

STAVROS ANTHONY, an individual,

Appellant,

v.

CLARK COUNTY BOARD OF
COMMISSIONERS, a local government
entity; ROSS MILLER, an individual,

Respondents.

Docket 82269 Document 2021-00491

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(1), and must be disclosed:

Appellant Stavros Anthony is an individual.

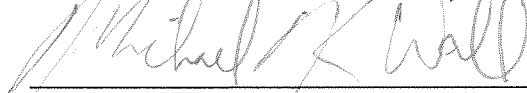
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These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 7th day of January, 2021.

HUTCHISON & STEFFEN, PLLC

A handwritten signature in dark ink, appearing to read "Michael K. Wall", is written over a horizontal line.

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JURISDICTIONAL STATEMENT

This is an appeal from an order of the district court denying a motion for a preliminary injunction. It is also an appeal from an order of the district court dismissing appellant/intervenor Stavros Anthony's amended complaint in intervention, which is the final judgment in district court.

Because the amended complaint in intervention sought permanent injunctive relief, and that claim was denied, the denial of a preliminary injunction is merged into the final judgment denying injunctive relief. *See S.E.C. v. Presto Telecommunications, Inc.*, 153 F. App'x 428, 429–30 (9th Cir. 2005) (dismissing appeal from preliminary injunction, stating: “Because the district court issued a permanent injunction in its final judgment, the preliminary injunction has merged into the final decree.”), *see also In re Estate of Ferdinand Marcos Human Rights Litigation*, 94 F.3d 539, 544 (9th Cir.1996) (same).

Nevertheless, this Court may consider in this appeal from the final judgment whether the district court erred in denying preliminary injunctive relief, and the impact of that denial on the events that transpired thereafter. *See Consolidated Generator v. Cummins Engine*, 114 Nev. 1304, 971 P.2d 1251 (1998) (stating that issues regarding interlocutory orders entered prior to final judgment may be heard on appeal from final judgment); *Keresey v. Rudiak*, 422 P.3d 1270 (Nev. 2018; unpublished) (dismissing appeal from preliminary injunction after permanent

injunction entered, but noting: “Appellant may raise any argument in opposition to the preliminary injunction in his appeal from the final judgment imposing the permanent injunction.”).

The issue of whether preliminary relief should have been granted is not rendered moot by the final denial of permanent relief. That denial prejudiced Anthony by allowing events to proceed, dramatically altering the *status quo*, and giving rise to Miller’s incorrect arguments that the issues are now moot because Miller has been sworn into the office he did not win. The impact on this Court’s jurisdiction and the reach of its authority to render relief is directly related to the district court’s denial of preliminary injunctive relief; events following that erroneous denial may be undone by order of this Court on review in this appeal.¹ The motion for an injunction sought to require the Commission to conduct the new election it had already approved; nothing limits this Court’s authority to order that new election now.

The district court’s order denying a preliminary injunction was entered on December 4, 2020. AA 170. Notice of entry of the order was served

¹It is truly a novel theory to argue that this Court cannot consider appeals of an action in district court and lacks authority to undo legal errors of a district court when a party moved to prevent those errors through both an injunction and a claim for a writ of mandamus. Miller will cite no legal authority for this unsupportable position.

electronically on December 29, 2020. AA 373. The order is independently appealable pursuant to NRAP 3A(b)(3) (order refusing to grant injunction). Anthony filed his notice of appeal on December 29, 2020. AA 378. The notice of appeal is timely pursuant to NRAP 4(a).

The district court entered an order denying Anthony's motion for a writ of mandamus on December 31, 2020. AA 381. Notice of entry of the order was served electronically on December 31, 2020. AA 384. The order is appealable pursuant to NRAP 3A(b)(1) (final judgment). Anthony filed his amended notice of appeal on January 1, 2021. AA 389. The notice of appeal is timely pursuant to NRAP 4(a).

Although the order denying Anthony's motion for a writ of mandamus left nothing more to be considered by the district court, and thus probably constitutes a final judgment, in an abundance of caution, the parties jointly caused the district court to enter an order that resolves all claims against all parties. That order was entered on January 6, 2021. AA 392. An amended notice of appeal was filed the same day. AA 401.

ROUTING STATEMENT

This appeal is assigned to the Nevada Supreme Court pursuant to NRAP 17(a)(2) (cases involving ballot or election questions).

STATEMENT OF THE CASE

This is an appeal from an order denying a motion for a preliminary injunction, and from a final judgment. Eighth Judicial District Court, Clark County, Department XI, the Honorable Elizabeth Gonzalez, District Judge.

STATEMENT OF THE ISSUES

- I. Whether the District Court Erred in Concluding That the Election was Not Prevented For Purposes of NRS 293.465.

STATEMENT OF FACTS

On Tuesday, November 3, 2020, voting in the general election was concluded and counting began. When the votes were tabulated in the race for Clark County Commission District C (“District C”), it was found that candidate Ross Miller had just 10 votes more than his opponent Stavros Anthony. AA 3.

On Monday, November 16, 2020, the Board of Clark County Commissioners held a special meeting to consider the canvass of the November 2020 general election. AA 4; 196. At that meeting, the Registrar stated that all of the elections in Clark County should be certified except the election in District C. The Registrar identified that there were 139 irreconcilable discrepancies in the District C race that resulted from the conduct of the election. AA 201. The Registrar has been clear that he does not know the cause of the irreconcilable discrepancies—hence their denomination as irreconcilable. Nevertheless, the

Registrar knows from experience what causes these types of discrepancies.

AA 201-03.

The 139 irreconcilable discrepancies prevented the Registrar from certifying the election because they can represent missing ballots (*i.e.*, ballots intended to be cast but not counted because of a staff error) or extra ballots (*i.e.*, caused when a voter erroneously believes the machine has not counted his vote, and is allowed to vote again, but the staffer fails to check and clear the voting machine appropriately). *Id.* The Registrar testified about his concern to the Commission:

MR. GLORIA: I've identified 139 discrepancies in the Commission C race that follow pretty closely to what I described in the canvas document. Basically, there are records that were transferred back and forth from different responsibilities within the mail process that canceled check-ins and things of that nature that we can't reconcile and so they very much or very well could represent a discrepancy that would affect the outcome of the election.

AA 201 (Exhibit 1, Tr. Special Meeting, Nov. 16, 2020 at 6:47-53).² When asked

²The Registrar reviewed the transcript of the hearing and confirmed at his deposition that he had an opportunity to review the transcript and found no errors in it. AA 259-60 (Exhibit 8, Gloria Depo. 9:7-12; 10:16-24). This transcript was created using the .mp4 file of the Special Meeting of County Commissioners on November 16, 2020, available at https://www.clarkcountynv.gov/government/board_of_county_commissioners/commission_meeting_agendas.php. The transcript has been authenticated by an attorney at Hutchison & Steffen, PLLC. AA 212 (Exhibit 2). The transcript was created for the convenience of the Court and parties to reference the testimony at the November 16, 2020, special meeting. Anthony recognizes that the official record is the publicly available video of the meeting.

about the possibility of a recount instead of a new election, the Registrar responded:

MR. GLORIA: The vote count will not change. So what we've tallied represent[s] the results in all of the contests within the election. However, we have found discrepancies that we can't explain that would cast a doubt on whether or not that margin of victory is solid and that I could certify it to say that is definitely accurate.

AA 202 at 7:22-26.

The Registrar thus plainly and forthrightly determined that the 139 irreconcilable discrepancies prevented him from certifying the election results as accurate.³

In a subsequent affidavit submitted to the Commission, which was intended to “formaliz[e] the statements [he] made to the Commissioners on November 16, 2020,” the Registrar was even more clear that the irreconcilable discrepancies prevented him from certifying the election: “There were 139 discrepancies which the election boards were unable to reconcile. As a result, I cannot certify that the vote is an accurate representation of the will of the voters in that district” AA 214 (Exhibit 3, Gloria Aff. ¶ 3).

On November 16, 2020, given the troubling and irreconcilable nature of the

³“MR. GLORIA: That is correct, Commissioner Brown. We have, for as long as I can remember since I've been here, it is always been the practice to go through and identify what the discrepancies are and ensure that the margin of victory surpasses that so that you can certify.” AA 206.

numerous discrepancies, and the narrow projected margin of victory, the Commission voted 6-1 to certify all elections in Clark County except the election in Clark County Commission District C, where a new election would be held. AA 209-10.⁴ The Registrar was asked to present options for running the new election at the Commission's December 1, 2020, Commission meeting. *Id.*

On Tuesday, November 17, 2020, Miller instituted this action, claiming that the Commission erred in voting for a new election in District C. AA 1. Miller argued that the Commission was required to certify the election in District C, and that the Commission should be forced to vote to certify the election. *Id.* In the district court proceedings, Miller argued the Commission's obligation to certify the election was a "ministerial, non-discretionary statutory obligation[]" of NRS 293.387," AA 323, despite the known existence of a superseding amount of irreconcilable discrepancies.

On Friday, November 20, 2020, the district court held a status hearing. AA 11. At the hearing, the district court granted Anthony's motion to intervene, AA 21, and parties stipulated to an injunction to preserve the status quo pending the Court's resolution of Miller's claims, and prevent the Commission from

⁴Action Summary, available at https://clark.granicus.com/MinutesViewer.php?view_id=17&clip_id=6901&doc_id=7d3dfc44-285a-11eb-a4b6-0050569183fa

proceeding to a vote at the December 1, 2020 meeting on how the special election would proceed. AA 19-20; 23.

On Monday, November 23, 2020, the first business day after the district court hearing, the Registrar submitted his affidavit to the Commission to formalize his statements to the Commission on November 16, 2020. AA 214; 318 (Exhibit 3, Gloria Aff. ¶ 1.). This affidavit was immediately followed by Anthony submitting an application for a new election pursuant to NRS 293.465. AA 217 (Exhibit 4, Anthony's application for a new election).

Also on Monday, November 23, 2020, the Agenda for the December 1, 2020, Commission meeting was released to the public. The first agenda item was for the Commission to reconsider the Commission's vote not to certify the election of District C and to proceed to a new election. AA 222-23 (Exhibit 6, Agenda of the Clark County Commission, December 1, 2020). Moreover, item #33 on the same agenda under "Business Items" marked for possible action was the canvassing of the District C election and directing the Registrar to submit documents of the election to the Secretary of State. AA 227.

Because the new agenda threatened to disrupt the stipulated status quo, Anthony filed for a motion for a preliminary injunction to prevent reconsideration based on both the parties' stipulated injunction, and the mandatory nature of NRS 293.465 requiring a new election. AA 44.

On November 30, 2020, the district court denied Anthony's motion for a preliminary injunction. AA 170. On December 1, 2020, the Commission, relying on the district court's statements at the November 30, 2020 hearing, voted unanimously to reconsider the new election. AA 176 The Commission proceeded to vote unanimously for canvassing and certifying the election in District C. *Id.*

On December 1, 2020, Anthony filed his amended complaint in intervention, seeking a writ of mandamus to require the Commission to order a new election pursuant to NRS 293.465. AA 150-65. On December 7, 2020, Registrar Gloria was deposed by the parties. AA 257 (Exhibit 8).

On December 11, 2020, the Registrar completed a recount in District C. The Registrar found seven additional ballots during the recount that had not been previously tabulated (one for Anthony and six for Miller). The net result of the recount was Miller's margin of victory was expanded to 15 votes. AA 337. The Registrar also responded to requests for admission, specifically admitting that he did not find any resolution to the 139 discrepancies through the recount, and the discrepancies remained irreconcilable. AA 359-363 (RFA'S 3, 4, 6 & 10).

On December 29, 2020, Miller served notice of entry of the district court's order denying Anthony's motion for a preliminary injunction. AA 373. That same day, this appeal was taken. AA 378.

On December 31, 2020, the district court entered an order denying

Anthony's motion for a writ of mandamus. AA 381. On January 1, 2021, Anthony appealed from the district court's order denying the motion. AA 389. A final judgment was entered on January 6, 2021, AA 392, and an amended notice of appeal was filed the same day. AA 401.

This Court should reverse the lower court's decision, and direct the district court to issue a writ of mandamus requiring the Commission to order a new election for Clark County Commission District C pursuant to Nevada law, including NRS 293.465.

SUMMARY OF ARGUMENT

NRS 293.465 requires a new election whenever "the appropriate election officer"—in this case the Registrar—presents an affidavit showing that an "election was prevented" for "any [] cause." The district court's conclusion that the election in District C was not prevented constitutes a far too myopic construction of NRS 293.465. The election in this case is not conclusive because of discrepancies that are irreconcilable. The margin of error is 15 votes. Just as in a case where ballots are lost, destroyed, or cannot be deciphered due to any myriad of causes, no one knows who won this race. This is precisely the situation—where a fair election result has been prevented by ballot issues beyond the control of election officials—NRS 293.465 was enacted to address. For "any other cause" must not be read restrictively to force a result not clearly the will of the voters. In this case, the will

of the voters is not known. Public policy demands a new election.

DISCUSSION

I. Standard of Appellate Review.

Pursuant to Article 6, Section 6 of the Nevada Constitution, the district court has jurisdiction to issue writs, including writs of mandamus. 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, or to control an abuse of discretion. *See* NRS 34.160; *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981); *see also*, *Beazer Homes, Nev., Inc. v. Dist. Ct.*, 120 Nev. 575, 97 P.3d 1132, 1135 (2004). An equitable writ of mandamus will not issue where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of the law. *See* NRS 34.170.

Because whether to grant extraordinary relief is addressed to the discretion of the court to which a petition for a writ is submitted, *see State ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 359, 662 P.2d 1338, 1339 (1983), this Court reviews the decision of the district court granting or denying a petition for a writ of mandamus on an abuse of discretion standard. *See Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006); *DR Partners v. Bd. of County Comm'rs*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000). A district court abuses its discretion when its decision is not supported by substantial evidence, *Otak Nev., LLC v.*

Eighth Judicial Dist. Court, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013), when no reasonable judge could reach a similar conclusion under the same circumstances, *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014), when it bases its decision on a clearly erroneous factual determination or disregards controlling law, *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016), or when a decision is made in clear disregard of guiding legal principles, *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993).

The district court's construction of NRS 293.465 is clearly erroneous. The construction of a statute is a legal determination which this Court reviews *de novo*. *Orion Portfolio Servs. 2 LLC v. Cty. of Clark ex rel. Univ. Med. Ctr. of S. Nevada*, 126 Nev. 397, 402, 245 P.3d 527, 531 (2010), *see Marquis & Aurbach v. Eighth Judicial Dist. Court*, 122 Nev. 1147, 1156, 146 P.3d 1130, 1136 (2006) (citing *Borger v. Dist. Ct.*, 120 Nev. 1021, 102 P.3d 600 (2004) (applying a *de novo* standard to review a district court's interpretation of NRS 41A.071 in resolving an original petition for a writ of mandamus)); *Beazer Homes Nevada, Inc. v. Dist. Ct.*, 120 Nev. 575, 97 P.3d 1132 (2004) (same). After this Court construes the statute, it will be clear that the district court's denial of mandamus was an abuse of discretion, because it disregards guiding legal principles.

II. NRS 293.465 Mandates a New Election.

This Case turns on the interpretation of the phrase “election is prevented” in NRS 293.465.

NRS 293.465 Loss or destruction of ballots, or other cause, preventing election in precinct or district; new election.

If an election is prevented in any precinct or district by reason of the loss or destruction of the ballots intended for that precinct, or any other cause, the appropriate election officers in that precinct or district shall make an affidavit setting forth that fact and transmit it to the appropriate board of county commissioners. Upon receipt of the affidavit and upon the application of any candidate for any office to be voted for by the registered voters of that precinct or district, the board of county commissioners shall order a new election in that precinct or district.

The statute is clear; where the result of an election cannot be determined based on ballot issues, a new election is mandatory.

Miller and the district court propose an interpretation of NRS 293 *et seq.* that fails to read the chapter as a cohesive whole, and unnecessarily limits and erroneously narrows the catchall phrase “or any other cause” in NRS 293.465, even though the statutory scheme mandates that the statute be “liberally construed.” NRS 293.127(1)(c).

The 139 irreconcilable discrepancies identified by the Registrar could represent either missing ballots or extra ballots. These discrepancies exceed the projected margin of victory, and prevented the Registrar from certifying the

election. On November 16, 2020, the Clark County Commission felt compelled by the nature of these discrepancies to order a new election in District C—the vote was 6-1, with Commissioner Justin Jones being the lone dissenter.⁵ This Court should interpret NRS 293.465 to mandate a new election as it did in *LaPorta v. Broadbent*, 91 Nev. 27, 530 P.2d 1404 (1975).

A. The Types of Errors at Issue.

The 139 discrepancies are not just any type of discrepancy. By the Registrar's own admission, they are irreconcilable errors resulting from the conduct of the election. AA 266 (Mot., Exhibit 8, Gloria Depo. 35:16-36:12).⁶ The specific causes of the errors are unknown. AA 214 (Mot. Exhibit 3, Gloria Aff. ¶ 3.) Meaning, they could represent extra ballots cast as duplicates, or they could represent ballots that were intended to be cast but were not accepted.⁷ The

⁵Action Summary, available at https://clark.granicus.com/MinutesViewer.php?view_id=17&clip_id=6901&doc_id=7d3dfc44-285a-11eb-a4b6-0050569183fa

⁶“Q. And those errors just simply result from the conduct of the election, correct?

A. I would agree with that.”

⁷AA 200 (Mot. Exhibit 1, Tr. Special Meeting 5:14-16) (specifically identifying duplicate activations in prepared report to the commissions); AA 266 (Mot. Exhibit 8, Gloria Depo. 35:16-36:12) (specifically discussing the possible scenario of ballots being cast twice instead of just once, or a voter who tried to vote but the vote was not counted).

Registrar has been clear he does not know which discrepancy lines up with which specific error.⁸ Therefore, he cannot reconcile them.⁹ But he does know from his decades of election experience that the missing ballot example, and the extra ballot examples described herein are real possibilities.¹⁰ For this reason, and the Registrar made this abundantly clear several times during his deposition testimony, these irreconcilable discrepancies should be counted against the margin of victory.¹¹

The Registrar also admitted during his deposition that these are errors that are known to occur in elections of this size, and they occur through the conduct of an election:

Q. And so these errors that we found are errors that you would expect in a – in any election, correct?

⁸AA 266 (Mot. Exhibit 8, Gloria Depo. 35:16-36:12) (closing discussion of various possible causes of the voting discrepancies with statement he does not know exactly what happened).

⁹AA 214 (Mot., Exhibit 3, Gloria Aff. ¶ 3.).

¹⁰AA 266 (Mot. Exhibit 8, Gloria Depo. 35:16-36:12); (*see also id.* at 30:5-10) (explaining Registrar knows from experience that it happens in elections and that “It’s not uncommon.”); (*see also id.* at 33:1-36:2) (Registrar specifically identifying his experience as explaining possibilities for extra ballots being cast erroneously and noting same for questions about missing ballots as a possibility).

¹¹AA 264 (Mot., Exhibit 8, Gloria Depo. 24:17-25:18; 27:11-28:17; 30:24-31:11; 36:19-37:12; 55:14-24) (multiple times wherein the Registrar testified that these discrepancies should be counted against the margin of victory).

A. An election this size, yes.

Q. And those errors just simply result from the conduct of the election, correct?

A. I would agree with that.

Q. And some of those errors, because you don't know what they are, some of those could be that somebody tried to vote, but their vote was not counted, correct?

A. Yes, that's a possible scenario. Yes.

Q. And going the other way, a possible scenario is that somebody voted and their ballot is actually counted twice simply because of the way the person in charge of the site handled the situation, correct?

A. Yes.

Q. And once again, those are hypotheticals because you don't know exactly what happened in those scenarios, correct?

A. Exactly.

AA 266.¹²

The Registrar also specifically identified these two concerns to the Commission at the special meeting on November 16, 2020, where the Commissioners voted 6-1 to hold a new election in District C given the concerns:

¹²See Exhibit 8, Gloria Depo. 35:16-36:12. The precise count of different types of errors is broken down by precinct in the exhibits submitted by the Registrar's attorney prior to the deposition. The Registrar's breakdown of the discrepancies by precinct is shown in Exhibits 5-7 of the Registrar's deposition.

MR. GLORIA: I've identified 139 discrepancies in the Commission C race that follow pretty closely to what I described in the canvass document. Basically, there are records that were transferred back and forth from different responsibilities within the mail process that canceled check-ins and things of that nature that we can't reconcile and so they very much or very well could represent a discrepancy that would affect the outcome of the election.

. . . .

MR. GLORIA: If I could follow up as well commissioner to maybe clarify. In the course of a day at a particular site, you may have 50 voters who vote at a precinct 1105. There are two areas where we track that activity. One is in the voter registration database where we have our pole book that signs voters in. That varies from time to time. What we tally into the system as a vote does not change. So if I end up with 50 votes in my voter registration, but then only 49 in my Democracy Suite or tabulation for voting systems, I have a discrepancy and because there were 50 votes in that I can't determine exactly which individual it was affected by, but I know that I'm off. And so, we go through with every single precinct by tally type: mail, early voting and election day and wherever there's a discrepancy, it should be a balance. It should be 50/50 but where we have areas in a Precinct where is 51 and 50 or 49 and 50 there's a discrepancy there. And so, we search through our documentation to identify if the team leader has identified with paperwork to document that so that we can explain it. If we don't have documentation, then we can't make a determination as to exactly why that discrepancy occurred but we know we have one. In the Commission C race, I've identified 139. That's the only race in the entire election where we have any concern related to the outcome and it's because of the close margin. It's a district with 218 precincts. A margin of 10 is very difficult to audit.

AA 201 (Exhibit 1, Tr. Special Meeting at 6:47-54; 7:49-8:16).

The Registrar has no confidence to certify the election result as accurate.

The race is only decided by 10-15 votes, and there are 139 irreconcilable errors

that could literally represent (1) extra ballots cast on accident because staff at the voting location handled a technical situation incorrectly; or (2) missing ballots of people who tried to vote but whose vote was not recorded. The Registrar was also clear at his deposition that the standard for dealing with these types of irreconcilable discrepancies is that they should be measured and counted against the margin of victory. AA 263 (Exhibit 8, Gloria Depo. 24:17-25:18; 27:11-28:17; 30:24-31:11; 36:19-37:12; 55:14-24).

In summary, the person with the most experience in conducting elections involved in this case—the Registrar—determined based on the type and volume of discrepancies that they “very much or very well could represent a discrepancy that would affect the outcome of the election.” AA 201 (Exhibit 1, Tr. Special Meeting at 6:47-54). Accordingly, the Registrar was prevented from certifying the election results, or in his words, he “cannot certify that the vote is an accurate representation of the will of the voters in that district.” AA 214 See Exhibit 3, (Gloria Aff. ¶ 3).

B. The District Court’s Interpretation of “Prevent” Is Too Narrow.

The district court’s interpretation is erroneous for two reasons: (1) it interprets the term prevent from solely an absolute “obstruction” perspective; and (2) it requires certification of the election as an event that happens rather than a

certification of the “real will of the electors,” NRS 293.127(1)(c), or the “true vote cast,” NRS 293.387(2)(b), as described in statutes.

According to the district court, the election is only prevented if the logistics of carrying out the election were literally stopped from happening by a natural disaster, or votes were lost in transit to the Registrar’s office. In denying the motion for a preliminary injunction, the district court held:

THE COURT: Thank you. The Motion for a Preliminary Injunction or Temporary Restraining Order is denied. NRS 293.465 is clear that the election must be prevented. There are a number of ways it could be prevented that don’t include natural disasters. There could be an accident that is transmitting the vehicle that has the thumb drives in it. There’s a lot of ways the election could have been prevented. That is not what is included in Mr. Gloria’s affidavit. There are discrepancies of 139. That does not mean there was any election that was prevented in any election or district.

AA 250 (Mot., Exhibit 7, Tr. Hr’g Nov. 30, 2020 at 21:18-22:4).

Similarly, the district court’s order denying the motion for a writ of mandamus concluded:

NRS 293.465 applies in instances in which an election, or a portion of one, is prevented from occurring, for instance due to a natural disaster, or an accident suffered by the vehicle transmitting the ballots, or some similar incident preventing an election from occurring and makes provision for a new election in those circumstances. The Court finds that NRS 293.465 cannot apply here because the Clark County Commission, District C election was not prevented. Clark County had an election on November 3, 2020. The results of every race have been canvassed and certified. No precinct failed to complete its election.

AA 382 (Order Denying Writ of Mandamus 2:18-24).

Accordingly, it is plain that the district court found that “preventing” an election only applies to the obstruction side of the coin, *i.e.*, stopping some of the logistics of the election from actually occurring. The fact that the district court’s mandamus order states that “the results of every race have been canvassed and certified” is meaningless because, as shown above, the district court was of the same opinion about NRS 293.465's application before the Commission had certified and canvassed the results in Commission District C.

The district court is of the same opinion as Miller, *i.e.*, as long as the election happens then it must be certified and no new election is warranted. Or as argued by Miller: “Ballots were not lost, there was no natural disaster. No election is perfect, but an election *did* take place in Clark County on November 3, 2020.” AA 325 (Opp'n 5:4-6; emphasis in original). Meaning, Miller and the district court believe the election is simply an event, and the only way it can be prevented is by some form of obstruction. This is error.

C. Why the District Court’s Interpretation Is in Error.

First, the district court erroneously limits the phrase “election is prevented” in NRS 293.465 solely to the logistics of the election and treats the “election” simply as a binary series of logistical events that do or do not occur. This is error

because everything in NRS 293 (the Chapter of NRS on elections) is directed to the purpose of determining: “[t]he real will of the electors.” *See* NRS 293.127(1)(c). This statute specifically requires that all other statutes in the chapter “must be liberally construed” so that “[t]he real will of the electors is not defeated” *Id.* The statutes are not supposed to be liberally construed to bring about the logistics of the election, or the occurrence of an election. Rather, NRS 293.127 specifically mandates that the purpose of liberally construing the statutes in the chapter is to determine “[t]he real will of the electors.”

As such, NRS 293.465's reference to “the election” is not simply a reference to logistical events that occur or do not occur, as the district court and Miller suggest. In fact, this Court’s precedent stands for the opposite conclusion. This Court found in *LaPorta* that if the logistics of the election prevent an accurate determination of the real will of the electors, NRS 293.465 applies and a new election is required: “The fundamentals of suffrage require that electors shall have the opportunity to participate in elections and that the real will of the electors should not be defeated by errors in the conduct of an election. NRS 293.127.” *LaPorta v. Broadbent*, 91 Nev. 27, 29, 530 P.2d 1404, 1406 (1975).

Second, it follows that the district court’s interpretation of what can prevent an election is erroneously narrow. NRS 293.465 contains a catchall provision

because there are more ways to “prevent” an election than simply losing ballots, a natural disaster that stops an election from occurring, or an accident that stops ballots from being counted. The quintessential example of why the district court and Miller’s interpretation of “prevent” is unreasonably narrow is that there is no difference to Joe and Jane Public if an election decided by 10 votes is known to have 100 ballots not counted because of the conduct of election, versus 100 extra ballots from people that were allowed to vote twice because of the conduct of the election. Those two problems are two sides of the same coin—the election prevention coin. That is because the election is not simply a determination of whether an election occurred; an election is supposed to be a determination of the “real will of the electors.” *See* NRS 293.127.

Sustaining the district court’s interpretation of NRS 293.465 means that situations where 100 ballots are lost, or 100 voters are unable to vote, in close elections, will result in an election prevented; but for some unknowable reason, 100 ballots added through unwitting voters and staff error would not merit the same remedy. This is a ridiculous result, and it results from failing to read NRS 293 as a cohesive statutory whole.

D. A Cohesive Rule Should Apply to NRS 293.465.

This Court must “construe statutes to give meaning to all of their parts and

language, and this court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation. Further, no part of a statute should be rendered meaningless and its language should not be read to produce absurd or unreasonable results.” *Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003) (internal citations and quotations omitted). Moreover, when possible, the interpretation of a statute or constitutional provision should be harmonized with other statutory provisions to avoid unreasonable or absurd results. *See Nevada Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870 (1999); *see also Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 225, 19 P.3d 245, 247 (2001) (“[W]ords within a statute must not be read in isolation, and statutes must be construed to give meaning to all of their parts and language within the context of the purpose of the legislation.”); *Orion Portfolio Servs. 2, LLC v. Cty. of Clark ex rel. Univ. Med. Ctr. of So. Nev.*, 126 Nev. 397, 403, 245 P.3d 527, 531 (2010) (The Court must “not render any part of the statute meaningless,” or read it in a way that “produce[s] absurd or unreasonable results.”).

Accordingly, a cohesive rule for interpreting NRS 293.465 should be read in the following context: (1) NRS 293.127 instructs that the rules should be interpreted liberally so that “[t]he real will of the electors is not defeated.” (2)

NRS 293.387 instructs that before certifying an election, the Commission is supposed to account for changes necessary from errors so that “the result declared represents the true vote cast.” (3) NRS 293.394 specifically calls out steps that should be taken to lower the risk of “certifying an incorrect election outcome.”

These statutes should not be ignored when interpreting NRS 293.465. Specifically, what should be certified pursuant to NRS 293.387 is not simply that an election happened, as Miller suggests, but rather, the Commission should be certifying something cohesive with the other statutes in the chapter. Accordingly the appropriate rule for reading NRS 293.465 would be:

An election is “prevented” pursuant to NRS 293.465 if it cannot be determined “by reason of the loss or destruction of the ballots intended for that precinct, or any other cause” what the “real will of the electors” is.

This rule means certification of an election is not simply certifying that an event happened, but actually certifying that the “real will of the electors” has been determined. Under the district court’s narrow reading, an election is only prevented if it is stopped, or the ballot counting is stopped. An election under the proposed rule is prevented for those reasons as well, but would also be prevented if someone added 100 ballots to the pool, by accident or on purpose, in an extremely close election such as we have in District C.

Notably, a new election would also be required if the amount of

irreconcilable discrepancies surpassed the margin of victory. The Registrar testified that these errors are irreconcilable and “very well could represent a discrepancy that would affect the outcome of the election.” AA 201 (Exhibit 1, Tr. Special Meeting 6:47-53). His sworn statement in the NRS 293.465 affidavit clearly lays out that the nature of the errors that prevent him from certifying the election: “As a result, I cannot certify that the vote is an accurate representation of the will of the voters in that district, and in my professional opinion as an election official, it raises a reasonable doubt as to the outcome of the election.” AA 214 (Exhibit 3, Gloria Aff. ¶ 3).

This Court should give appropriate deference to the Registrar in his determination that the errors and discrepancies involved here prevent him, or any other body, from making an accurate determination of the “real will of the voters.” As such a new election should be required.

E. Can Future Courts and Commissions Deal with this Rule or Will it Be Abused?

The Clark County Commission has seven voting members. Those members are all Democrats. Still, on November 16, 2020, those members voted 6-1 to hold a new election in light of the superseding and concerning irreconcilable discrepancies discovered by the Registrar. This was the vote despite the fact that the candidate supported by the presumed margin of victory was a Democrat.

Surely, that should mean something and should not be ignored. Surely, that indicates that Anthony's proposed rule for interpreting NRS 293.465 is coherent, fair, and sustainable.

The Registrar's opinion that the superseding 139 irreconcilable discrepancies prevented him from certifying the election and troubled him because they "very well could represent a discrepancy that would affect the outcome of the election" should mean something and be owed some deference by the district court and this Court.

Alternatively, adoption of the district court's interpretation renders that incredible show of statesmanship, non-partisanship, and dedication to the rule of law null and void. Adoption of the district court's interpretation also renders what it means to certify an election meaningless. Certify is defined as: "to attest authoritatively: such as . . . to attest as being true or as represented or as meeting a standard" or "to inform with certainty."¹³ However, the election results of Clark County Commission District C, as confirmed by the Registrar, cannot be "attested to authoritatively" nor have the election results met any standard. Instead these results and the 139 voting discrepancies in a race with 10-15 votes separating the candidates plainly prevent the Commission from declaring a victor with certainty.

¹³Merriam Webster's Dictionary, available at <https://www.merriam-webster.com/dictionary/certify>.

In short, the Commission is not supposed to certify simply that an election happened. That would be a truly meaningless, and frankly useless, certification. Rather, the certification should mean something about the integrity of the election results, and honor the purpose of the election. The certification should mean that the “real will of the electors” has been determined in the race.

F. An Alternative Interpretation That Yields the Same Result.

Another way to construe the facts in this case is to use the district court rule but to apply the facts differently. The Registrar was clear in his deposition testimony that the ballots associated with the 139 discrepancies cannot be found. AA 266 (Exhibit 8, Gloria Depo 37:13-16). Another way of saying something cannot be found is that it is lost. The Registrar testified that there is no way to find the ballots associated with the 139 discrepancies. *Id.*

If the margin of victory were 200 votes, and there were only 139 discrepancies, then the fact that the ballots associated with the 139 discrepancies cannot be found would not justify a new election for the obvious reason that the discrepancies could not be deemed outcome determinative. But the problem is that NRS 293.387 requires the Commission to not only identify errors in the election, but also pursuant to NRS 293.387(2)(b) the Commission must “[t]ake account of the changes resulting from the discovery [of the errors], so that the

result declared represents the true vote cast.”

These 139 discrepancies were caused by errors in staff mismanaging sign-ins, staff failing to handle troublesome machines correctly and causing double entries, ballots being filled out but not submitted (*i.e.*, a missing data entry), and staff failing to properly document what actually occurred to definitively determine the cause of discrepancies. Accordingly, these discrepancies are data entry errors, and are squarely within the "clerical errors" universe identified in NRS 293.387.

The ballots associated with these 139 discrepancies cannot be identified. They cannot be found. They cannot be cured to show the “true vote cast” pursuant to NRS 293.387(2)(b). They are as strands of hay in a haystack. The ballots associated with these discrepancies are for all practical purposes lost. Because the errors cannot be reconciled pursuant to NRS 293.387(2)(b), and they cannot be resolved because the ballots associated with these discrepancies are essentially lost (*see* NRS 293.465), the election is prevented because the will of the electors and the true vote cast cannot be determined.

G. Additional Application of *Laporta* in this Case.

This Court has interpreted NRS 293.465 on one other occasion. *LaPorta* case dealt with an Assembly Race in Clark County. The concern in that election

revolved around how staff had set up a voting apparatus, which resulted in an unknown number of voters casting their ballots for the wrong candidates. *See LaPorta v. Broadbent*, 91 Nev. 27, 29, 530 P.2d 1404, 1406 (1975). In *LaPorta*, the candidates on the ballot for Nevada State Assembly District 22 were R. Hal Smith and John E. Jeffery. *Id.* at 28. On election day, an unknown amount of voters assigned to vote in a certain precinct were unknowingly unable to cast a ballot for either Smith or Jeffery. *Id.* The problem resulted from a staff error. Specifically, one machine became unusable and a staff member failed to appropriately update the substituted mechanism to show Smith and Jeffery as candidates, but instead listed candidates running in another precinct. *Id.* This problem was unnoticed for approximately three hours. *Id.*

Although the staff error was ultimately discovered and the correct candidates list was inserted, an unknown number of voters had already cast their ballots. *Id.* Ultimately Jeffery won the election by a mere six votes. *Id.* Smith requested that the Commission order a re-vote. *Id.* at 28. The Commission's vote for a new election resulted in a tie, and therefore failed to pass. Smith filed a petition for a writ of mandamus with this Court to compel a re-vote. *Id.* at 29. This Court granted the petition, and ordered a re-vote pursuant to NRS 293.465. *Id.* In analyzing NRS 293.465, this Court concluded that the "fundamentals of

suffrage require that electors shall have the opportunity to participate in elections and that the real will of the electors should not be defeated by errors in the conduct of an election.” *Id.* at 30 (citing NRS 293.127).

This Court in *LaPorta* recognized that an unknown number of people had used the voting machine that by staff error had failed to be updated. Accordingly, the final vote count of the election was questionable because of the margin of victory and an unknown number of errors, caused by staff failing to update equipment correctly. This could have changed the outcome of the election. In other words, the nature and number of errors was potentially outcome determinative. Given the reasonable doubt that the real will of the electors was represented in the election result, this Court issued a writ of mandamus for the Commission to order a new election.

LaPorta is directly comparable to the instant case between Anthony and the Commission. At the Special Meeting of the Clark County Commission, the Registrar specifically offered two examples of causes for a discrepancy or error: (1) 50 people sign-in to vote in a precinct but there are 51 ballots [*i.e.*, an extra ballot problem]; or (2) 50 people signed in to vote but only 49 ballots were counted for the precinct [*i.e.*, a missing ballot problem]. The Registrar acknowledged at his deposition that these are errors that are known to occur in

elections of this size, and known to occur as part of the conduct of an election.

These types of discrepancies identified by the Registrar are directly comparable to the situation in *LaPorta* where it was unknown how many people were affected by an error caused by staff, but known that it was possibly a problem for some voters casting their votes. *Id.* In *LaPorta* it was also known that the margin of victory in the tabulated votes was only six votes. *Id.* And it was known that staff had set up a machine incorrectly. *Id.* What was unknown was whether the staff's failure to properly conduct the election prevented anyone from voting, or even prevented enough people from voting that it changed the election result. *Id.* 28-29, at 1405. Yet, the situation in *LaPorta* was sufficiently concerning that this Court issued a writ of mandamus directing the Commission to order a re-vote or new election. *Id.* at 30.

Notably, if those conducting the election in *LaPorta* could have affirmatively stated: “only three ballots were cast on the machine in its impaired state” that would easily change the outcome of *LaPorta*. Obviously, there would be no concern, and no need for this Court to require a new election, if it was known that the error in conducting the election could not have changed the election result—because what is being certified is that the results represents the real will of the electors.

Further, even if this Court limits its interpretation of NRS 293.465 to solely votes not counted, an unexplainable error of the district court is that it found no reason why the 139 discrepancies that could represent voters that intended to vote, but whose ballots were not accepted, across the district is not directly comparable to *LaPorta*. Why should the result or the application of NRS 293.465 be different if it is a staff error at one voter location (*LaPorta*) vs multiple staff errors potentially preventing votes from being counted across the district (*i.e.*, as in this case)? In *LaPorta* no one knew how many people had voted on the machine setup incorrectly by staff. In *LaPorta* no one knew if the number of persons who voted on the machine were enough to change the outcome of the election. Yet a new election was ordered.

In contrast, in the instant case, the Registrar has been abundantly clear of his concern that the errors could “very well” be outcome determinative. In the instant case we know there are more irreconcilable discrepancies than the projected margin of victory. Why should the known irreconcilable discrepancies caused by the conduct of the election in this case be treated differently from the unknown number of discrepancies in *LaPorta*? There is no reason. A new election should be ordered.

H. The Registrar's Affidavit Satisfies the Requirement of NRS 293.465.

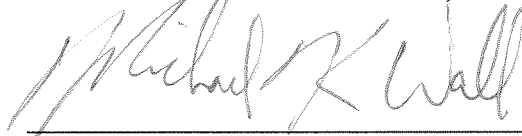
In denying the motion for writ of mandamus, the district court also found that the Registrar's affidavit did not satisfy the requirement for an affidavit pursuant to NRS 293.465. If this Court agrees with the interpretation of NRS 293.465 proposed herein, the Registrar's affidavit clearly meets the requirements of NRS 293.465. This was more fully argued below.

CONCLUSION

This Court should reverse the district court's decision and interpret NRS 293.465 to require a writ of mandamus to be issued and a new election to be held in District C.

DATED this 7th day of January, 2021.

HUTCHISON & STEFFEN, PLLC

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ATTORNEY'S CERTIFICATE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect X4 in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date the **APPELLANT'S OPENING BRIEF** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list.

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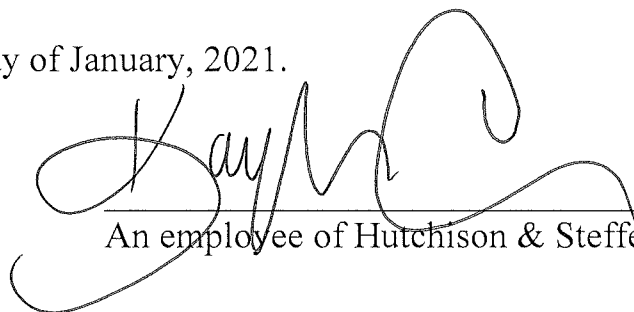
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