In the Supreme Court of the State of Nevada

Electronically Filed
Jan 29 2021 02:05 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

STAVROS ANTHONY, an individual,

Appellant,

vs.

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

Respondents.

Case No. 82269

Eighth Judicial District Court
Case No.: A-20-824971-W
Hon. Elizabeth Gonzalez

RESPONDENT ROSS MILLER'S ANSWERING BRIEF

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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 29th day of January, 2021.

By: /s/ *Bradley Schrager*

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I. INTRODUCTION

It is a difficult thing to run a lengthy, expensive, and exhausting election campaign for public office, and then not succeed. Where the final margin is fifteen votes out of more than 150,000 cast, the disappointment must be acute. But, to put it coldly, the Nevada election code does not care whether an election is closely-run or ends in a landslide. Whether a candidate loses by a single vote or a hundred thousand votes, his or her rights to contest the results are the same. If he or she wants to challenge (and, presumably, to reverse) an electoral defeat, there are express, specific, and exclusive statutory avenues to do so: a recount and an election contest.[1] Appellant Stavros Anthony ("Mr. Anthony"), however, out of political calculation, declined to file a contest of the election in Commission District C, after a full recount that increased Respondent Ross Miller's ("Mr. Miller") final margin from ten

[1] Beyond a recount of the votes pursuant to NRS 293.403 *et seq.,* election contest law in Nevada sets out 1) eligibility to file an election contest and formal procedural requirements (*see* NRS 293.407); 2) precise grounds for bringing and maintaining a contest (*see* NRS 293.410); 3) the exact periods within which a filed contest is timely (*see* NRS 293.413); 4) evidentiary and discovery parameters, as well as standards, for contest hearings (*see* NRS 293.413, NRS 293.415, NRS 293.423); and, 5) requirements regarding the form and content of a judgment in an election contest (*see* NRS 293.417).

to fifteen votes. Appellant's Appendix ("AA"), at 337. Instead, Mr. Anthony here attempts to contest his defeat by resort to NRS 293.465, Nevada's prevented-election statute, which opens avenues of redress for the benefit of voters if, for some reason, an election cannot be conducted or completed due to some unforeseen incident.

But not only is the plain text of NRS 293.465 at odds with Mr. Anthony's use of it as a mechanism for resolving, essentially, a dispute over who won an election, its terms are inapplicable on their face and, further, its basic procedural requirements were never met at the County level. The district court determined that the general election of November 3, 2020, was *not prevented* under the clear meaning of NRS 293.465—either in Clark County Commission District C or anywhere else[2]—and that the Clark County Registrar of Voters' ("Registrar") undated affidavit was *not* an NRS 293.465 affidavit establishing (or indeed even indicating) that an election had been prevented. AA, at 382-383. There was no way, in other words, for the Clark County Board of County Commissioners ("BCC" or the "Commission") to order a new election, because NRS 293.465 could not apply, and therefore

[2] The district court found that "No precinct failed to complete its election." AA, at 382.

mandamus directing the Commission to do so was not available to Mr. Anthony. *Id.*

Faced with this set of law and facts, Mr. Anthony here argues that the election—or more accurately, just his own race—*was* in fact prevented, owing to a purported 139 routine, clerical discrepancies in the Registrar's records of the election, and that the Registrar's undated affidavit, against both its plain text and the Registrar's own clearly-stated testimony, operates as a *de facto* NRS 293.465 affidavit demonstrating that the election was prevented. The Commission, the argument goes, must therefore be commanded to conduct a new election for the seat in District C. Mr. Anthony further invites the Court to adopt a novel interpretation of NRS 293.465 that strains its terms and application beyond all reasonable bounds, and he essentially asks the Court to displace legislative judgment regarding election law matters with its own.

This is all a bit much, this cascade of improbable arguments, each depending upon the next, and Mr. Anthony's theory of the case fails at multiple junctures. First, NRS 293.465 cannot mandate a new election because no election was prevented; the Registrar never claimed, and did

not execute an affidavit attesting, that an election had been prevented; and the BCC performed its ministerial, mandatory duty to canvass and certify the official results showing Mr. Miller as the prevailing candidate. It did so twice, actually, once before and once after the recount of the ballots. AA, at 151, 382. Second, the matter is essentially moot, or at least immediately disposable, not just because Mr. Miller has been serving his constituents from his Commission seat for a month now but because Mr. Anthony's legal option for challenging the results of a general election under Nevada law was an election contest, a procedure he declined to follow because—in his own words—he did not believe he could win in court, even with all the evidentiary and discovery opportunities an election contest affords a defeated candidate. AA, at 55.

The architecture of Mr. Anthony's case is unsound, and it cannot provide a basis for invalidating a fair, if close, election in which 150,000 voters in Clark County Commission District C participated and chose their Commissioner. There is no path to success on appeal in this matter for Mr. Anthony, and the district court's sensible determinations should be affirmed.

II. THE QUESTION(S) PRESENTED

Mr. Anthony's statement of the issue on appeal here ("Whether the district court erred in concluding that the election was not prevented for purposes of NRS 293.465") is acceptable, in a manner of speaking, but does not fully capture what the Court would need to determine for him to prevail on appeal. In short, the Court would need to answer each of the following questions and propositions in Mr. Anthony's favor to support the unprecedented step of ordering a new election under these circumstances, months after both the election and its certification:

1) Whether—contrary to the district court's express finding—the District C election was prevented, within the meaning of NRS 293,465;

2) Whether—contrary to the district court's express finding—the Registrar's affidavit was, in fact, a declaration pursuant to NRS 293.465 that the election had been prevented;

3) Whether the Board of County Commissioners had a mandatory, non-discretionary duty, therefore, to call for and conduct a new election in the district, in contradistinction to its duty to canvass

and certify the election's results and permit the parties to proceed to the adversarial, statutory process of an election contest; and

4) Whether NRS 293.465 presents a right of action constituting, essentially, an alternative means of contesting an election result and rescinding a duly-awarded certificate of election, when both of those appear to be the exclusive province of Nevada's election contest statutes, NRS 293.407 *et seq*.

III. STATEMENT OF FACTS

Much of what Mr. Anthony includes in his statement of facts is more or less accurate, but not all of it.

A. The Routine Nature Of The Data "Discrepancies," Upon Which Mr. Anthony Relies So Heavily

Most importantly, it is crucial to understand and characterize correctly the data "discrepancies" upon which Mr. Anthony's entire case is premised, and which furnish the reasons he insists his election was prevented. These are not ballots, and they do not represent votes that went uncounted or were otherwise lost. The tabulation of the ballots cast votes was entirely accurate, something the Registrar has insisted all along. At his deposition, he testified thus:

> [Mr. Schrager]. Now, you told the Commission that

> there were no tabulation errors in the 1150 precincts in this election, correct?
>
> [Registrar]. That was in my canvass report, yes, sir.
>
> Q. And you stand by that here today?
>
> A. I do. There was no issue with what we tabulated.

AA, at 274 (pp. 65:24-66:5).

And, under examination by Mr. Anthony's counsel this time:

> [Mr. Reynolds]. So you -- you have a great deal of confidence that the machines operated appropriately; is that correct?
>
> [Registrar]. Tabulated properly, yes.
>
> Q. As registrar, though, do you agree that at least in 139 instances the votes were not correctly tabulated and counted?
>
> A. No, not if you're trying to correlate that to the tabulation system. The tabulation system did exactly what we asked it to do.

AA, at 269 (p. 47:1-10).

All the Registrar knows—all anyone, even the parties, know—is that a number of the sign-in and registration databases that comprise a portion of the records of the election (not the tabulation of votes) show different figures than the total of ballots shown to be cast in particular precincts. Almost all of these are differences of one or at most two. *See*,

e.g., AA, at 310-315, where what is called the VEMACS data—the poll book total—differs from the "D-Suite" data, which is the actual number of ballots cast and counted in a precinct. Sometime the VEMACS figure is one number higher that the D-Suite number, sometimes the other way around. These discrepancies can occur for a number of reasons, but are neither traceable nor identifiable; they are irreconcilable data points. They may represent voter error at the polls, they may represent paper-function issues with the touchscreen machines, there may have been clerical error in the poll book usage at the voting site; it is not knowable why the figures do not match. It is not even knowable how many of any kind of particular hypothetical discrepancy example occurred, if at all. There is no way to determine why the columns do not match, only that the discrepancies cannot be traced to any particular cause in any specific instance, and cannot be linked to any individual voter or his or her ballot:

> [Mr. Reynolds]. And once again, there's no way to identify any particular ballot cast into the election that is associated with the discrepancy, correct?
>
> [Registrar]. No. We have privacy of the ballot.

AA, at 267-268 (pp. 41:24-42:3).

There is likely no linkage to any particular voter or ballot at all:

> [Mr. Reynolds]. Let me ask a slightly different question. In your opinion, is it likely that these 139 discrepancies represent voters that did not have their votes counted correctly?
>
> [Registrar]. I can't say that either. I don't know what those discrepancies are.

AA, at 269 (p. 47:11-17).

Most important for Mr. Anthony's will-of-the-voter narrative, it is absolutely beyond anyone's ken to state that these data discrepancies had any effect whatsoever on the election's results:

> [Mr. Reynolds]. And you don't know whether or not any of those discrepancies actually represents a difference from the will of the voter; is that correct?
>
> [Registrar]. Correct.
>
> Q. Okay. Now, given your experience in conducting elections, would you agree that it is likely that these errors come from the type of scenarios you've described where, for example, a person gets their ballot counted twice because the person conducting the election has made an error?
>
> A. No, I can't answer that question.
>
> Q. Why not?
>
> A. What I've been trying to emphasize is that I don't know what those discrepancies are. There's no way for me to even guess or tell you where I think -- they're unknown

discrepancies, the majority of these.

AA, at 269 (p. 48:2-18).

In the registrar's estimation, the will-of-the-voter approach is not an appropriate lens through which to view the matter of the data discrepancies:

> [Mr. Reynolds]. Now, in the other scenario, 51 ballots counted but 50 ballots -- 50 sign-ins. Okay, 51 ballots counted but 50 sign-ins. You don't know -- like in that scenario, how can you say that the ballots counted represent the will of the voter?
>
> [Registrar]. I don't know how to answer that question to be honest with you, sir. Those voters went through and they had an opportunity to review their screen and then they printed out their voter verifiable paper audit trail, had another opportunity to review that screen. So why wouldn't I think that they had an opportunity to verify their ballot and vote?

AA, at 269 (p. 49:9-21).

All the examples given of what *could* have caused these discrepancies are merely theoretical and conjectural attempts to understand how elections actually function, and the potential categories of voter conduct that may have produced statistical anomalies:

> [Mr. Schrager]. And so all the examples that opposing counsel led you through or had you bring to the floor, those are merely hypothetical examples of things that may have happened to cause these discrepancies, correct?

> [Registrar]. That's correct.
>
> Q. Okay. We don't even know if there were any ballots associated with these discrepancies, there may not be any ballots. There may just be discrepancies that will never be reconciled or explained, correct?
>
> A. That is also correct.
>
> Q. Okay. And there's certainly no way to understand whether these discrepancies favored or disfavored any particular candidate, correct?
>
> A. There's no way for me to know.
>
> Q. So calling them errors is assuming a bit too much, right? The evidence is we don't know what happened, correct?
>
> A. I can't disagree with that. I can't give you an explanation. I don't have anything documented.

AA, at 273 (pp. 64:5-65:1).

The bottom line is that elections are not perfect, they function imperfectly, and they generate data discrepancies. The 2020 General Election was no different, except for the fact, perhaps, that this election actually generated *fewer* such statistical discrepancies than in years past, even in a pandemic year that challenged every aspect of election administration, according to the Registrar:

> [Mr. Schrager]. Now, there were -- I think you told the

> Commission there were some 900 total discrepancies, correct?[3]
>
> [Registrar]. It was in the area of 900, that's correct.
>
> Q. And 139 of them actually within Commission District C. Are those within the normal range of discrepancies given the size of the vote pool?
>
> A. I would say that those are historically lower.

AA 274 (p. 66:12-22).

Every election cycle, we see these data discrepancies, and we accept them as the inevitable logistical results of complex electoral processes colliding with human voters and pollworkers. They happen whether an election is razor-close or is a runaway victory for one candidate. The discrepancies at issue here, in other words, do not describe a *prevented election*, they just describe an election.

B. Other Factual Issues

There are other necessary factual corrections. For instance, Mr. Miller did not bring this action originally to claim that the Board of County Commissioners "erred in voting for a new election in District C." Opening Brief, at 7. Rather, it was the Commission's initial failure to comply with its ministerial, non-discretionary duty to canvass the final

[3] The 900 number refers to county-wide statistics, not just District C.

results of the election that occasioned the lawsuit. AA, at 1-2, 7-8. This became moot on December 1, 2020—after the district court denied Mr. Anthony's motion for preliminary injunction, which sought not only to control the Commission's agenda but also to direct it to conduct the new election Mr. Anthony prays for here—when the Board made the correct decision to canvass and certify Mr. Miller as the winner of the election. AA, at 170-171.

The stipulation entered into by the parties at the November 20, 2020 status hearing conducted by the district court was entered into to delay any planning for or conducting of a new election while Mr. Miller's claims that the BCC had unlawfully failed to certify were pending. AA, at 166-168. At this point in the litigation, Mr. Anthony had made no affirmative claims of his own, and had only intervened as a defendant, presumably to protect his interests in a matter that, at that stage, he believed was proceeding in his favor. *See, e.g.,* AA, at 29-43.

Mr. Anthony's references to the Registrar's responses to requests for admission are incomplete, but incomplete in a manner suggesting strategic selectivity. While the Registrar did say that he could make no

resolution of the clerical discrepancies in the poll books, as Mr. Anthony notes (Opening Brief, at 9), that is not all the Registrar averred. Asked to "[a]dmit that, as You previously testified, it is Your opinion that the 139 discrepancies You previously identified should be counted against the margin of victory," a point Mr. Anthony is fond of repeating in his merits brief, the Registrar responded "Deny; that was not my testimony or statement." AA, at 360. Asked to "[a]dmit that as part of the Recount you identified 7 ballots in the Clark County Commission District C race that had not been previously tabulated," the Registrar responded "Deny: I did not identify any particular ballots as not previously tabulated." AA, at 361. Asked to "[a]dmit that on November 16, 2020, when you gave Your canvass report to the Clark County Board of Commissioners that the ballots in District C had not been correctly tabulated," the Registrar responded "Deny; I stated that the ballots had been correctly tabulated." *Id*. Given the emphasis Mr. Anthony places on the meaning and gravity of the "discrepancies" in the poll book numbers, these responses are important for the Court to have squarely before it.

And following from the discussion above regarding the data

discrepancies, one aspect of Mr. Anthony's brief that he treats as fact but is unable to support—and knows better than to assert—is any connection between the 139 "discrepancies" and any actual ballots cast or not cast. The entirety of Mr. Anthony's argument section "Discussion II.F" proceeds in the vein of statements like "the ballots associated with the 139 discrepancies cannot be found," or that "there is no way to find the ballots associated with the 139 discrepancies," or that "the ballots associated with these 139 discrepancies cannot be identified." Opening Brief, at 27, 28. This is deliberately misleading. There are no such ballots. There are no lost ballots, and there are no extra ballots. There are no ballots in a shoebox or in the trunk of some poll worker's car waiting to be located and examined. As the Registrar explained over and over again, the "discrepancies" noted by him in the District C election exist merely because the poll books for the precincts within the district show a difference between ballots and sign-ins—some precincts have undercounts on the sheets, some have over-counts, usually by one or two per precinct. AA, at 263 (p. 22:12-23), 273 (pp. 63:18-64:20). Making it seem as though 139 ballots have gone missing, or that they exist and would clarify the result of the election if only they could be

found, is wrong to assert, both as a matter of fact and as an assertion undermining the integrity of the elections process; we have had quite enough of that lately.

IV. STANDARD OF REVIEW

The appropriate standard of review of a denial of a petition for writ of mandamus, as Mr. Anthony states, is for abuse of discretion, but he fails to note just how difficult a standard that is to meet. This Court will review the district court's decision to determine whether it abused its discretion if, for example, "no reasonable judge could reach a similar conclusion," or it made "clearly erroneous factual findings or disregard[ed] controlling law." *JPMorgan Chase Bank, Nat'l Ass'n v. SFR Investments Pool 1, LLC*, 136 Nev. Adv. Op. 68, 475 P.3d 52, 58 (2020); *NOLM, LLC v. Cnty. of Clark*, 120 Nev. 736, 739, 100 P.3d 658, 660-61 (2004). This standard is not merely exhortative, but represents an arduous burden for Mr. Anthony to meet here. He has not shown that the district court's legal determination is without any reasonable basis, or that its factual findings were so clearly erroneous that no fellow judge could agree, or that clear controlling law exists which the district court ignored.

In its order, the district court issued two sets of findings and conclusions. In the first, it found that:

> [T]he 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, at 382. Therefore, "NRS 293.465 does not apply in this case," under its substantive terms. *Id.*

In the second set, independently but with equally dispositive consequences, the district court found that:

> [T]he Registrar's affidavit is not an NRS 293.465 affidavit, either by its own terms … or by the expressed intentions of the Registrar. The affidavit does not declare that an election was prevented, either in whole or at the level of any particular precinct. It does not describe or identify any "loss or destruction of the ballots" per NRS 293.465.

AA, at 382-383. For those further reasons, therefore, "Intervenor cannot establish that NRS 293.465 mandates a new election." AA, at 383.

Even if this Court were to disagree in some respect with the district court's interpretation of NRS 293.465 as requiring "instances in which an election, or a portion of one, [to be] prevented from occurring, for instance due to a natural disaster, or an accident suffered by the vehicle transmitting the ballots, or some similar incident," those are

very difficult findings to characterize as abuses of the district court's discretion. Undisturbed on appeal, they lead to the same ultimate result. AA, at 381-383.

V. ARGUMENT

A. NRS 293.465 Cannot Mandate A New Election in Commission District C

1. The clear text and plain meaning of NRS 293.465

The text of NRS 293.465 is not particularly opaque, and it lends itself to a straightforward reading and interpretation.

In this Court's jurisprudence, "[w]hen the words of a statute are clear and unambiguous, they will be given their plain, ordinary meaning," and the Court "need not look beyond the language of the statute. *Newell v. State*, 131 Nev. 974, 977, 364 P.3d 602, 603-04 (2015) (quoting *State v. Friend,* 118 Nev. 115, 120, 40 P.3d 436, 439 (2002)). "However, when the 'literal, plain meaning interpretation' leads to an unreasonable or absurd result, this court may look to other sources for the statute's meaning." *Id*. Here, there are no absurd or unreasonable results threatened, and Mr. Anthony has not argued that the text of the statute is ambiguous; in fact, it is not. He is not suggesting that there are multiple, reasonable definitions of the term *prevented*, but rather

that, under his reading of the words of the statute, *prevented* takes in situations where, in a single race, there exist some threshold number of irreconcilable data discrepancies.

NRS 293.465 reads:

> 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 immediate and direct meaning of this statute concerns incidents that cause an election, or part of an election, not to occur. Its primary example of what may "prevent" an election is "loss or destruction of the ballots." Mr. Anthony tries to read the "or any other cause" clause far too broadly, because what need would there be for the examples given, if not to provide guidance on the types of events and scenarios that fall within the ambit of the statute? In fact, though urging a "holistic" reading of the statute generally, Mr. Anthony urges the Court to consider the "any other cause" language in non-contextual isolation. But it is a commonplace of statutory construction—*ejusdem generis*—that

where "a general term in a statute follows specific words of a like nature, it takes its meaning from those specific words, and is presumed to embrace the kind of things designated by the specific words." *Young Electric Sign Co. v. Irwin Electric Co.*, 86 Nev. 822, 825, 477 P.2d 864, 867 (1970).

Here, *ejusdem generis* instructs us that "any other cause" preventing an election means causes of like kind, meaning further but unenumerated incidents that would disrupt the conduct of the election: a truck carrying ballots from a polling site is in an accident and there is a consuming fire; the criminal act of a rogue individual destroys the cartridges containing records of the touchscreen machines before they can be downloaded; a catastrophic power outage shuts down a major polling site ten minutes before closing, with 200 prospective voters still in line. NRS 293.465 is Nevada's "election disaster" statute, and although the causes of the prevention of an election need not be an earthquake or a tornado—there can be mundane, localized causes as well—the *raison d'être* of the provision is to address the failure to have or complete an election by reason of incident.

NRS 293.465 is not a provision offering remedies to aggrieved

candidates with questions about the accuracy of the vote tabulation; there are other statutes that address that. It does not mention the margin of victory or defeat between candidates. It has no connection to the counting of votes, and has no reference to miscounted votes, spoiled ballots, voter errors, or any such similar matter. It is not a statute concerned with those things, because it is not part of the election code dealing with returns, counting, or resolving disputes between contenders. Instead, NRS 293.465 is concerned with ensuring voter's ability to partake in an election at all. These voters, once they are able to take part, may participate well or badly; they may ruin their ballots, over-vote, under-vote, flee without casting a ballot, confuse their verified paper receipt, miss an error they've made, be subjected to poll worker error or clerical data discrepancies. But those are not the province of NRS 293.465, which exists to ensure voters have the opportunity to partake. All the other aspects, which essentially encompass the complaints of Mr. Anthony, are subjects for claims for relief to be made under other statutes designed for exactly those purposes.

This is why NRS 293.465 is not found among the contest statutes,

but instead is properly codified next to the statutes, for example, that permit employees to absent themselves from their workplaces to cast ballots (*see* NRS 293.463); authorize courts to extend voting hours (*see* NRS 293.464); and direct the Secretary of State to provide election materials to elderly or disabled persons in suitable formats (*see* NRS 293.468). NRS 293.465 focuses upon the rights of voters, not on the rights of candidates like Mr. Anthony.

In fact, because of its voter-centric purpose and lack of any reference to the margin between candidates, it is theoretically possible that NRS 293.465 could be employed in any election, even one where no race on the ballot was close at all. Take the example above where a massive power outage leaves 200, 500, or 1,000 voters in line as the hour for closing the polls strikes, and there is not time to order polls to remain open and no timely resolution of the power outage is forthcoming at the site. If the margins between all the candidates on the ballot are so great that the votes of those stranded in line at the polls that evening would not alter the outcomes, it may not be practical or useful from one perspective to activate NRS 293.465 and hold a new election in that precinct or district. That does not mean, however, that

it would not be proper or lawful to do so, and a sufficient respect for the rights of those who were not able to cast ballots might counsel invocation of the statute's provisions. But that has nothing whatsoever to do with any concern in the statute for the margin or votes between competing candidates; that is simply not part of the scheme or purpose of NRS 293.465.

Here, no events or occurrences prevented the conduct of the 2020 General Election in Nevada, in Clark County, or in Commission District C. The presence of normal and expected data discrepancies in the records of the election which have no demonstrable connection to the miscounting, miscasting, or misplacement of any ballot in the race—whether the number of discrepancies do or do not exceed the final certified margin between candidates—is simply not the sort of incident sufficient for this Court, the Registrar of Voters, or the Clark County Commission to consider as having prevented the election.

2. The Registrar never invoked NRS 293.465's provisions

Beyond the fact NRS 293.465 does not apply here by virtue of its own express, substantive terms, there is the question of whether, even if it did, the procedural steps the statute prescribes were executed, such

that the Commission could be ordered to conduct a new election in any event. Pursuant to the statute, if, in fact, an election has been prevented, "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." NRS 293.465. The affidavit must state the facts of the prevention of the election, and must be transmitted to the Commission.

Here, the district court found, correctly, that the Registrar's affidavit does not satisfy the requirement of NRS 293.465. AA, at 382-383. The affidavit does not mention NRS 293.465. It does not use the word *prevent*. *See, e.g.,* AA, at 73-74. It describes no loss or destruction of ballots in any district, race, or precinct, or any other cause of a prevented election. *Id*. It merely, as Mr. Anthony concedes, "formalizes the statements [the registrar] made to the Commissioners on November 16, 2020 during the canvass of the 2020 General Election." AA, at 73.

Indeed, the affidavit was never intended to meet NRS 293.465's requirements. The Registrar himself was very clear and direct during his deposition in stating that his affidavit was never meant to satisfy and trigger NRS 293.465's new election provision:

> [Mr. Reynolds]. When you submitted your affidavit … was it your understanding that you were submitting the affidavit to comply with the affidavit requirement in NRS 293.465?
>
> [Registrar]. No, I don't believe I correlated the two. I simply was following the directive given to me in preparing the affidavit by my civil DA.

AA, at 260 (p. 14:3-9).

If the Registrar's affidavit is not an NRS 293.465 affidavit, then the exact interpretation of what does or does not *prevent* an election becomes merely academic. A proper NRS 293.465 affidavit is an absolute and fundamental precursor to any action by the Commission to order and conduct a new election. No affidavit, no new election, and certainly no writ of mandamus, because no duty to order a new election could possibly exist. Here, the affidavit does not appear to reference any connection to NRS 293.465, the district court has found it does not and cannot operate as a 293.465 affidavit, and the Registrar himself has said he did not intend it to trigger NRS 293.465's provisions.

3. *LaPorta* and *Montandon*

Mr. Anthony enlists to his cause the single published opinion of this Court touching upon NRS 293.465, *LaPorta v. Broadbent*, 91 Nev. 27, 530 P.2d 1404 (1975), but the case does not appear to support his

position.

In *LaPorta*, during an Assembly race in the 1974 General Election, ballots were unavailable to voters for a period of hours because a ballot became stuck in the voting apparatus and the mechanism had to be replaced. *Id.* The replacement mechanism failed to include the names of the State Assembly District 22 candidates, and instead a list of candidates that belonged to another precinct was included. *Id.* Some number of voters cast their votes on the faulty mechanism. *Id.* This Court held "NRS 293.465 is unequivocal on the subject of a faulty election when the ballots are unavailable… [and] if an election is prevented as it was here by absence of ballots the statute specifically states that the county commissioners shall order a new election in the precinct where the ballots were absent." *Id.*, 91 Nev. at 29.

Judging by the dissent, *LaPorta* is not exactly a sterling example of this Court's historical precedents. But what does emerge from the decision are a number of durable concepts, each of which redound to Mr. Anthony's disadvantage in the present appeal. First, it is apparent that the *LaPorta* Court was focused on an unforeseen *event* that prevented voter participation. The election, the Court reasoned, was prevented by

a failure of a specific voting machine and its replacement with a faulty substitute—the "absence of ballots," which the Court appropriately considered a type of "loss" of ballots per NRS 293.465. *Id.* "[T]he question," averred the Court, is "what happens when the ballots aren't there but the voters are." *Id.*, 91 Nev. at 29-30. Second, the *LaPorta* Court confirmed that the focus of NRS 293.465 is upon voter participation, "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.*, 91 Nev. at 30. Third, whatever one thinks of the exact result of the case, the *LaPorta* Court at least tried to fashion a narrow remedy that would meet the circumstances presented: a re-vote in one precinct, involving the voters who had attended on election day itself. Here, Mr. Anthony cannot point to an incident that prevented voters from participating or having the opportunity to express their will, or to any faulty election process that caused damage to any voter's rights of suffrage, or any impact that the statistical discrepancies had on the result of the election, even in the abstract. Furthermore, let us not forget that Mr. Anthony is asking this Court to nullify 150,000 votes district-wide, on the basis of conjecture,

and replace them with the results of a special election on some random Tuesday in March, all while insisting such a remedy will more accurately and genuinely produce the will of the electorate of District C regarding its Commission representative. In this comparative and distinguishing light, *LaPorta* offers Mr. Anthony no succor.

A case that had as its subject the application of NRS 293.465's provisions and did not result in an appeal or a published opinion, but is nonetheless instructive, is *Montandon v. City of North Las Vegas*, No. 11A643835, 2011 WL 12524104 (Nev. Dist. Ct. July 12, 2011).[4] *Montandon* involved a North Las Vegas City Council race in which the final margin was one vote, out of approximately 3,600. *Id.* After the balloting, it was discovered that a single, identifiable voter had cast an unlawful ballot. *Id.* The North Las Vegas City Council had both an election official's affidavit pursuant to NRS 293C.710, the municipal prevented-election statute, and an application by the candidate for a

[4] Mr. Miller cites to *Montandon* not for mandatory authority, obviously, but rather for the Court's information and any interest it may have for the Court's deliberations. Strictly speaking, *Montandon* involved NRS 293C.710, which is a word-for-word cognate of NRS 293.465, applied to municipal elections. *Compare* NRS 293C.710 *with* NRS 293.465. There is no meaningful distinction between their respective texts, interpretations, or applications.

new election. *Id*. In court, however, none of this was sufficient to mandate a new election, and the city council was directed to canvass the votes and certify the winner. *Id.*, 2011 WL 12524104, at *4. The candidates had the option of proceeding to a recount and an election contest, which is exactly what occurred. The district court found that "no election was prevented here," even with the acknowledged problem of a poll worker error permitting an unlawful elector to cast a ballot in a race that turned on a single vote. *Id.*, 2011 WL 12524104, at *5.

In the present case we have a much less concrete situation than in *Montandon*. There all the parties knew exactly what had happened, even knew the identity of the unlawful voter and the complete story of how that individual was able to cast a ballot, yet that was not the "prevention" of an election for purposes of the municipal version of NRS 293.465, it was fodder for an election contest. The margin between the candidates was properly considered to be immaterial; that could be addressed by the parties in an adversarial judicial proceeding. Here, we have no particularized evidence of a prevented election at all, no information or evidence about what generated any of the statistical anomalies, and not even a shred of evidence that there is any

connection to any voter's ballot at all. All we have is the mere fact that the usual data discrepancies have occurred, and their number exceeds the margin between Mr. Miller and Mr. Anthony. This is why recounts and contests exist, to address the kinds of claims Mr. Anthony seeks to resolve, but it is not a matter to which NRS 293.465 speaks.

B. An Election Contest Is The Form Of Action Through Which Mr. Anthony Should Have Sought Relief

1. Mootness

Election controversies are meant to be brought and determined in the shortest possible period, to avoid any disruption in representative government. It is why judicial districts set up same-day election chambers, for processing cases rapidly in the midst of an election. It is why recount and contest statutes feature quick, expedited filing periods, and why NRS 293.413(2) directs that, upon the filing of a timely election contest, "[t]he court shall set the matter for hearing not less than 5 days nor more than 10 days after the filing of the statement of contest," and that "[e]lection contests shall take precedence over all regular business of the court in order that results of elections shall be determined as soon as practicable." NRS 293.413. Yet here we are, three months past the General Election, two months after the canvass

and certification of the final vote totals, and a month beyond Mr. Miller's swearing in as Clark County Commissioner for District C. For an effort aiming to overturn a certified election, rescind a properly-issued certificate of election, and nullify the votes of 150,000 electors of the district, Mr. Anthony has moved his case at a pace that cannot readily be termed urgent. This was especially surprising to Mr. Miller, because Mr. Anthony had been explicit in briefing to the district court that "Once an election is certified, Anthony's legal remedies are limited to a recount, and/or an election contest," an argument that seemed to concede impending mootness during the middle of the case below. AA, at 55.

"Generally, this court will not decide moot cases." *Cashman Equipment Co. v. West Edna Assoc. Ltd.*, 132 Nev. 689, 702, 380 P.3d 844, 853 (2016) (quoting *NCAA v. Univ. of Nev., Reno*, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981)). Moot cases ask a court to "determine an abstract question which does not rest upon existing facts or rights." *Id.* What, exactly, are the existing rights in this matter? Beyond Mr. Anthony's own declaration of his shrinking post-certification options, if NRS 293.465 is considered, essentially, a *voter's* rights statute, as its

terms and the logic of *LaPorta* appear to instruct, this Court would be justified in considering this matter mooted not just by the fact of Mr. Miller's investiture as Commissioner, but because—taking a page from the dissent in *LaPorta*—no voters here have "complained of loss of suffrage," and none has said he either wanted to or tried to vote for" Mr. Anthony but somehow could not. *LaPorta*, 91 Nev. at 30 (Gunderson, dissenting).[5]

Even if not precisely mooted, however, this action is susceptible to quick disposal because the Court should make clear that the exclusive vehicle for challenging the results of an election is resort to the recount and election contest procedures set out in NRS 293.400 *et seq*. There are no other ways of pursuing the overturning of an electoral defeat—and there oughtn't be, or else ever-creative parties will seek ways to evade the clear mandates of election law and stretch election challenges months into the new terms of elected officials, which is a recipe for democratic instability.

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[5] Mr. Miller will also note that if the cases involving NRS 293.465 are countable on less than one hand and are separated by decades, the issue involved here likely is not one that "is capable of repetition, yet evading review." *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010).

2. An election contest was the exclusive action open to Mr. Anthony under these circumstances

As stated earlier, though he demanded a recount of the votes in District C, Mr. Anthony did not file an election contest in this matter. His reasons for not doing so turned out to be flatly political: Out of all possible remedies for curing his defeat, he believed he stood the best chance of gaining office if he was able to arrange a new, special election rather than to contest any concrete set of votes or voters. Mr. Anthony told the district court in briefing that he would forego a contest because

> [P]ursuant to the Nevada election contest statute, even if Anthony prevailed in the election contest, his remedies do not include a new election. The Court has one of two statutory remedies in an election contest in evaluating the Registrar's already-identified voting discrepancies or irregularities: (1) find from the evidence that Anthony actually "received the greater number of legal votes" than Mr. Miller received or (2) determine that the election should be "annulled or set aside" and thereby "the office is vacant." NRS 293.417(1), (4). Thus, even if Anthony prevails at this point, the vacant seat would not be awarded to Anthony, but would be filled by a person selected by the Governor – who is under no obligation or inclination to appoint Anthony as Anthony is a member of the opposing political party.
>
> Obviously seeking to have the Commission certify the election for District C is clearly a shrewd political maneuver because it guarantees either Miller or another Democrat appointed by Governor Sisolak will occupy the District C Commission seat, but not Republican Anthony.

AA, at 55. This is remarkable, actually. Mr. Anthony is saying that he chose his form of action not because it fit the facts and law of his circumstances, necessarily, but because he did not think he could prevail in a court contest and his best and most likely outcome was him not being appointed to a vacant Commission seat due to his political party registration. This is not appropriate conduct of post-election litigation to challenge the results of a particular race, and represents a form of shopping of election claims.

Election contest-type claims are reserved to the election contest scheme at law. "The right to contest an election is not a common law or equitable right, but, rather, the right to contest an election is only conferred by virtue of statute." *Wright-Jones v. Johnson*, 256 S.W.3d 177, 180 (Mo. App. E. Dist. 2008). Further, "[t]he procedures prescribed for election contests are specific and exclusive, and must be strictly construed." *In re Contested Election of November 3, 1993,* 72 Ohio St. 3d 411, 414, 650 N.E.2d 859, 862 (Ohio 1995). *See also Bradley v. Perrodin*, 106 Cal. App. 4th 1153, 1173, 131 Cal. Rptr. 2d 4 (Cal. App. 2d Dist. 2003) (Election results may only be challenged on grounds specified in the election contest statutes); *Tunica County Democratic Exec. Comm.*

v. Jones, 233 So. 3d 792 (Miss. 2017) (statutory scheme contests is the exclusive remedy for deciding election contest issues).

Mr. Anthony's novel suggested reading of NRS 293.465 operates against the weight of statutory authority. He would have this Court grant political bodies like boards of county commissioners the power to decide what can only be characterized as election contests, when in the wake of an election the function of the Commission is supposed to be that of a canvassing authority performing a ministerial duty. NRS 293.387; NRS 244.090(5). Nevada law provides a clear mechanism for prompt judicial resolution of election disputes matters, replete with standards and express directives, and in the absence of legislative action to alter that scheme it should not be disturbed by the Court.

Had Mr. Anthony followed proper post-election challenge procedures, this matter would have been decided long before now, as contemplated by the statutory contest scheme in NRS Chapter 293. In fact, under an election contest, Mr. Anthony could have argued over the two dozen paper ballots in the race that were invalidated entirely for voter error, or the more than two hundred paper ballots which were adjudicated by hand by election officials in the race; both sides had

scanned copies of all of these materials. In that event, the parties would be placing before a court actual evidence of the will of the voters, reflected on actual ballots. Instead, he has proceeded under an inapplicable statute, with no evidence of anything at all except that the poll books demonstrate their usual irreconcilable discrepancies.

To his partial credit, Mr. Anthony appears aware that an election contest was the proper path to pursue his claims. In his explanation of how he expects, through this suit for mandamus against the Board of County Commissioners, to rescind Mr. Miller's certificate of election, *see* Supplemental Brief, at 16, each of the four citations which he claims demonstrates that NRS Chapter 293 "contemplates that an awarded certificate of election can be voided or annulled" comes directly from election contest statutes: NRS 293.435(2); NRS 293.417(3); NRS 293.417(4); and, NRS 293.427(4). This is not promising when one has failed either to ask for annulment of a valid certificate of election in this case, and did not bring an election contest pursuant to the cited statutes. Furthermore, Mr. Anthony repeatedly employs the language of an election contest, when he discusses errors sufficient to call the result of the election into question. *See, e.g.,* NRS 293.410(2)(d). Apart from

every other dispositive argument that cuts off Mr. Anthony's path to success in this appeal, this Court should have little trouble construing his claims as those of an election contest and disposing of them as having been improvidently brought as a petition for mandamus.

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VI. CONCLUSION

For the foregoing reasons, Mr. Miller asks this Court to affirm the decision of the district court denying the petition for writ of mandamus.

DATED this 29th day of January, 2021.

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CERTIFICATE OF COMPLIANCE

1. I certify that this Brief 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, Century Schoolbook.

2. I further certify that this Brief complies with the type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the Brief exempted by N.R.A.P. 32(a)(7)(C), it contains 7,916 words.

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

Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2021, a true and correct copy of the foregoing RESPONDENT'S ANSWERING BRIEF 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*
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