standard of proof in reaching his conclusions and based his conclusions on a survey on internet newspaper articles.

V. CONCLUSION

For the reasons set forth above, Appellants request that this Court deny the Motion, afford Appellants the due process to which they are entitled, and allow the parties' to fully brief the issues on appeal before issuing any decision on the merits of Appellants' claims.

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Dated: this 8TH day of December, 2020. **WEIR LAW GROUP, LLC**

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANTS' OPPOSITION TO DEFENDANTS-APPELLEES' MOTION FOR SUMMARY AFFIRMANCE BY DECEMBER 8, 2020** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

Dated this 8th day of December, 2020.

By: */s/ Shana D. Weir*
an employee of Weir Law Group, LLC