IN THE SUPREME COURT OF THE STATE OF NEVADA

STAVROS ANTHONY, an individual, Appellant, v. CLARK COUNTY BOARD OF COMMISSIONERS, a local government entity; ROSS MILLER, an individual, Respondents.	)	Supreme Court No. 82269 District Case No. A-20-824371-W

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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:

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

DATED this 3 day of February, 2021.

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INTRODUCTION

Stripped of its attitude and condescending rhetoric, Miller's answering brief can be summed up as follows: NRS 293.465 is so clear that it can be construed only in favor of Miller, and Anthony's sole remedy to challenge the result of an election is to demand a recount pursuant to NRS 293.403, or contest the election pursuant to NRS 293.407 *et seq.*. Ignoring the fact that the Registrar declared that the result of the election was unknowable, and that the Commission originally, with advice of counsel, ordered a new election, and focusing only on the favorable outcome to himself, Miller "coldly" declares himself the winner.

Respectfully, Anthony is not pursuing a recount, nor is he contesting the election. Anthony is seeking a declaration from this Court of the meaning and scope of NRS 293.465, a statute that independently of any recount or election contest mandates a new election under circumstances that come within its ambit. This Court has both the authority and the obligation to construe NRS 293.465 to determine when a new election is required. This appeal is not about who won or who lost the election;[1] that fact is unknown and unknowable. This appeal is about the integrity of elections, and the reach of NRS 293.465.

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[1]Miller claims the moral high ground, wearing the white hat of acceptance of the election result, but were the tables turned, and Miller had lost by 10 votes under the same, questionable circumstances, he might be singing a different song.

DISCUSSION

I. Construction of the Statute.

NRS 293.127(1)© provides that the "real will of the electors [will] not [be] defeated by any informality or by failure substantially to comply with the provisions of this title." This is the overarching policy of Nevada with regard to elections, and should be the starting point of construction of every election statute, including NRS 293.465.

NRS 293.465 mandates that "[i]f 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," a new election must be ordered. Miller's entire argument is based on his insistence that a plain language of NRS 293.465 requires a construction of the term "prevented" that equates with an "election disaster," RAB 20, but nothing in the statute or in the plain meaning of the word "prevented" mandates such a construction.[2]

Miller argued that NRS 293.465 applies only to catestrophic events preventing the voters from access to the polls or the ballots from being counted.

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[2]In support of its self-created term, "election disaster statute," Miller has provided a list of incidents that would disrupt the conduct of an election. This list is clearly not exhaustive, but highlights that there are a variety of issues that could frustrate the real will of the voters.

The statute says nothing about access to the polls. The statute is broad. It applies when an election is prevented based on "any cause," and expresses the intent that the will of the voters be determined and carried into effect. If an election is held, the voters vote, and there is no disaster, but the outcome of the election cannot be determined, the Legislature has provided the remedy of a new election.[3]

The word prevented could be construed, instead, to mean that any time something happens that makes the result of the election unknown or unknowable, *i.e.*, "any other cause," the election has been prevented and a new election is mandatory. This is not an unreasonable construction of the statute, and in light of the overarching declaration of the Legislature that the intent of the electors must be the guiding star, this is a more reasonable construction than Miller's myopic and self-serving suggestions.

But Miller offers a mind-numbingly narrow definition of the term "prevented" not suggested by any language of the statute, and "coldly" (and self-righteously) declares victory in an election, the true outcome of which is unknown and unknowable. Each of Miller's arguments is based on his narrow reading of

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[3]Miller says the purpose of the statute is to address election failures related to an incident. RAB 20. Nothing in the statute addresses an incident. The loss or destruction of ballots does not require an incident, nor does the phrase "any other cause" so suggest.

the only word in the statute on which he can hang his hat. With respect, it is this Court that declares the proper construction of the statute, not Miller.

At the very least, it must be conceded that the word "prevented" is capable of degrees of interpretation, meaning banging the drum for a construction of the plain terms of the statute resonates hollowly.

The phrase "or any other cause" (the more important term this Court is called upon to construe) could not be more broad, or plain. Any cause that prevents an election requires a new election. Recognizing the breadth of this mandate, Miller attempts to read "any other cause" out of the statute by means of the doctrine of *ejusdem generis*.

The doctrine of *ejusdem generis* does not apply for the simple reason that there is no "general term in [the] statute [that] follows specific words of like nature." RAB 20. The statute is not a specific term that is explained with a list of general applications. It is not a list at all, to which a catchall is added which should be construed in the same vein. It has two components only: (1) prevented by the loss or destruction of ballots; and (2) prevented by "any other cause." These are neither explanatory of each other, nor are they words of a like nature. Neither is specific in relation to the generality of the other. Both are equally specific, and independent. Miller would read the statute as "loss of ballots, or any

other loss of ballots," which would seriously offend the language of the statute. A more inappropriate invocation of *ejusdem generis* is hard to imagine.

Further, Miller's reliance on *ejusdem generis* would limit, rather than illuminate, the plain meaning of NRS Chapter 293. In *Young Elec. Sign Co. v. Erwin Elec. Co.*, 86 Nev. 822, 825, 477 P.2d 864, 866 (1970), the sole legal authority cited by Miller, this Court stated, "[i]f the intention of a statute is clear, courts do not resort to the rule of *ejusdem generis* because the statute must control. Courts may not read something into the statute which is not there." By the same token, courts should not ignore what is clearly there.

In *Helvering v. Stockholms Enskilda Bank*, (1934) 293 U.S. 84, 79 L.Ed. 211, 55 S.Ct. 50, the United States Supreme Court agreed that:

> [w]hile the rule (of *ejusdem generis*) is a well-established and useful one, it is, like other canons of statutory construction, only an aid to the ascertainment of the true meaning of the statute. It is neither final nor exclusive. To ascertain the meaning of the words of a statute, they may be submitted to the test of all appropriate canons of statutory construction, of which the rule of *ejusdem generis* is only one. If, upon a consideration of the context and the objects sought to be attained and of the act as a whole, it adequately appears that the general words were not used in the restricted sense suggested by the rule, we must give effect to the conclusion afforded by the wider view in order that the will of the Legislature shall not fail.

NRS 293.465 it is a separately standing direction that whenever an election has resulted in a situation where the will of the people cannot be determined, the election has been unsuccessful, or prevented, and a new election is required.

Miller's assertion that the plain language of the statute requires a disaster is inconsistent with his reliance on *ejusdem generis* to argue for a different construction. This is an admission that the phrase "or any other cause" can be read in more ways than one, which is the definition of ambiguity. If that phrase is ambiguous, and if the term "prevented" could be interpreted either as Miller has interpreted it, or as Anthony has interpreted it in line with the primary purpose of the statute, which is to protect the integrity of the election process and insure that no person is declared the winner of an election unless the will of the electors can be determined, then this Court must rely on all of the rules of statutory construction and the other evidence and arguments available to determine the intent of the statute.

By including "or any other cause," the Legislature has provided for any unknown event that may prevent an election. "[C]ourts presume that 'or' is used in a statute disjunctively unless there is clear legislative intent to the contrary." 1A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutes & Statutory Construction § 21.14 (7th ed. 2009) (emphasis added); *Dezzani v. Kern & Assocs.,*

Ltd., 134 Nev. 61, 66, 412 P.3d 56, 60 (2018) (the word "or" is typically used to connect phrases or clauses representing alternatives). A final clause that is separated by a comma and the disjunctive "or"indicates that the final clause is an alternate to the prior language, rather than conditioned by the prior language. *See Coast Hotels & Casinos, Inc. v. Nev. State Labor Comm'n*, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001).

The new election required by NRS 293.465 is not conditioned on an "election disaster," a "criminal acts," or simply "the loss or destruction of ballots." To protect the integrity of the election for every citizens who voted, a new election is required if for any reason, the result of the election cannot be determined. In all such cases, the election has been prevented.

Miller relies on what he believes to be the plain meaning of the statute, as does Anthony. But the plain meanings collide. Although plain language is useful in determining intent, plain language must never be a substitute for intent. "The leading rule of statutory construction is to ascertain the intent of the Legislature in enacting the statute." *McKay v. Bd. of Supervisors of Carson City*, 102 Nev. 644, 650, 730 P.2d 438, 443 (1986). This paramount rule is sometimes lost in expressions of the standard of review. *Compare Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. 61, 64, 412 P.3d 56, 59 (2018) (reh'g denied (2018)) ("To determine

legislative intent, we first consider and give effect to the statute's plain meaning because that is the best indicator of the Legislature's intent.") (citations omitted) *with Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 641–42, 81 P.3d 532, 534 (2003) ("When the words of the statute have a definite and ordinary meaning, this court will not look beyond the plain language of the statute, unless it is clear that this meaning was not intended. However, if a statute is ambiguous, the plain meaning rule of statutory construction is inapplicable, and the drafter's intent becomes the controlling factor in statutory construction.") (citations and internal punctuation omitted).

Although these formulations of the standard are similar, Anthony suggests the articulation of the rule in *Dezzani* is superior to the statement in *Harris*. The "unless" clause in *Harris* is often ignored in application of that standard.

Courts use the plain language to ascertain intent; intent does not become important only when the language is ambiguous. This is a slippery slope that could give meaning to an interpretation of the statute based on one reading of the language that seems plain to one reader, even when a different intent is manifest. This Court should never conclude, "A is what the Legislature intended, but the plain language says B, so we are stuck with B." Intent should always be the controlling factor.

II. Anthony is Not Limited to a Recount or an Election Contest.

Although Anthony acknowledges that the remedies of a recount or an election contest are available to a candidate who has appropriate bases to contest an election under the statutes set forth for that purpose, nothing in NRS 293.465 or the election contest statutes suggests that those candidate remedies are exclusive from the statutory remedy of a mandated new election. The cases cited by Miller do not address this issue, and are not on point.

Anthony and the electors in Clark County have a statutory right to a new election under NRS 293.465. This statutory right is not the result of a recount. It is not the result of an election contest. It is the result of a legislative declaration that in certain defined circumstances, a new election is required. It is irrelevant what methods of election contests are open to Anthony; Anthony and the electors of Clark County seek and are entitled to an authoritative construction of NRS 293.465 from this Court, setting forth when and under what circumstances a new election is mandated.

Anthony had no obligation to demand a recount or file an election contest. Miller's much verbiage about Anthony's allegedly ulterior motives in electing this action over an election contest is a great waste of breath. Depending on this Court's construction of the statute, NRS 293.465 is the only method of seeking a

new election, and is the correct method of insuring that an election without a winner is not certified as final. NRS 293.465 is not in the election contest section of the law, because it is not an election contest statute. It is in the section of the law where it belongs; the statutes intended to insure the integrity of elections.

Miller's argument misses the point. The point is that when the margin of error is so small that admitted, irreconcilable discrepancies make it impossible for the will of the electors to be known, no fair election has been conducted, or in other words, the election has been prevented, and the electors are entitled to a new election. Miller has all but ignored the margin of error issue, preferring instead to tilt at the windmill of "election disaster."

Anthony did not challenge the election based on any ground available to a candidate to challenge an election for cause.[4] All of the arguments about "election consent" being the only remedy to challenge an election are as irrelevant as they are misguided. NRS 293.465 is not a method of contesting an election. It is not dependent on fraud, wrongdoing, or any other basis on which an election contest

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[4]Anthony sought an injunction followed by a petition for a writ of mandamus, both for the purpose of compelling the Commission to order a new election as required by the statute. The Commission either has that obligation, or it does not, and that turns on this Court's construction of NRS 293.465. The "election contest exclusive remedy" argument could not be more misguided.

might be based. NRS 293.465 is self-executing; it demands a new election whenever an election has been prevented by any cause, wrongful or not.

III. The Margin of Error Precludes Certification of the Election.

Miller spends pages demonstrating that discrepancies happen in every election, and declares that NRS 293.465 was not intended to address these discrepancies. Miller cites no authority for this declaration, and there is none. In any event, Miller's arguments again miss the point.

This election was won or lost by a handful of votes, and was certified in the face of 139 irreconcilable discrepancies. The election cannot be certified within any concept of any margin of error. Whatever else may be disputed, it cannot be disputed that no one–not the Registrar, not the Commissioners, not Miller, and most importantly, not the electors, knows who won this election. Miller's position is, tough, there is no remedy. Anthony believes NRS 293.465 was intended to remedy precisely this possible situation.

Anthony argued that NRS 293.465 applies whenever the margin of error leaves the result of the election and the will of the electors unknowable. Miller counters that is does not matter who actually won the election, or what the margin of error is (close election or landslide is the same according to Miller) so long as there was no insurrection or other incident of disastrous proportion that prevented

the voters from going to the polls. But Miller's argument presupposes that his narrow understanding of NRS 293.465 is the only and correct construction.

The sole issue presented in this appeal is the construction of NRS 293.465. This Court may ignore all of Miller's arguments regarding the strawman issues he has raised. Anthony's motives in pursuing this action are irrelevant. Construction of the statute all that is at issue; this Court's construction of the statute will end the debate.

Miller conflates a candidates right of contest with the electors' right to a new election when no winner can be declared simply because this action is brought by a candidate, but Anthony's identity as a candidate is irrelevant to the action he pursues on behalf of Clark County electors. No matter the cause, when no winner can be declared and the will of the voters cannot be known, the election has been prevented in a broad sense of that word.

Miller can provide no legal, logical, or policy reason why the statue should not be construed to give effect to its most important and expressed intent, rather than neutered by a narrow definition of a single word. This Court generally considers and construes the statute as a whole, giving meaning to each of its parts, without rendering any part nugatory or absurd. In this case, the "will of the voters" focus of the statutory scheme should not defeated by an overly myopic

reading of the single word "prevented," especially where the Legislature has defined that term broadly to include "prevented . . . for any cause," and the election cannot be certified to any acceptable margin of error.

IV. *LaPorta* Provides a Clear Path Forward.

This is not an issue of first impression. This Court has analyzed a similar election in *LaPorta v. Broadbent*, 91 Nev. 27, 530 P.2d 1404 (1975). In *LaPorta*, there was no "loss or destruction of the ballots," that resulted in the prevention of an election. Instead, this Court found that an election was prevented due to the absence of ballots–a clear example of "any other cause" as prescribed in NRS 293.465. *LaPorta v. Broadbent*, 91 Nev. 27, 29, 530 P.2d 1404, 1406 (1975). Miller incorrectly summarizes this Court's opinion–this Court did not hold that an unforeseen event prevented voter participation. Relying on NRS 293.127, this Court held that "[t]he 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 1406. The *LaPorta* election was decided by six votes, the election staff failed to insert the correct list for a voting machine. As a result of the staff's actions in conducting the election, the integrity of the election result (combined with margin of victory) was called into doubt. *Id.* at 1405. The same is true here.

It is uncontested that there are 139 irreconcilable discrepancies that have called into question the integrity of the election. The Registrar testified that, "we can't reconcile and so [the 139 discrepancies] very much or very well could represent a discrepancy that would affect the outcome of the election." AA 201. He further testified, "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. As in *LaPorta*, the 139 discrepancies have created a similar absence of votes. Because 139 voter discrepancies is significantly larger than a 15 vote margin of victory, the errors are potentially outcome determinative. It is imperative to ensure the results.

V. The Registrar's Affidavit.

Miller's argument that the Registrar's affidavit does not satisfy the statute is entirely based on Miller's myopic interpretation of the word prevent. Miller argues only that because the Registrar did not use the word prevent or cites the statute in his affidavit, the affidavit is ineffective. Again, the statute does not require that the affidavit use the word prevent or cite NRS 293.465. The Registrar informed the Commission that he could not certify a winner based on discrepancies and the margin of error, and then confirmed that with an affidavits. The statute requires no more.

The Registrar submitted his affidavit with the intent to comply with NRS 293.465. The statutory language indicates that the Registrar's actions could only have one meaning. Moreover, Miller has proffered no alternative reason for such an affidavit.

In relevant part, NRS 293.465 states: "If an election is 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 Chapter 293 contains many sections and subsections. The Legislature used the term "affidavit' 46 times in these provisions, and used the term "election officers" only 10 times. Only once does NRS Chapter 293 require an election officer to submit an affidavit: to inform the appropriate board of county commissioners that an election was prevented pursuant to NRS 293.465. Thus the rebuttal to Miller's argument is a simple question: if not for purposes of NRS 293.465, why did the Registrar submit an affidavit to the Clark County Board of Commissioners immediately after reporting that he could not certify the election based on discrepancies?

NRS 293.465 does not require any particular language in the affidavit. This is an artificial requirement proffered by Miller, nothing more. Here, remembering that the key is to give notice (See NRS 293.127) the Registrar's affidavit was

sufficient to invoke NRS 293.465. Miller may argue that the affidavit language is informal, but the lack of Miller's desired language is immaterial.

VI. Additional Responses.

Miller has not responded in any substantive manner to the mootness issues contained in Anthony's supplemental opening brief. Anthony will rely on the arguments in his brief. The suggestion that Anthony has not proceeded expeditiously with this action is not supported in the record.

The repeated warning in the answering brief that requiring a new election here will have far ranging effect and undermine the integrity of elections is a strawman. Miller insists there are discrepancies in all elections, but he cannot establish that those discrepancies are beyond the margin of error or would affect more than a handful of elections. Miller has been able to point to one example where this issue was raised, but never authoritatively resolved. *Montandon v. North Las Vegas*, 2011 WL 12524104 (Nev. Dist. Ct. 2011). RAB 28. That case was hardly apposite to this. Miller argues that all elections, whether close or not, must be treated the same, but there is no policy reason to accept such a categorical statement. As with all categorical declarations, they will prove false in some circumstances. If the election is not in doubt and the will of the electors is known, NRS 293.465 is not implicated.

This situation, where the vote tally is so close that the discrepancy margin of error results in real concern about whether the will of the electors has been manifested, will be relatively rare. If this Court is truly concerned about protecting the integrity of elections, as it obviously is, it should choose as a matter of public policy that a new election is mandated where the will of the electors cannot be determined because of irreconcilable discrepancies within the margin of error. In every true sense of the word, in all such cases, the election has been prevented (there is no way a winner can be declared). That certainly meets a definition of prevented, if not Miller's definition of prevented.

Miller argues that everyone has accepted the result of the election except Anthony. But every voter in Clark County is watching to see whether this election, which produced no winner, will be corrected or will be allowed to stand.

CONCLUSION

The judgment of the district court should be reversed.

DATED this 3 day of February, 2021.

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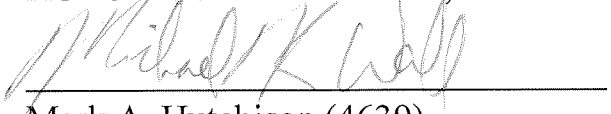

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ATTORNEY'S CERTIFICATE

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.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 4,047 words.

3. Finally, I certify that I have read this appellate 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 NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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 the

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 3 day of February, 2021.

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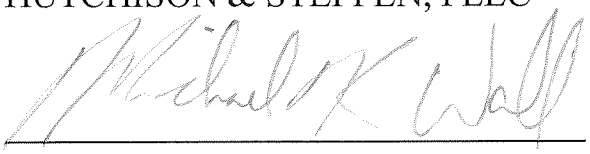

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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date the **APPELLANT'S REPLY 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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