

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

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

7 Appellants.

8 vs.

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

11 Respondents,

Electronically Filed
Jun 06 2011 04:04 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

Supreme Court No. 58404

District Court No. 11 OC 00147 1B

12 **APPELLANT'S SUPPLEMENTAL BRIEF**

13 Appellant Ross Miller, Secretary of State, by and through counsel, Catherine Cortez
14 Masto, Attorney General, and Kevin Benson, Deputy Attorney General, hereby submits his
15 Supplemental Brief in response to this Court's order dated May 31, 2011.

16 I. **Relevant factual and procedural background.**

17 Following John Ensign's resignation from the U.S. Senate on May 3, 2011, Governor
18 Brian Sandoval appointed Representative Dean Heller to serve the remainder of Ensign's
19 unexpired term. Senator Heller's subsequent resignation from the House has created a
20 vacancy in the office of Representative for Nevada's Congressional District 2. On May 9,
21 2011, Governor Sandoval issued a Proclamation calling for a special election to fill the
22 vacancy, pursuant to NRS 304.230. The Proclamation set the date of the special election for
23 Tuesday, September 13, 2011, which is 127 days from the date of the Proclamation.

24 II. **The date of the special election may be delayed pursuant to this Court's
25 equitable powers.**

26 As noted in this Court's order, NRS 304.230 governs the date of the special election. It
27 provides in pertinent part:

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1. In the event of a vacancy in the office of Representative in Congress, the Governor shall, within 7 days after the event giving rise to the vacancy, issue an election proclamation calling for a special election to fill the vacancy. The Governor shall specify the date of the special election in the proclamation. Except as otherwise provided in subsection 2, the election must be conducted:
- (a) As soon as practicable after the issuance of the proclamation;
 - (b) On a Tuesday; and
 - (c) Not more than 180 days after the issuance of the proclamation. If the vacancy is caused by a catastrophe, the election must be conducted not more than 90 days after the issuance of the proclamation.

NRS 304.230(1).

The Governor's authority to set the date of the election is derived from Article 1, § 2, cl. 4 of the U.S. Constitution, which provides: "When vacancies happen in the Representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies." However, the times, places, and manner of elections to fill vacancies are left up to the States. U.S. Const. Art. 1, § 4. The particular dates of the regular elections are therefore set by statute by the legislature. See NRS 293.175(1) (primary election must be on second Tuesday in June); NRS 293.12755 (general election must be on first Tuesday after the first Monday in November). Unlike a regular election, the Legislature in this case has permitted the election to be scheduled within a frame of time, rather than a date certain. This makes good practical sense, considering vacancies often arise unexpectedly.

Under the special election law, the Governor must issue a proclamation within 7 days after the event giving rise to the vacancy. NRS 293.230. Governor Sandoval's Proclamation was issued within this time frame, and set the date of the election for 127 days after the date of the Proclamation. This is consistent with NRS 304.230(1)'s requirement that the special election be set "as soon as practicable," on a Tuesday, and within 180 days.

As stated in Secretary Miller's declaration filed May 26, 2011, a final list of candidates would be needed by July 6, 2011, in order to be sure that ballots can be prepared, printed, and sent in time to meet the federal MOVE Act deadlines. In this Court's May 31, 2011 Order, it expresses doubt concerning whether it can reach a well-reasoned decision in that time, considering the substantial public policy issues at stake.

1 In this case, 180 days from May 9, 2011 (the date of the Proclamation) is November 5,
2 2011, a Saturday. NRS 304.230(1)(b) requires that the special election be held on a Tuesday.
3 Therefore, Tuesday November 1, 2011, is the latest date the election could be held consistent
4 with NRS 304.230. Of course, the statute also provides that the election should be held as
5 soon as practicable. NRS 304.230(1)(a).

6 This Court has previously recognized that, "in the course of orderly appellate
7 consideration," the time necessary to reach a well-reasoned opinion that will stand as law
8 could, at times, interfere with the electoral franchise itself. *Beebe v. Koontz*, 72 Nev. 247,
9 253, 302 P.2d 486, 490 (1956). Accordingly, in cases where a party's unreasonable delay
10 has caused the urgency for a decision, the court will not intervene. *Id.* In this case, however,
11 all parties have been diligent in pursuing litigation to resolve the dispute ahead of the election.

12 Additionally, the court may enjoin an election where a palpable violation of law is
13 threatened, and irreparable harm would result. *Lauritzen v. Casady*, 70 Nev. 136, 140, 261
14 P.2d 145, 146-47 (1953). In *Casady*, the court enjoined the holding of a special election to
15 move the county seat of Lander County, as the election had been called outside of the
16 statutorily required timeframe, and therefore was illegal. *Id.*, 70 Nev. at 138, 261 P.2d at 145-
17 46. The court further recognized that the law authorizing the special election was in conflict
18 with the general election laws' requirements for registration of voters, which therefore made it
19 impossible to call a legal election with the time prescribed. *Id.* Nevertheless, the court
20 enjoined the illegal election. *Id.*, 70 Nev. at 140, 261 P.2d at 145-46.

21 The court noted that the election, being clearly illegal, would cause unnecessary
22 expense, as would moving the county seat, assuming the question passed. *Id.* Thus it found
23 equitable relief to be appropriate: "To deny the jurisdiction of courts in a case of this
24 character, where a plain, palpable violation of the constitution is threatened, would be to
25 concede that irreparable injury, obvious and undisputed, was beyond the restraint of the
26 remedial arm of equity." *Id.* (quoting *Caine v. Robbins*, 61 Nev. 416, 131 P.2d 516, 520
27 (1942)).

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1 Although the court affirmed the injunction, it recognized that such equitable powers
2 should be used carefully and sparingly:

3 While an important and delicate function is before this court in
4 affirming an injunction restraining an election wherein the voters of
5 the county may express their choice as to the change of a county
6 seat, our decision is not fatal to future opportunity to accomplish
7 the will of the voters. When legislative provision is made to permit
8 the accomplishment of such objective, the same may be carried
9 into effect.

10 *Id.*, 70 Nev. at 140, 261 P.2d at 145-46.

11 In the circumstances of this case, it is within this Court's equitable powers and is
12 appropriate to delay the special election, if doing so is necessary for meaningful appellate
13 consideration. *See id.*; *Koontz*, 72 Nev. at 253, 302 P.2d at 490.

14 First, unlike a regular election, the Legislature has specifically permitted the election to
15 be held within a range of time. In this case, it may be held as late as 180 days from the date of
16 the Governor's proclamation. NRS 304.230. Therefore, unlike the situation in *Casady*, it is
17 possible to hold the special election within the timeframe required by the Legislature, while
18 also permitting the Court adequate time to consider the merits of this appeal. Second, this
19 Court has inquired as to the possibility of *delaying* the election, rather than enjoining it
20 altogether, as was the case in *Casady*. Therefore any decision to delay the election "is not
21 fatal to future opportunity to accomplish the will of the voters." *Casady*, 70 Nev. at 140, 261
22 P.2d at 145-46.

23 The longer the vacancy in former Congressman Heller's seat is left open, the longer the
24 people of Congressional District 2 are left without representation in the House. The Secretary
25 is informed that Alan Glover, Clerk – Recorder of Carson City, sent a letter to the Court
26 advising that the county clerks have already sent notices to overseas voters that the election
27 will be September 13, reserved polling locations, and set up training and early voting
28 schedules. Clearly, these are practical considerations that the Court should consider.
However, it appears the clerks have been able to timely plan for the election and the Court
has inquired about delaying the election, rather than speeding it up, therefore the clerks
should be able to reschedule these events in a timely manner. Moving the election date

1 slightly will cause more disruption to the clerks than moving it a few weeks or more, as the
2 latter would permit more time to reschedule polling places, print new notices, and so forth.


3 On balance, this appeal directly implicates the right of those voters to choose their
4 preferred candidate, as well as the candidates' right to access the ballot. If conducted
5 according the district court's order, the election will be held in violation of the plain language of
6 NRS 304.240. This appeal raises substantial issues of public policy and affects a great
7 number of people. If this Court is not able to address the merits of this appeal in time for the
8 special election as presently scheduled, a greater harm will result to the public than if the
9 election is modestly delayed.

10 CONCLUSION

11 For the foregoing reasons, it is within this Court's equitable powers to delay the special
12 election in order for the Court to reach a considered decision on the merits of this appeal;
13 however, the election should be set for a date as soon as practicable, and in this case, no
14 later than November 1, 2011.

15 DATED this 6th day of June 2011.

16 CATHERINE CORTEZ MASTO
17 Attorney General

18 By 
19 KEVIN BENSON
20 Deputy Attorney General
21 Nevada State Bar No. 9970
22 100 North Carson Street
23 Carson City, Nevada 89701-4717
24 (775) 684-1114
25 kbenson@ag.nv.gov
26 Attorneys for Appellant
27 ROSS MILLER, Secretary of State
28

CERTIFICATE OF SERVICE

I declare that I am an employee of the State of Nevada and on this 6th day of June, 2011, I served a copy of the foregoing APPELLANT'S SUPPLEMENTAL BRIEF, by Nevada Supreme Court CM/ECF Electronic filing to:

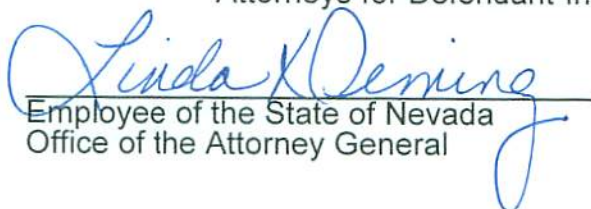
William M. O'Mara, Esq.
bill@omaralaw.net
David C. O'Mara
david@omaralaw.net
311 East Liberty Street
Reno, Nevada 89501
Attorneys for Plaintiffs

Rew R. Goodenow, Esq.
Parsons Behle & Latimer
50 West Liberty Street
Suite 750
Reno, Nevada 89501
rgoodenow@parsonsbehle.com
Attorney for Plaintiffs

Bradley S. Schrager, Esq.
Jones Vargas
3773 Howard Hughes Parkway
Third Floor South
Las Vegas, Nevada 89169
bschrager@jonesvargas.com
Attorneys for Defendant-Intervenor

Matthew M. Griffin, Esq.
1400 South Virginia Street
Suite A
Reno, Nevada 89502
mgriffin@thecapitolcompany.com
Attorneys for Defendant-Intervenor

Marc E. Elias, Esq.
Perkins Coie LLP
Pro Hac Vice
700 Thirteenth Street NW
Washington, D.C. 20005-3960
melias@perkinscoie.com
Attorneys for Defendant-Intervenor


Employee of the State of Nevada
Office of the Attorney General