In the Supreme Court of the State of Nevada

FRED KRAUS, and individual registered to vote in Clark County, Nevada; DONALD J. TRUMP FOR PRESIDENT, INC.; and NEVADA REPUBLICAN PARTY, Appellants, vs. BARBARA CEGAVSKE, in her official capacity as Nevada Secretary of State; JOSEPH GLORIA, in his official capacity as Registrar of Voters for Clark County, Nevada; DEMOCRATIC NATIONAL COMMITTEE; and NEVADA STATE DEMOCRATIC PARTY Respondents,	Case No.: 82018 First Judicial District Court Case No.: 20 OC 00142 1B

RESPONSE TO APPELLANTS' EMERGENCY MOTION UNDER NRAP 27(e) FOR STAY AND TO EXPEDITE APPEAL

BRADLEY SCHRAGER, ESQ., Nevada Bar No. 10217
DANIEL BRAVO, ESQ., Nevada Bar No. 13078
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3556 E. Russell Road, 2nd Floor
Las Vegas, Nevada 89120-2234
(702) 341-5200 / Fax: (702) 341-5300

JOHN M. DEVANEY (D.C. Bar No. 375465) (admitted *pro hac vice*)
PERKINS COIE LLP
700 Thirteenth Street NW, Suite 800
Washington, D.C. 20005-3960

Attorneys for Respondents the Nevada Democratic Party and Democratic National Committee

Table of Contents

INTRODUCTION 3

BACKGROUND 4

I. Statutory Background 4

A. Mail Ballots 5

B. Public Access to Handling, Processing, and Counting of Ballots 6

II. Procedural Posture 8

LEGAL STANDARD 10

ARGUMENT 10

I. The Court correctly determined that mandamus relief was not appropriate. 10

A. The District Court correctly determined that mandamus is inappropriate so close to Election Day. 11

B. The District Court's order comports with controlling election laws. 13

C. The District Court rightly rejected Petitioners' equal protection claims. 16

II. Equitable considerations require a denial of a stay pending appeal. 24

CONCLUSION 25

CERTIFICATE OF SERVICE 26

CERTIFICATE OF COMPLIANCE 27

INTRODUCTION

Today is Election Day. Clark County is working diligently to process and count hundreds of thousands of mail ballots all while navigating a resurgent threat from COVID-19. Nearly halfway through this herculean effort, and in reliance on claims untethered from any requirement in the Nevada Revised Statutes ("NRS") or the U.S. Constitution, Petitioners Donald J. Trump for President, Inc., the Nevada Republican Party, and Fred Kraus ("Republican Petitioners" or "Petitioners") filed a mandamus petition inviting the District Court to wreak havoc on the election process and single out Clark County voters for extra scrutiny. Many of the grievances lodged in their petition could have been brought months ago. The District Court rightly rejected Petitioners' gambit, thereby avoiding the massive disruption that would have resulted from implementation of Petitioners' requested remedies. Nothing should disturb the District Court's finding now.

The District Court correctly rejected every one of Petitioners' claims. In a thorough opinion written after a full evidentiary hearing, the District Court found that Petitioners lacked standing to bring their claims, failed to prove that Clark County Registrar of Voters Joe Gloria's ("Registrar Gloria") October 20 observation plan submission and subsequent approval by Secretary of State Barbara Cegavske ("Secretary Cegavske" or the "Secretary") on October 22 did not satisfy the edicts of NRS 293B.354(1), and failed as a factual and legal matter to establish each element of an equal protection violation. App'x at 214–15, 223, 225–277. The Court also pointed out that Petitioners failed to provide citation to a single constitutional or statutory provision that required their preferred remedy of carte blanche access to the Nevada observation program and the cessation of use of the Agilis machine. App'x at 223-24. Accordingly, the Court held that issuance of an extraordinary writ of mandamus would be improper.

Petitioners now seek to stay that order. The purpose of this motion is unclear

given that the District Court's order merely affirmed the status quo, and therefore any stay would have no legal effect. In any event, this Court should not consider granting any affirmative relief under its opinion in *Tam v. Colton*, which held that the Court should not grant relief that "would substantially impair . . . the stability of the political election process in this state." 94 Nev. 453, 460, 581 P.2d 447, 452 (1978). For these reasons and those that follow, this Court should deny the petition.

BACKGROUND

The expertise of election officials in how to best process and count ballots has never been more important. The COVID-19 pandemic has fundamentally altered how people are voting in Nevada and across the country. Mail voting is surging, and those who choose to vote in person must comply with safety protocols that are essential to protect against spread of the virus. In processing these votes, election officials are required to carefully balance the novel factors that are in play while conducting an election during a pandemic. These include ensuring the safety of election workers, protecting the confidentiality of voter information, giving the public the opportunity to observe the ballot-counting process, and ensuring that all lawfully cast ballots are accepted and counted.

I. Statutory Background

Nevada officials navigated this uncharted territory with a series of changes to the State's election procedures. On March 24, Secretary Cegavske announced that, in coordination with the State's 17 counties, she would mail ballots to all active registered Nevada voters for the June 9, 2020 primary and operate limited in-person polling places in each county. And in a special session this past summer, the Nevada Legislature enacted Assembly Bill 4 ("AB 4"), creating a category of "affected elections" during emergency periods for which the State would again mail ballots to voters. Those rules apply to this election.

Petitioners' motion for stay touches on two areas in AB 4 and Nevada's

other election laws: the processing and counting of mail ballots and the public's right to observe that processing and counting. This section addresses the statutes that govern each in turn.

A. Mail Ballots

Because this election is affected by the COVID-19 pandemic, every active registered voter was mailed a ballot by October 14, 2020. *See* NRS 293.8844. During the hearing in this case, Registrar Gloria testified that 300,000 voters had already returned their ballots.[1] To allow for timely processing of the new influx of mail ballots, AB 4 allowed each county's central counting board to "begin counting the received mail ballots 15 days before the day of the election." NRS 293.8881(1). That process has now been in full swing in Clark County for two weeks.

When a ballot is received by the county clerk, the counting board is required to check the signature on the ballot return envelope against the signature in the registration records. NRS 293.8874(1)(a) ("The clerk or employee shall check the signature used for the mail ballot against all signatures of the voter available in the records of the clerk."). The statute does not require that a manual or electronic process be used except to say that a ballot cannot be flagged for rejection unless "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." NRS 293.8874(1)(b). AB 4 specifically allows the clerk to "establish procedures for the processing and counting of mail ballots." NRS 293.8871(1). Those procedures "[m]ay authorize mail ballots to be processed and counted by electronic means." NRS 293.8871(2)(a). Pursuant to this statutory authority, Clark

[1] Because no transcript is available, Intervenor-Petitioners' representation of the testimony that was put on at the hearing is based on their best recollection.

County began using an Agilis machine to process ballots, including to conduct an initial analysis and flag ballots where the signatures are clearly a match. As Registrar Gloria testified, however, Clark County continues to require that two employees agree there is a reasonable question of fact that the signatures do not match before a ballot is rejected.

Once a ballot is accepted by the county clerk's office, it is securely transferred to the counting board. NRS 293.8874(3). Registrar Gloria testified that in Clark County this means trucks containing ballots receive a law enforcement escort. The counting board then verifies the name on the return envelope and the serial numbers on the return envelope and ballot. NRS 293.8884(2). After this is completed, the ballot "must be counted." *Id.*

Clark County is required to complete this process by November 12, 2020. *See* NRS 293.8881(1). Because Nevada allows ballots to be counted if they are postmarked on Election Day and received by November 10, *see* NRS 293.317(b)(2), and also allows voters to cure an issue with the signature on their ballots until November 12, *see* NRS 293.8874(4), Clark County will be receiving ballots that it has to process and count throughout this period. This deadline is followed in short succession by a number of interconnected deadlines that move the State towards a final resolution of the election. The county is required to complete its canvass by November 16. *See* NRS 293.387(1). This deadline triggers the window for recounts, which must be requested by November 19, *see* NRS 293.403(1), and must conclude by November 29, *see* NRS 293.405(3). On November 24, the Nevada Supreme Court canvasses the vote. *See* NRS 293.395(2). And the State's election results must be certified by December 1, 2020. *See* NRS 293.395.

B. Public Access to Handling, Processing, and Counting of Ballots

The election laws provide very specific details about when and how the

public must be allowed to observe this counting process. For mail ballots, AB 4 states that once the counting board begins counting ballots, "[t]he counting procedure must be public." NRS 293.8881(1). Neither AB 4 nor any other part of the Nevada Revised Statutes grants the public additional rights to observe or access the processing of mail ballots by the county clerk. Clark County complied with this requirement granting even broader access to the work of its office. For example, while Registrar Gloria was only required to provide "public access" to the *counting board*, extensive testimony from witnesses for Respondents established at the hearing that Registrar Gloria has allowed Petitioners' representatives to observe *his office's* processing of mail ballots including signature verification.

For voting in person, on the other hand, Nevada's laws and regulations create a number of qualified rights for members of the public to observe the process. For example, members of the general public may observe voting at polling places from a designated area in the polling location that "allow[s] for meaningful observation." NAC 293.245(6). Members of the public may also "observe the handling of the ballots" after the close of polls at polling locations so long as the "do not interfere." NRS 293B.330(4). Candidate representatives and members of the press are permitted to observe the testing of voting machines used at polling places. NRS 293B.330(2). And the code lays out a litany of other opportunities for members of the public to observe the handling and processing of ballots from polling places. *E.g.*, NRS 293B.335(3) (members of the public can observe delivery of ballots from polling places); NRS 293B.380(2)(a) (the ballot processing board must allow public observation).

The county clerk is required, by April 15, to submit to the Secretary of State "a written plan for the accommodation of members of the general public who observe the delivery, counting, handling and processing of ballots at a polling place, receiving center or central counting place." NRS 293B.354. As former

Deputy Secretary of Elections Wayne Thorley ("Deputy Secretary Thorley") testified, Clark County submitted its plan on October 20, and the Secretary approved that plan on October 22.

II. Procedural Posture

The Nevada Republican Party (the "Nevada GOP") wrote to Clark County on October 19 and to Secretary Cegavske on October 20 to complain that they should be permitted closer access to election workers and allowed to view all aspects of the process—including, apparently, looking over the shoulders of election officials while they view voter's confidential information and perform signature matching. Unsatisfied with the already expanded access Clark County has granted them, the Nevada GOP demanded that the Registrar permit it to install GOP-financed and -controlled video cameras and audio equipment to monitor the work of election workers and, apparently, to view the voter information displayed on their computer screens. The Nevada GOP has made this audacious request only of Clark County and not any of the 16 other counties in the State that are engaged in the same process of verifying and counting mail ballots.

Two days after making these requests, the Nevada GOP, joined by Donald J. Trump for President, Inc. and voter Fred Kraus, petitioned the District Court for writs of mandamus or prohibition and requested a temporary restraining order that would have stopped the ballot-counting process during this critical pre-election period. The Court held a hearing that same day at which the Nevada State Democratic Party and the Democratic National Committee ("Respondents") appeared and were granted intervention into the case. The Court denied Petitioners' request for emergency injunctive relief. The parties then submitted briefing on the request for a writ of mandamus or prohibition, and, on October 28, the court held an evidentiary hearing where Petitioners put on testimony from several individuals who observed the processing and counting of ballots in Clark

County and from Registrar Gloria. Secretary Cegavske put on evidence from Deputy Secretary Thorley.

The District Court released its order on the morning of November 2, denying the entirety of Petitioners' claims. It found that Petitioners lack standing to bring their claims because they had "provided no evidence of any injury, direct or indirect, to themselves or any other person or organization as a result of the different procedures." App'x at 221. The Court also found that Petitioners' request for "unlimited access" to the entirety of the Clark county facilities was not supported by "any constitutional provisions, statutes, rules, or case," making mandamus improper. *Id.* at 10–11. Further, "because there is no duty or right to sequential stacking" of ballot envelopes and because there is no Nevada law that "gives the public the right to photograph or videotape ballot counting," the petitioners were unable to prevail. *Id.* at 11–12. Petitioners also "failed to prove that the secrecy of any ballot was violated by anyone at any time." *Id.* at 12. And because the legislature had explicitly allowed ballots to be processed and counted by electronic means, the Court declined to order Registrar Gloria to cease use of the Agilis machine. *Id.* Finally, the Court found that the Petitioners failed on their equal protection claims because nothing Clark County or the State had done created "two different classes of voters" and because there was "no evidence of debasement or dilution of a citizen's vote." *Id.* at 13.

Today, several months after Petitioners' first learned about the Agilis machine and after Clark County purportedly missed its deadline to file a public observation report, more than a week after the District Court denied their motion for emergency relief, and more than 24 hours after the District Court released its order, they have turned to this Court with an emergency motion to stay.[2] The

[2] Petitioners did not seek a stay in the district court first.

motion raises only two of the issues litigated below: their claim that NRS 293B.354—a reporting requirement—requires Clark County to grant them expanded access to ballot processing and their claim that Clark's use of a ballot sorting machine that conducts an initial signature match violates the Equal Protection Clause. Neither has merit.

LEGAL STANDARD

The Nevada Supreme Court's Rules "generally require a party to seek a stay in the district court before seeking a stay in this court." *Hansen v. Eighth Jud. Dist. Ct. ex rel. County of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000) (citing Nev. R. App. P. 8(a)). In determining whether to issue a stay pending appeal, the Nevada Supreme Court considers several factors:

> (1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.

Nev. R. App. P. 8(c). No one factor in the analysis carries more weight than any other. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004).

ARGUMENT

I. The Court correctly determined that mandamus relief was not appropriate.

The Court correctly determined that the remedy of mandamus is only appropriate "to compel the performance of an act which the law especially enjoins as a duty resulting from an office." App'x at 218 (citing NRS 34.160). Mandamus shall only issue when the officer's "duty to perform such act is clear" under the law. *Gill v. State ex rel. Booher*, 75 Nev. 448, 451, 345 P.2d 421, 422 (1959).

"Mandamus will not issue unless a *clear legal right* to the relief sought is shown." *State ex rel. Conklin v. Buckingham*, 58 Nev. 450, 83 P.2d 462, 463 (1938) (emphasis added); *In re Manhattan W. Mech.'s Lien Litig.*, 131 Nev. 702, 708, 359 P.3d 125, 129 (2015) ("'A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station.'" (quoting *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct. ex rel. County of Washoe*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008))). Petitioners' burden to establish their entitlement to the writ was "a heavy one." *Poulos v. Eighth Jud. Dist. Ct. ex rel. County of Clark*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982).

A. The District Court correctly determined that mandamus is inappropriate so close to Election Day.

The District Court's rejection of mandamus directly follows binding precedent from this Court that prohibits issuance of mandamus close to an election where the claim to relief is not clear and straightforward. In *Tam v. Colton*, prospective candidates for elective office sued to invalidate two Nevada statutes—one that set the length of term for certain offices and another districting scheme—on constitutional grounds. 94 Nev. at 457, 581 P.2d at 450. Mandamus was denied at the district court level. *Id.* at 459–60. Writing in *July of a midterm election year*, this Court affirmed the denial, underscoring that mandamus was "entirely inappropriate within the procedural setting and *practical time constraints*" of the upcoming election. *Id.* (emphasis added). With just a "few months remaining" before the general election, a judicially mandated remedy would mean "overstepping of our own judicial powers, both in duty and practical competence." *Id.* at 460. Instead, when the campaign is "already in full swing," any drastic shift in electoral rules "would substantially impair, to say the least, the stability of the political election process in this state." *Id.* at 461. Even more so here. The District Court correctly abstained from rewriting elections laws a few days before an

election, just as *Tam* commands.

This course dictated by *Tam* is consistent with the practice of federal courts across the country—including the U.S. Supreme Court, in several rulings over the past few weeks. *See, e.g.*, *Wise v. Circosta*, No. 20A71, 2020 WL 6305035 (U.S. Oct. 28, 2020) (denying stay that would have changed the ballot receipt deadline for mail ballots from status quo); *Republican Party of Pa. v. Boockvar*, No. 20-542, 2020 WL 6304626 (U.S. Oct. 28, 2020) (denying motion to expedite petition for writ of certiorari in case involving ballot receipt deadlines); *Scarnati v. Boockvar*, No. 20A53, 2020 WL 6128194 (U.S. Oct. 19, 2020) (denying by divided vote application for stay of decision of Pennsylvania Supreme Court changing Election Day deadline); *see also, e.g.*, *Wise v. Circosta*, No. 20-2104, 2020 WL 6156302, at *4 (4th Cir. Oct. 20, 2020) (en banc); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.").

This issue of timing is one of Petitioners' own making. They sat on their rights for months. Clark County's purported failure to comply with NRS 293B.354, which requires it to provide its plans for public observance of ballot handling, processing, and counting, became ripe on April 16. And Clark County first employed the Agilis machine in the State's June primary. Indeed, Clark County's acquisition and use of the Agilis machine was well known to Petitioners' counsel from their participation in discovery in parallel proceedings about Nevada's signature match law this summer. *See infra* I.C.1. They delayed bringing these proceedings until the eleventh hour *even though* earlier action would have blunted the disruptive impact of Petitioners' requested relief. Because they failed to do so, and because of this Court's edict in *Tam*, this Court should not disturb the District Court's order to maintain the status quo.

B. The District Court's order comports with controlling election laws.

The District Court correctly determined that mandamus relief was an inappropriate. App'x at 224–25. Mandamus is not an appropriate vehicle to micromanage election officials down to the specific settings used on ballot sorting machinery. Mandamus relief is generally unavailable to challenge discretionary actions. *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (general rule that mandamus may not be used to control discretionary action). The only exception is when discretion is "exercised arbitrarily or through mere caprice." App'x at 218-19 (citing *Gragson v. Toco*, 90 Nev. 131, 133, 520 P.2d 616, 617 (1974). Nevada's election code grants a great deal of election administration power to county election officials.[3] Therefore, Clark County's election plan, including their observation plan and the settings used on ballot sorting equipment, is undoubtedly the kind of discretionary action that is inappropriate for mandamus review.

1. Clark County complied with NRS 293B.354 by submitting a plan for public access.

Petitioners wholly relied on NRS 293B.354 to support their claim that they are entitled to greater access to Clark County's ballot processing and counting.

[3] *See, e.g.*, NRS 293.213 (power to establish mailing precincts); NRS 293.218 (power to recommend chairs of county election boards); NRS 293.323 (power to send and process absent ballots); NRS 293.325 (power to conduct signature matching and begin ballot cure process); NRS 293.343 (power to establish in-person polling locations); NRS 293.345 (power to mail regular and sample ballots to registered voters); NRS 293.2733 (power to, upon request, establish polling place within boundaries of Native American reservation); NRS 293.3564 (power to establish permanent polling locations for early voting); NRS 244.164 (describing election "powers and duties vested in and imposed upon the county clerk with respect to elections" that county with population of more than 100,000 can delegate to registrars of voters).

NRS 293B.354 provides that the "county clerk shall, not later than April 15 of each year in which a general election is held, submit to the Secretary of State for approval a written plan for the accommodation of members of the general public who observe the delivery, counting, handling and processing of ballots at a polling place, receiving center or central counting place." Putting aside whether this section applies to the mail ballot central counting *board* or county clerk's office where mail ballots are processed and counted at all, Clark County complied.[4] Clark County submitted a plan, albeit late, on October 20. Deputy Secretary Thorley provided uncontradicted testimony at the evidentiary hearing in this case that the Secretary approved the plan on October 22. The District Court found that although Gloria did not submit a plan by April 15, this was "remedied by submitting the plan late and the secretary of State approving the plan." App'x at 222. The District Court was correct in not granting mandamus based on Gloria's late submission, given that mandamus is only appropriate when a public official refuses to comply with explicit tenets of the law. *Buckingham*, 58 Nev. at 450, 83 P.2d at 463 ("[M]andamus against an officer is an appropriate remedy only where he refuses to perform a definite present duty imposed upon him by law."). Mandamus requires a "*clear*" duty to act, *Gill*, 75 Nev. at 451, 345 P.2d at 422, yet there is nothing in NRS 293B.354—a disclosure requirement—that requires Clark County to do

[4] NRS 293B.354 is right in the middle of a section which deals entirely with mechanical voting processes employed at in-person polling locations. It also refers to locations where ballots from in-person polling locations are processed. For example, ballots from polling places are sent to a "central counting place" for counting, NRS 293B.330(1)(b)(4)—and members of the public are expressly permitted to "observe" this occurrence, NRS 293B.330(4)—whereas mail ballots are processed by a "mail ballot central counting board," and the statute only requires that the procedure be "public." NRS 293.8881. As discussed in the next section, Nevada law governing mail ballots does not create any additional rights to observe this counting process.

anything besides file a plan.[5]

2. Petitioners did not establish that Clark County has violated the public access requirements in the election code.

The District Court noted that "Petitioners seem to request unlimited access to all areas of the ballot counting area and observation of all information involved in the ballot counting process so they can verify the validity of the ballot, creating in effect a second tier of ballot counters and/or concurrent auditors of the ballot counting election workers." App'x at 222–23. The Court correctly held that "Petitioners failed to cite any constitutional provision, statute, rule, or case that supports such a request." App'x at 223. The Nevada election code states that "the counting procedure" employed by the counting board "must be public." NRS 293.8881(1). That's it. That is all that Clark County is required to do. Petitioners' evidence conclusively established that Clark County has met this requirement and gone beyond it.

The Court held that "Petitioners have failed to prove Registrar Gloria has interfered with any right they or anyone else has as an observer." App'x at 223. The evidence before the Court supports this determination. By their own admission, Registrar Gloria has granted extended public access to, and observation of, the processing and counting of ballots in the lead up to today's election. In several places in his declaration, which was admitted into evidence, Petitioner Kraus related his experience being granted access to observe processing at Clark

[5] Petitioners argued below that they *must* be allowed to observe the "handling and processing of" mail ballots because NRS 293B.354 requires Clark County to provide a plan for that. This language is clearly a reference to the various sections of NRS 293B, which provide expanded access to the handling and processing of ballots. *See* NRS 293B.330(4) (qualified right to observe the "handling" of ballots at polling locations), NRS 293B.380(2)(a) (qualified right to observe the "processing" of ballots from polling locations).

County's voting centers on multiple occasions in the last several weeks. App'x at 14–18 (access granted to Flamingo Road facility on October 15, 2020); *id.* (access granted on October 16, 2020); *id*. (access granted on October 17, 2020); *id.* (access granted to North Las Vegas facility on October 20, 2020). The same is true for declarant Robert Thomas, whose declaration was also admitted. App'x at 20–22 (access granted to North Las Vegas facility on October 19, 2020); *id.* (access granted to same facility on October 21, 2020). And the same was true for the five other Republican poll observers who testified at the hearing. In other words, there was no need for the District Court to mandate anything; Registrar Gloria and his office are already in compliance by facilitating public access to the process.

C. The District Court rightly rejected Petitioners' equal protection claims.

1. These claims are untimely.

Petitioners' requested relief was also barred by the equitable doctrine of laches and equitable estoppel. *See Carson City v. Price*, 113 Nev. 409, 412, 934 P.2d 1042, 1043 (1997) (recognizing that laches is equitable doctrine invoked to deny relief to party who worked to disadvantage of other parties and caused change in circumstances*); Nev. State Bank v. Jamison P'ship*, 106 Nev. 792, 799, 801 P.2d 1377, 1382 (1990) ("Equitable estoppel [prevents] a party from asserting legal rights that, in equity and good conscience, they should not be allowed to assert because of their conduct."). Clark County began using the Agilis sorting machine to conduct signature matching during the June primary. As the District Court noted, Petitioners' counsel, the Republican National Committee, and the Nevada GOP were all privy to detailed discovery describing the Agilis machine in a prior litigation over Nevada's signature match laws, and even sat in a deposition of Registrar Gloria as he described in detail how Clark County used the Agilis machine and chose its calibration settings. App'x at 216; *see also* App'x at 73

(deposition transcript of Registrar Gloria describing use and operation of Agilis machine in June primary); App'x at 114 ("The process begins with the Agilis ballot sorting machine."). Yet, Petitioners waited until *10 days before Election Day* to bring an "emergency" action that would fundamentally alter the way Clark County sorts ballots, threatening to delay election results in Nevada's largest county for weeks. Petitioners could have brought this claim at an earlier juncture, particularly considering that they very recently brought similar challenges to Nevada's election laws in federal court. *See Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-CV-1445 JCM (VCF) (D. Nev.). Their delay has prejudiced the parties to this action, including Clark County, which has been planning for this election for months and implementing its plan for almost two weeks. And it will prejudice Respondents, who will have to set up a last-minute program to assist their supporters in jumping through extra hoops to have their votes counted.

2. Clark County has no clearly established duty to use a manual process to conduct its initial signature analysis.

Petitioners argued to the district court that Clark County's use of an Agilis machine violates the Equal Protection Clause. In their petition to this Court, however, they appear to shift their argument to one suggesting that Clark County's use of the Agilis machine violates the election laws. Neither has merit.

a. NRS 293.8871 specifically allows Clark County to use electronic means to process and count ballots.

As the District Court correctly held, Clark's use of a signature matching machine does not violate the Nevada election laws. In passing AB 4, the Nevada Legislature specifically authorized the counties to adopt procedures that included the processing and counting of mail ballots, including "by electronic means." NRS 293.8871(2)(a); *see also* App'x at 224. These procedures must "not conflict with the provisions of NRS 293.8801 to 293.8887, inclusive." NRS 293.8871(2)(b). Pursuant to this authority, Registrar Gloria employs the Agilis machine to sort

ballots and conduct a first pass in matching the signature on the ballot return envelope with the signature on file in Clark County's records. Deputy Secretary Thorley and Registrar Gloria testified at the hearing that the State assisted Clark County to purchase an Agilis machine, and that the machine was first put to use in the June Primary.

Petitioners suggest that Clark's use of the Agilis machine conflicts with NRS 293.8874 because that section does not "permit[] the use of a machine." Mot. 7. But it does not have to because NRS 293.8871(2)(a) *does*. Nothing in NRS 293.8874 requires the clerk or the clerk's employees to conduct its initial signature matching manually, or to abstain from using a machine to process ballots, so no conflict exists. Instead, human intervention is only required when a ballot is to be rejected. At that point, "at least two employees in the office of the clerk" must agree that "there is a reasonable question of fact as to whether the signature used for the mail ballot matches the signature of the voter." NRS 293.8874(1)(b). Registrar Gloria testified that the Agilis machine accepts 30 percent of ballots but that the other 70 percent are reviewed manually and no ballot is rejected unless at least two people on the counting board agree that there is a reasonable question of fact regarding the signature's veracity. In other words, Clark County's use of the Agilis machine is in compliance with AB 4.

b. Petitioner's equal protection claim has no merit.

In broad strokes, Petitioners argued to the District Court that Clark County's use of the Agilis machine where other counties have not exercised their authority under NRS 293.8871(1) to employ electronic means to process ballots creates "two classes of voters: those whose signatures are verified by Agilis and those who signatures are being checked visually by election officials." App'x at 9. Petitioners also spent a considerable amount of time arguing that Clark County, because of how it has calibrated the machine, is "catching fewer improperly signed ballots

compared to other Nevada counties." App'x at 9.

This claim fails at every level. First, even accepting that their legal theory is viable—it is not—Petitioners failed to adduce proof of the factual predicate for their claims. The District Court's finding that "Petitioners failed to show any error or flaw in the Agilis results or any other reason for such mandate" was supported by the record. App'x at 224. Petitioners presented evidence that Clark County uses the Agilis machine but did not present any evidence of how ballots are being processed in other counties. According to Registrar Gloria's testimony, the County tested the machine first to settle on a proper confidence interval of 40, meaning that only 30 percent of ballots representing clear matches will be accepted. The other *70 percent* of ballots are subject to manual review. Petitioners also did not put forth any evidence establishing that the Agilis machine is inaccurate in general or at the settings Clark County is using, or that the machine is likely to "mak[e] it harder for Clark County officials to catch improper or fraudulent mail ballots as opposed to the rest of Nevada." App'x at 9. Petitioners relied wholly on cursory ballot rejection statistics from this election which reflect the following rejection rates for each county:

County	Rejection Rate	County	Rejection Rate
Esmeralda	0	Clark	0.54
Mineral	0.16	White Pine	0.76
Lincoln	0.31	Carson City	0.77
Lander	0.35	Lyon	1.09
Pershing	0.39	Douglas	1.19
Eureka	0.44	Washoe	1.2
Storey	0.47	Humboldt	1.57
Nye	0.52	Churchill	1.83

Elko	0.53		

App'x at 59. These statistics, if anything, prove exactly the *opposite* of what Petitioners are citing them for. Clark County's rejection rate is squarely in the middle. As Deputy Secretary Thorley testified, the outlier on this chart is *Churchill* County, not Clark.

Second, as the Court correctly held, Petitioners did not establish disparate treatment, a necessary predicate to an equal protection violation both on the merits and for standing. App'x at 225; *see also, e.g.*, *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017) ("[T]he gravamen of an equal protection claim is differential governmental treatment."). Registrar Gloria testified that in Clark County every ballot is reviewed by two employees, who must agree that there is a reasonable question of fact that the signature on the return envelope does not match the signature in their records before it is rejected. In other words, Clark County is following the same procedures every other county is required to follow before a ballot is rejected under the signature matching regime. And Petitioners did not offer any evidence to suggest otherwise. Thus, the evidence at the hearing demonstrated that there is only *one* class of voters whose mail ballots are being rejected: those whose ballots are evaluated by two persons who agree that there is a reasonable question of fact as required by NRS 293.8874(1)(b).

Nor is there any evidence in the record that Clark County's ballots will be weighted or valued differently than anyone else's. For the first time in the motion to stay, Petitioners appear to raise a vote-dilution-by-fraud challenge to the use of the Agilis machine.[6] Vote dilution is a viable basis for equal protection claims in certain contexts, such as when laws are crafted that structurally devalue one

[6] Petitioners previously asserted a vote-dilution-by-fraud claim against the challenge statute, which is not raised in this motion.

community's votes over another's. *See, e.g., Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 406–07 (E. D. Penn. 2016); *Reynolds v. Sims*, 377 U.S. 533, 568, 84 S. Ct. 1362, 1385 (1964) ("Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."). In these unique cases, plaintiffs allege that their votes are devalued as compared to similarly situated voters in other parts of the state. *See Reynolds*, 377 U.S. at 567–68, 84 S. Ct. at 1384–85. However, as the District Court correctly held, Petitioners did not introduce *any* evidence that their votes were being weighted differently than anyone else's. App'x at 225 ("There is no evidence of debasement or dilution of a citizen's vote."). Nor do Petitioners put forth even a modicum of persuasive explanation—let alone evidence—to support their conclusory allegation that the use of an Agilis machine will cause fraud. App'x at 224.

Vote dilution by fraud as asserted by Plaintiffs is fundamentally speculative *and* applies to all voters equally, making it an ill-fit for an equal protection challenge. That is why courts across the country have repeatedly reject it both on standing[7] *and* merits[8] grounds.

---

[7] *See, e.g.*, *Donald J. Trump for President, Inc. v. Way*, Civil Action No. 20-10753 (MAS) (ZNQ), 2020 WL 6204477, at *6 (D.N.J. Oct. 22, 2020); *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5997680, at *59 (W.D. Pa. Oct. 10, 2020); *Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-CV-1445 JCM (VCF), 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020); *Martel v. Condos*, No. 5:20-cv-131, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926–27 (D. Nev. 2020); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015).

[8] *See, e.g.*, *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5997680, at *76 (W.D. Pa. Oct. 10, 2020); *Donald J. Trump for President, Inc. v. Bullock*, No. CV 20-66-H-DLC, 2020 WL 5810556, at *12 (D. Mont. Sept.

Third, even if NRS 293.8871(1)—and Clark County's use of the Agilis machine pursuant to it—constitutes disparate treatment, the statute furthers a legitimate government purpose and therefore passes constitutional muster. "[U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 2331 (1992). "County of residence is not a suspect classification warranting heightened scrutiny." *Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018). And since Petitioners did not put on evidence that the Agilis machine is causing Clark County to reject ballots at a higher rate than they would absent its use, they have not proven that the practice threatens the right to vote, and rational basis review therefore applies. *See id.*

Nevada is made up of 16 counties and one independent city that vary dramatically by population, size, and geographic attributes. Nevada, like many of the states in this country, has acknowledged these differences by adopting a decentralized system of election administration that empowers county clerks to make decisions about what their county needs. NRS 293.8871(1) is part of this decentralized system: the statute facilitates "incremental election-system experimentation" and acknowledges the differing demands on county election officials in Clark County—1,402,235 registered voters—and Esmerelda County—607 registered voters. *Id*. These interests alone justify the purported differential treatment.

30, 2020); *Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 406–07 (E.D. Pa. 2016); *see also Minn. Voters All. v. Ritchie*, 720 F.3d 1029, 1031–32 (8th Cir. 2013).

This is especially true in the context of the current election: a general election that has seen historic levels of voter participation across the country taking place primarily by mail. App'x at 214–25. Clark is faced with the monumental task of meeting this demand. As Registrar Gloria testified, the Agilis machine is a critical component of doing so. Registrar Gloria testified that Petitioners' request that they cease using the Agilis for signature matching purposes would likely cause the County to miss the canvass deadline because of the influx of ballots. "[R]ational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 2642 (1993) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314, 113 S. Ct. 2096, 2101 (1993)).[9]

Ultimately, equal protection does not demand the imposition of "mechanical compartments of law all exactly alike." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31, 43 S. Ct. 9, 9 (1922). "[F]ew (if any) electoral systems could survive constitutional scrutiny if the use of different voting mechanisms by counties offended the Equal Protection Clause." *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5997680, at *45 (W.D. Pa. Oct. 10, 2020) (quoting *Donald J. Trump for President, Inc. v. Bullock*, No. CV 20-66-H-DLC, 2020 WL 5810556, at *14 (D. Mont. Sept. 30, 2020)). The Court found that

[9] *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam) does not save Petitioners' claims. In *Bush*, the U.S. Supreme Court considered "whether the use of standardless manual recounts" by some, but not all, Florida counties in the aftermath of the 2000 presidential election violated the Equal Protection Clause of the U.S. Constitution. *Id.* at 103. The Court specifically clarified that it was *not* deciding "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id.* at 109. Instead, it was addressing a situation where the counting of ballots lacked even "minimal procedural safeguards." *Id.* Here, the continuing requirement that all ballots be subject to manual review before they are rejected provides that safeguard.

Registrar Gloria decided to purchase Agilis "because of the pandemic and the need to more efficiently process ballot signatures." App'x at 216. Clark County, the most populous county in Nevada, has an interest in processing ballots in a different manner than other counties to ensure it is able to process the larger amount of ballots it will receive. *See Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2748301, at *9 (D. Nev. May 27, 2020) ("[I]t cannot be contested that Clark County, which contains most of Nevada's population—and likewise voters (69% of all registered voters)—is differently situated than other counties.").

II. Equitable considerations require a denial of a stay pending appeal.

In their motion, Petitioners incorrectly assert that Respondents "will suffer no harm from a brief stay." Mot. 8. This could not be further from the truth. Clark County must process almost *70 percent* of the deluge of mail ballots received statewide during this election cycle, and it must do so prior to the state's canvassing deadline of November 15. Petitioners are asking Clark County to dramatically alter its carefully designed protocols on Election Day, more than two weeks after it first began processing ballots. In his opinion below, Judge Wilson found that "if Clark County is not allowed to continue using Agilis the county will not meet the canvass deadline." App'x at 216. This will have enormous downstream effects for the County, the State, and all Nevada voters.

As described above, Petitioners also sat on their claims for far too long to raise them on the very last day of voting. The reporting requirement they allege to be the cornerstone of their appeal—NRS 293B.354—was enacted in April of this year, nearly seven months ago. Likewise, Petitioners in this case have known about Clark County's use of the Agilis machine since just after the June primary. *See supra*, I.C.1. The relief Petitioners request would have been improperly provided by judicial decree *months ago*, let alone on Election Day. *See supra*, I.A.

Finally, it should not be lost on this Court that these Republican Petitioners

ask for emergency relief for just one of Nevada's 17 counties, the state's largest Democratic stronghold. There is no reason to upset ballots processing at this late hour anywhere in the state, but to do so under such politically suspect motives makes the request relief all the more unwarranted.

CONCLUSION

The District Court denied Petitioners' requests for relief. Twice. There is no order from Judge Wilson to stay. Petitioners' motion for a stay pending appeal is procedurally improper and substantively meritless, and should therefore be denied.

DATED this 3rd day of November, 2020

WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP

By: */s/ Bradley S. Schrager*
BRADLEY S. SCHRAGER, ESQ., SBN 10217
DANIEL BRAVO, ESQ., SBN 13078
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120

JOHN M. DEVANEY (D.C. Bar No. 375465)*
PERKINS COIE LLP
700 Thirteenth Street NW, Suite 800
Washington, D.C. 20005-3960

**Admitted pro hac vice*

Attorneys for Respondents the Nevada Democratic Party and Democratic National Committee

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2020, a true and correct copy of **INTERVENOR-RESPONDENTS' ANSWER TO EMERGENCY PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERATIVE, WRIT OF PROHIBITION**, has been served on all parties in this matter.

By: */s/ Dannielle Fresquez*
Dannielle Fresquez, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

CERTIFICATE OF COMPLIANCE

1. I certify that this Response complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface, size 14, Times New Roman.

2. I further certify that this Response complies with the type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the Petition exempted by N.R.A.P. 32(a)(7)(C), it contains 7,865 words.

3. Finally, I hereby certify that I have read this Response, 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 Response complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the Response 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 Response is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 3rd day of November, 2020

WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP

By: */s/ Bradley S. Schrager*
BRADLEY S. SCHRAGER, ESQ., SBN 10217

DANIEL BRAVO, ESQ., SBN 13078
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120

JOHN M. DEVANEY (D.C. Bar No. 375465)*
PERKINS COIE LLP
700 Thirteenth Street NW, Suite 800
Washington, D.C. 20005-3960

**Admitted pro hac vice*

Attorneys for Respondents the Nevada Democratic Party and Democratic National Committee

N.R.A.P. 26.1 DISCLOSURE

Pursuant to N.R.A.P. 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in N.R.A.P. 26.1(a) that must be disclosed.

DATED this 3rd day of November, 2020

WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP

By: */s/ Bradley S. Schrager*

BRADLEY S. SCHRAGER, ESQ., SBN 10217
DANIEL BRAVO, ESQ., SBN 13078
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120

JOHN M. DEVANEY (D.C. Bar No. 375465)*
PERKINS COIE LLP
700 Thirteenth Street NW, Suite 800
Washington, D.C. 20005-3960

**Admitted pro hac vice*

Attorneys for Respondents the Nevada Democratic Party and Democratic National Committee

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2020, a true and correct copy of the RESPONSE TO APPELLANTS' EMERGENCY MOTION was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system

By */s/ Dannielle Fresquez*
Dannielle Fresquez, an Employee of
WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP