

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

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

5 Appellants,

6 vs.

7
8 NEVADA REPUBLICAN PARTY; AND DAVID
9 BUELL,

10 Respondents.

Supreme Court Docket No. 58404

Electronically Filed
Jun 06 2011 03:34 p.m.

Tracie K. Lindeman
Clerk of Supreme Court
Appeal from the First Judicial District
COURT, CARSON CITY, NEVADA

THE HONORABLE JAMES TODD RUSSELL.

District Judge

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

11
12 **NEVADA STATE DEMOCRATIC PARTY'S SUPPLEMENTAL BRIEF**
13 **REGARDING SPECIAL ELECTION SCHEDULING**

14
15 **JONES VARGAS**
16 **BRADLEY SCOTT SCHRAGER, ESQ.**
Nevada Bar No. 10217
3773 Howard Hughes Parkway
Third Floor South
Las Vegas, Nevada 89169
Telephone: (702) 862-3300
Facsimile: (702) 737-7705

17
18 **GRIFFIN ROWE & NAVE**
19 **MATTHEW M. GRIFFIN, ESQ.**
Nevada Bar No. 8097
1400 S. Virginia Street, Ste. A
Reno, Nevada 89502
Telephone: (775) 323-1240

20
21 **PERKINS COIE LLP**
22 **MARC. E. ELIAS, ESQ.**
Pro hac vice
700 Thirteenth Street N.W.
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211

23
24
25
26
27 *Attorneys for Appellant*
28 *The Nevada State Democratic Party*

JONES VARGAS
3773 Howard Hughes Parkway - Third Floor South
Las Vegas, Nevada 89169
Tel: (702) 862-3300 Fax: (702) 737-7705

**NEVADA STATE DEMOCRATIC PARTY'S SUPPLEMENTAL BRIEF
REGARDING SPECIAL ELECTION SCHEDULING**

Pursuant to an Order of this Court issued on May 31, 2011, Appellant the Nevada State Democratic Party (the "NSDP") here submits supplemental briefing on the issue of the scheduling of the special election to fill the vacancy in Nevada's Second Congressional District, currently set for September 13, 2011.

This Court has the authority, pursuant to its inherent and equitable powers, to reschedule the special election to a later date, if doing so would allow this Court to work substantial justice and permit the Court to address and balance the potential harms raised by present circumstances.

A. TIMELINE OF EVENTS

On May 9, 2011, the Governor issued a proclamation setting September 13, 2011 as the date for a special election to fill the vacancy in Nevada's Second Congressional District seat occasioned by the resignation of former Rep. Dean Heller. In his proclamation, the Governor anticipated that the Secretary of State would be responsible for interpreting and administering the special election to comply with all state and federal laws pertaining thereto. See Proclamation, Joint Appendix (J.App) I, 64. Not anticipating legal challenges to the election procedures, the Governor set the special election for 121 days after the issuance of this proclamation, well short of the 180-day period allowed by statute. N.R.S. 304.230(1).

Pursuant to the Governor's Proclamation, NRS Chapters 293 and 304, and his authority as Nevada's Chief Elections Officer, the Secretary established candidate filing periods and other ballot preparation deadlines. N.R.S. 304.240(1); 293.204; 293.124(1). These periods and deadlines were designed to allow the state to hold the special election on September 13 while still complying with the Uniformed and Overseas Citizens Voting Act, as amended by the Military and Overseas Voter Empowerment Act, which requires states to mail ballots to service members and other overseas voters at least 45 days before any federal election, including special elections. See 42 U.S.C. § 1973ff.

Within its prayer for relief below, Respondent the Nevada Republican Party ("NRP"), asked the district court to delay and re-set the deadlines established by the Secretary of State. See Complaint,

1 J. App. I, 6. Declining to afford deference to the Secretary's established schedule, the district court,
2 in its Findings of Fact and Order, altered and extended the candidate filing period for the special
3 election. J.App. III, 272. As a result, this Court is now faced with a compressed timeline within
4 which to resolve the statutory and constitutional issues raised by the NRP's lawsuit, while still trying
5 to keep the state in compliance with federal law.

6 Given the pressing need to resolve all of the NRP's claims below, to resolve this appeal of the
7 district court's order, and to keep the state in compliance with federal law, this Court may reschedule
8 the special election for a date after September 13, 2011 but within the 180-day period prescribed by
9 N.R.S. 304.230(c).¹

10 **B. N.R.S. 304.230(1)(a) AND THE COURT'S INHERENT POWERS ALLOW IT TO**
11 **RESCHEDULE THE SPECIAL ELECTION**

12 The Nevada Supreme Court has long held that Articles 3, § 1 and 6, § 1 of the Nevada
13 Constitution provide the Court with the inherent authority to exercise the judicial function of the
14 state. *Galloway v Truesdell*, 83 Nev 13, 422 P.2d 237 (1967). The judicial function "is the exercise
15 of judicial authority to hear and determine questions and controversies that are proper to be
16 examined in a court of justice." *Galloway*, at 20. The judicial power granted to the Court includes
17 the authority to exercise "any power or authority that is inherent or incidental" to the judicial
18 function. *Galloway*, at 20-21; *see also Goldberg v Eighth Judicial District Court*, 93 Nev. 614,
19 617, 572 P.2d 521 (1977); *State v. Second Judicial District Court*, 116 Nev. 953, 959, 11 P.3d. 1209
20 (2000). Where the Court's ability to hear and determine questions and controversies is constrained,
21 the Court may act under its inherent judicial powers in order to discharge its judicial function.
22 *Galloway* at 20-21; *see also Waite v. Burgess*, 69 Nev. 230, 233-34, 245 P.2d 994 (1952); *Lindauer*
23 *v. Allen*, 85 Nev. 430, 434, 456 P.2d 851 (1969); *State v. American Bankers Ins. Co.*, 106 Nev. 880,
24 883, 802 P.2d 1276 (1990). In such circumstances, the exercise of judicial power includes altering
25 fixed periods set by the legislative and/or the executive branch. *Id.*; *see also Burling v.*

26
27 ¹ The latest possible date for which the special election may be scheduled and still conform to
28 the timelines contemplated by N.R.S. 304.230(1) is **Tuesday, November 1, 2011**. The NRP's
Supplemental Brief incorrectly calculates October 4, 2011 as the last possible day.

1 *Chandler*, 148 N.H. 143, 804 A.2d 471 (2002) (state supreme court established new deadlines for
2 candidate filing due to ongoing judicial proceeding).

3 Where the need for careful and considered review of important legal and policy issues
4 constrains the ability of the Court to exercise its judicial powers in a just manner within a particular
5 timeframe—and that timeframe may be adjusted without significant harm to parties or the public—
6 there must necessarily be a measure of flexibility available to the Court.

7 N.R.S. 304.230(1)(a) states that the special election must be conducted "as soon as
8 practicable after the issuance of the proclamation," but no later than 187 days after the creation of
9 the vacancy. N.R.S. 304.230(1).² Practicability, in this instance, must be broad enough to allow the
10 Court to do its work and to discharge the judicial function. The phrase certainly is broad enough to
11 allow for the machinery of the executive branch, through the Secretary of State, to meet the myriad
12 deadlines for candidate filing, ballot drafting and printing, etc.—all important and necessary steps
13 for the holding of an election. It must also be broad enough to permit the judicial branch to fulfill
14 its constitutional obligation to ensure the proper interpretation of state law.

15 N.R.S. 304.230(1) and this Court's inherent powers provide authority to reschedule the
16 pending special election, especially in view of the relative harms, discussed below, threatened by the
17 exercise of that authority.

18 **C. UPON BALANCING THE POTENTIAL HARMS INVOLVED, THE COURT'S**
19 **EQUITABLE POWERS AUTHORIZE IT TO RESCHEDULE THE SPECIAL**
20 **ELECTION**

21 There is no harm to any party, or to the public, arising from the rescheduling of the special
22 election to allow review by this Court of the pending appeal. N.R.S. 304.230(1) requires that a
23 special election to fill the vacancy must occur within 187 days of the vacancy in office, and any
24 extension of the date pursuant to this Court's discretion would not be contrary to the purpose of that
25 statute. Additionally, under both the Secretary of State's interpretation and the District Court's

26
27 ² The Governor is directed by statute to issue his proclamation within seven days of the event
28 giving rise to the vacancy, and the election is to be held within 180 days of the issuance of the
proclamation. Therefore the statute contemplates a maximum of 187 days between vacancy and
special election. N.R.S. 304.230(1).

1 interpretation, the filing period for declarations of candidacy has not expired and, as such, the field
2 of candidates, and their expectations, will not be affected by extending the date of the election.

3 In contrast, the harm arising from the holding of the special election under terms and
4 procedures upon which this Court has not passed, even though litigation focusing upon those very
5 questions is pending and was brought without delay or lack of diligence, would be severe.
6 Nevadans have a right to have elections conducted pursuant to law, in a fair and equitable manner.
7 The Secretary of State merits consideration of his interpretation of state law regarding elections, as
8 Chief Elections Officer on behalf of all Nevadans. The parties to this appeal—major political
9 parties whose interests in the outcome are manifest—should expect that substantial issues regarding
10 their rights as political parties will be determined in advance of major electoral events in, as the
11 Court notes, "a thoughtful and considered" manner. Supreme Court Order, May 31, 2011, 1.
12 Finally, though they are not before this Court, candidates who wish to run in the special election,
13 many of whom have already filed, have rights and interests implicated by this matter.

14 It is worth noting that the power to set the date of the special election pursuant to N.R.S.
15 304.240(1) is bestowed upon the Governor by the Legislature, and is not itself a constitutional
16 power.³ The Court's authority to reschedule the special election, therefore, does not implicate a
17 separation of powers question, especially where opposing constitutional rights of parties and the
18 public are at issue. *See Sawyer v. Dooley*, 21 Nev. 390, 32 Pac. 437 (1893) (Constitutional
19 prohibition against exercising powers of another department or branch refers to duties and functions
20 charged by the Nevada Constitution). To the contrary, separation of powers concerns might be
21 implicated were the executive branch's schedule to prohibit this Court from meeting its independent
22 right and obligation to construe state law.

23 Here, because the gubernatorial power to set the special election date is legislatively created,
24 and the rights implicated in the appeal are not only constitutional in nature but fundamental to the
25 democratic process, the former should yield, albeit in a fashion that remains true to the larger
26

27 ³ The power vested in the Governor to issue the writ of election arises from U.S. Const. art. 1,
28 § 2, cl. 4, but the content, manner, timing, and terms of the writ are set by state statute, here
N.R.S. 304.240(1).

1 democratic process, the former should yield, albeit in a fashion that remains true to the larger
2 concerns of N.R.S. 304.230(1) that the election be conducted as soon as practicable, on a Tuesday,
3 within 187 days after the event giving rise to the vacancy in the office of Representative in
4 Congress.

5 **C. CONCLUSION**

6 In sum, if this Court believes it needs an appropriate period of time to consider the merits of
7 this appeal because of the "important issues and questions of public policy that may be at stake," and
8 that period is not commensurate or available under the schedule as currently formulated pursuant to
9 the Governor's proclamation of May 9, 2011, this Court can, and should, reschedule the special
10 election for a date within the statutory timeframe.

11 Should the Court, however, not concur that it has the authority to reschedule the special
12 election, Appellants are prepared to work within whatever timeframe the Court deems necessary to
13 resolve this matter.

14 DATED this 6th day of June, 2011.

Submitted by,

15
16 **JONES VARGAS**

17 By: /s/ Bradley Scott Schrager
18 BRADLEY SCOTT SCHRAGER, ESQ.
19 Nevada Bar No. 10217
20 3773 Howard Hughes Parkway
21 Third Floor South
22 Las Vegas, Nevada 89169
23 Telephone: (702) 862-3300
24 Facsimile: (702) 737-7705

25 **GRIFFIN ROWE & NAVE**
26 MATTHEW M. GRIFFIN, ESQ.
27 Nevada Bar No. 8097
28 1400 S. Virginia Street, Ste. A
Reno, Nevada 89502
Telephone: (775) 323-1240

25 **PERKINS COIE LLP**
26 MARC. E. ELIAS, ESQ.
27 *Pro hac vice*
28 700 Thirteenth Street N.W.
Washington, D.C. 20005-3960
Tel: (202) 654-6200
Facsimile: (202) 654-6211
Attorneys for Appellant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 6th day of June, 2011 and pursuant to NRCP 5(b), I served the foregoing by Nevada Supreme Court CM/ECF Filing to:

William M. O'Mara, Esq.
David C. O'Mara, Esq.
311 East Liberty Street
Reno, NV 89501
Attorneys for Respondent

Rew R. Goodenow, Esq.
50 West Liberty Street
Suite 750
Reno, NV 89501
Attorneys for Respondent

Catherine Cortez Masto, Esq.
Nevada Attorney General
100 N. Carson Street
Carson City, NV 89701
Attorney for Appellant the Secretary of State

/s/ Robyn Campbell
An employee of JONES VARGAS

JONES VARGAS
3773 Howard Hughes Parkway - Third Floor South
Las Vegas, Nevada 89169
Tel: (702) 862-3300 Fax: (702) 737-7705