

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 NEVADA STATE DEMOCRATIC)
3 PARTY; AND ROSS MILLER, IN HIS)
4 CAPACITY AS SECRETARY OF)
5 STATE FOR THE STATE OF)
6 NEVADA)

7 Appellants,)

8 vs.)

9 NEVADA REPUBLICAN PARTY, and)
10 DAVID BUELL, an individual,)
11)

12 Respondents.)
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Case No. 58404

District Court No. 11-OC-00147-1B

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Tracie K. Lindeman
Clerk of Supreme Court

12 **RESPONDENTS' SUPPLEMENTAL BRIEF**

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14 Respondents Nevada Republican Party and David Buell, by and through their
15 undersigned counsel, David C. O'Mara of The O'Mara Law Firm P.C. and Rew R.
16 Goodenow of Parsons Behle & Latimer, hereby file and serve their supplemental brief,
17 pursuant to the Court's request made in the Order Directing Supplemental Briefing, filed
18 May 31, 2011.

19 **Introduction**

20 Notwithstanding the importance and seriousness of the issues presented, the statutes
21 and case law provide little guidance in resolving the question that the Court has asked the
22 parties. The applicable statute, referenced in the Court's Order, NRS 304.230(1), mandates
23 that the special election be held one hundred eighty days after the Governor issues the
24 proclamation. Neither chapter 304, nor chapter 293, the general election law, provides any
25 statutory authority for the Governor or the courts to change the date.

26 The latest date upon which the special election could have been scheduled, at the time
27 of the proclamation's issuance, was October 4, 2011. This is less than 180, because NRS
28 304.230(1)(b) requires the special election to be held on a Tuesday. The special election was

1 scheduled for September 13, 2011. The proclamation does not give a rationale for not using
2 all of the statutorily allotted time. 1 Joint Appendix (“JA”) 64.

3 **Discussion**

4 Respondents would not oppose rescheduling the special election. However,
5 Respondents have been unable to find any authority to support rescheduling. Respondents
6 also note that the Appellants filed a Motion to Expedite Appeal, on May 24, 2011 in this
7 case. The Court granted that motion. Also, Respondents note that the Carson City Clerk –
8 Recorder on behalf of the “county clerks” sent a letter to the Court expressing concern about
9 rescheduling the date of the special election. Respondents generally agree that the public
10 interest would be served by a reasonably expeditious resolution.

11 Nevada’s statute governing the replacement of members of the House of
12 Representatives does not provide any guidance on this question. NRS 304.230 says that the
13 special election must be conducted as soon as practicable after the proclamation. It also
14 clearly grants to the Governor the power to set the date. It also specifies the number of days
15 within which the election must be conducted. Importantly, it does not say that the election
16 may be rescheduled.

17 Unfortunately, the general election law found in NRS chapter 293 also does not
18 provide any answers to this question. The Court is certainly familiar with NRS 293.464,
19 which provides the Court with authority to extend the deadline for voting. However, there is
20 no provision that permits an election to be rescheduled.

21 Neither Nevada’s Constitution, nor the Constitution of the United States provides
22 such authority. Article I, Section 2 of the Constitution of the United States provides for the
23 election of members of the House of Representatives, by the states, every second year. The
24 authority to determine the time, place and manner of holding elections for Representatives
25 resides in the state Legislatures. U.S. Const. Art. I, Sec. 4. The powers of the Governor and
26 of the Secretary of State granted in Art.5 of the Constitution of the State of Nevada do not
27 specifically include the power to reschedule elections.

1 While no reported decisions in Nevada appear to have resolved the question of
2 whether authority to reschedule elections resides in any branch of government, some courts
3 in other jurisdictions have considered the question. In Republican Party of State of Delaware
4 v. Dept. of Elections of New Castle County, 792 A.2d 224, 226 (Sup. Ct. of Del., New Castle
5 Co. 2001), the court decided that the election board did not have authority to move a special
6 election, at the request of a political party, because it coincided with a United States
7 presidential inauguration). That court reasoned that the statutes specifying the date for the
8 special election were “mandatory” in nature. Id. It came to this conclusion by reading the
9 statutory language using the word “shall” to require the Board of Elections to set issue a
10 proclamation setting the election date. The same “mandatory” language is used in NRS
11 304.230(1). Review of the common legal resource, American Jurisprudence (2nd Ed. May
12 2011), “Elections” at Sec. 299 seems to be in accord with the aforementioned case, “a statute
13 fixing the time for a special election is mandatory, and as such is not subject to interpretation
14 or manipulation by either an appellate court or a board of elections. Further, statutory
15 language authorizing a board of elections to set a special election date does not impliedly
16 grant the board authority to change a special election date.”

17 **Conclusion**

18 Respondents perceive the advantage of this Court having adequate time to fully and
19 carefully consider the important issue presented by this case. Therefore, Respondents do not
20 oppose rescheduling the election. However, Respondents are concerned that the Court does
21 not have authority to order the election to be rescheduled. Doing so could further jeopardize
22 an already questioned process. Therefore, Respondents believe the most prudent course for
23 the Court would be to proceed with the case, without rescheduling the election.

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1 DATED: June 6, 2011
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1 CERTIFICATE OF SERVICE

2 I hereby certify that I am an employee of Parsons Behle & Latimer, and that on this 6th
3 day of June, 2011, I filed a true and correct copy of the foregoing RESPONDENTS'
4 SUPPLEMENTAL BRIEF with the Clerk of the Court through the Court's CM/ECF system,
5 which sent electronic notification to all registered users as follows:

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18 Additionally, I hereby certify that on this on this 6th day of June, 2011, I caused to be
19 served a true and correct copy of the foregoing RESPONDENTS' SUPPLEMENTAL BRIEF via
20 U.S. Mail, at Reno, Nevada, in a sealed envelope with first-class postage fully prepaid, and
21 addressed as follows:

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