

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 85507

AMERICAN CIVIL LIBERTIES UNION OF NEVADA
Petitioner,

Electronically Filed
Oct 27 2022 07:04 AM
Elizabeth A. Brown
Clerk of Supreme Court

v.

THE COUNTY OF NYE, et al.,
Respondent.

**EMERGENCY MOTION FOR CLARIFICATION
PURSUANT TO NRAP 21(a)(6)**

PETITIONER'S APPENDIX, VOL. 2

SADMIRA RAMIC
Nevada Bar No.: 15984
CHRISTOPHER M. PETERSON
Nevada Bar No.: 13932
SOPHIA A. ROMERO
Nevada Bar No.: 12446
**AMERICAN CIVIL LIBERTIES
UNION OF NEVADA**
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*Counsel for Petitioners ACLU of
Nevada and Steven Bacus*

DOCUMENT	DATE	VOL	PAGE(S)
Affidavit of Attempted Service, County of Nye, October 4, 2022	10/4/2022	1	43–44
Affidavit of Attempted Service, Second Attempt, County of Nye, October 4, 2022	10/4/2022	1	45–46
Affidavit of Service, County of Nye, October 10, 2022	10/10/2022	1	47
Affidavit of Service, Mark Kampf, October 4, 2022	10/4/2022	1	42
Clerk's Office Announcing Paper Ballot and Hand-Count Procedures for General Election, September 6, 2022	9/6/2022	1	1
Declaration of American Civil Liberties Union of Nevada in Support of Writ of Mandamus, October 14, 2022	10/14/2022	1	56–58
Declaration of Athar Haseebullah in Support of Motion for Clarification, October 26, 2022	10/26/2022	2	76–77
Declaration of Cèsar Carvajal in support of Motion for Clarification, October 26, 2022	10/26/2022	2	74–75
Declaration of Sadmira Ramic in Support of Writ of Mandamus, October 14, 2022	10/14/2022	1	59–60
Declaration of Steven Bacus in Support of Writ of Mandamus, October 14, 2022	10/14/2022	1	54–55
Email exchange between Deputy Solicitor General Craig A. Newby, Attorney Brian R. Hardy, and Attorney Harry L. Arnold, CC'ing Attorney Sadmira Ramic, from October 24, 2022	10/24/2022	2	68–69

DOCUMENT	DATE	VOL	PAGE(S)
Email exchange between Attorney Sadmira Ramic and Frank G. Carbone from October 5, 2022 and October 7, 2022	10/5/2022;10/7/2022	1	48–50
Emergency Petition for Writ of Mandamus Enjoining Nye County Interim County Clerk From Implementing Proposed Unlawful Hand Counting Measures During the November 2022 General Election and Complaint of Declaratory and Injunctive Relief, October 4, 2022	10/4/2022	1	14–41
Letter from Attorney Brian Hardy to Deputy Secretary of State for Elections Mark Walschin from October 24, 2022	10/24/2022	2	62–67
Letter from Attorney Sadmira Ramic to Deputy Secretary of State for Elections Mark Wlaschin from October 25, 2022	10/25/2022	2	70–72
Letter from Deputy Secretary of State for Elections Mark Walschin to Nye County Clerk Mark Kampf from October 22, 2022	10/22/2022	2	61
Letter from Deputy Solicitor General Craig A. Newby on behalf of Secretary of State to Attorneys Brian R. Hardy and Sadmira Ramic from October 25, 2022	10/25/2022	2	73
Order Denying Writ of Mandamus, Declaratory Relief, Injunctive Relief, October 12, 2022	10/12/2022	1	51–53

DOCUMENT	DATE	VOL	PAGE(S)
Presentation titled “Nye County – 2022 General Election Process”, September 20, 2022	9/20/2022	. 1	2–13

Respectfully submitted,

/s/ Christopher Peterson
CHRISTOPHER PETERSON
Counsel for the Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2022, I electronically filed the foregoing Appendix with the Nevada Supreme Court by using the appellate electronic filing system.

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

Harry L. Arnold
Marquis Aurbach
10001 Park Run Drive
Las Vegas, NV 89145

I further certify that a true and correct copy of this document was served by email to:

Harry L. Arnold
harnold@maclaw.com

/s/ Christopher Peterson

Christopher Peterson

An employee of the ACLU of Nevada



**OFFICE OF THE
SECRETARY OF STATE**

October 22, 2022

Mr. Mark Kampf
Nye County Clerk
101 Radar Road
P.O. Box 1031
Tonopah, NV 89049
mkampf@nyecountynv.gov

Via Email & Certified Mail

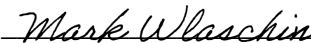
RE: Compliance with Nevada Supreme Court Writ of Mandamus dated Oct 21, 2022

Mr. Kampf,

I am in receipt of yesterday's writ of mandamus from the Nevada Supreme Court. I am seeking written explanation as to how Nye County and you intend to comply with all of the provisions from the writ of mandamus, in particular how Nye County will "ensure public observers do not prematurely learn any election results." Writ at 10.

Time is of the essence should Nye County wish to proceed with its parallel process, which cannot proceed until compliance with these mandates from the Nevada Supreme Court is resolved. To expedite resolution, please copy Petitioners' counsel with any written explanation.

Please reply no later than 5 p.m. on Monday, October 24, 2022. You may call or email me with any questions you might have.


Mark Wlaschin
Deputy Secretary of State for Elections

cc: Secretary of State Barbara K. Cegavske



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JENNIFER L. MICHELI
OF COUNSEL

October 24, 2022

Nevada Secretary of State
c/o Mark Wlaschin, Deputy Secretary of State for Elections
101 N. Carson Street, Suite 3
Carson City, NV 89701

Via mail & email to mwlaschin@sos.nv.gov and nvelect@sos.nv.gov

Re: Nye County Hand Count Procedures
Compliance With Supreme Court Writ of Mandamus (Case No. 85507)
Response to Correspondence Dated October 22, 2022

Dear Mr. Wlaschin:

As you may be aware, this firm represents Nye County and its Clerk Mark Kampf with respect to the above-referenced legal action filed by the ACLU. As such, please ensure this office is copied on all future correspondence regarding this matter. We are in receipt of your correspondence dated October 22, 2022 and, consistent with the same, Nye County fully intends to comply with the Nevada's Supreme Court's October 21, 2022 order in Case No. 85507 ("Order"). The Order compelled the County to do the following:

(1) Refrain from livestreaming the hand-count read-aloud process prior to the close of the polls on November 8, require all observers to certify that they will not prematurely release any information regarding the vote count before then, and ensure public observers do not prematurely learn any election results, and

(2) Make available to voters all three of the statutorily established methods for proving voter identity when a signature verification fails.

With respect the first issue regarding the public dissemination of results, the County reaffirms its intent to not livestream the hand-count process. Instead, the recordings from the cameras in the hand-count rooms will not be released until the close of all polls as determined by the Secretary of State's office. At the earliest, the recordings will not be released until the morning following the election.

With respect to the public dissemination issue, the Nevada Supreme Court did not explicitly bar the "read-aloud" element of the County's hand count process (it only barred the livestreaming thereof). Moreover, the Supreme Court clearly differentiated the "vote count" from "election results." As I'm sure you would

agree, “election results” refers to the totality of vote count results. This is why the Supreme Court has required the County to have all observers of the hand count process certify they will not “prematurely release any information regarding the *vote count* [not election results]” prior to close of all polls (emphasis added). As set forth in the attached observer form and observer declaration, the County intends to require all observers of the hand count process to sign a certification as required by the Order.

Finally, the County plans to employ a bi-fold approach to ensuring observers do not “prematurely learn any election results,” which again clearly refers to the totality of returns, not the individual counting of ballots. Not accounted for in the Order is the fact that the County’s hand count process will take place in multiple rooms. At this time, the County estimates that at all times in which the hand count is taking place, there will be roughly 4 – 6 different rooms with separate hand count teams tallying ballots *simultaneously*. As such, by simultaneously spreading the hand count among various rooms, not a single observer will be able, even if they wanted to, to learn the totality of the vote count (i.e. election results). As a secondary safeguard, the County, as set forth in the attached Observer Declaration, is having observers declare under the penalty of perjury that, among other things, they will not undertake any efforts to interfere with, obstruct or otherwise impede the election or its processes.

Overall, the County is quite confident that the procedures set forth above ensure compliance with the Order and ameliorate any concerns over the public dissemination of election results. With respect to the second obligation of ensuring voters are afforded all three methods of signature verification set forth in NRS 293.285, the County is not instructing its poll workers to limit signature verification to only showing identification. Instead, the County is ensuring its poll workers handling signature verification understand that a voter subject to the signature verification process does not necessarily need to show identification, and can instead, pursuant to NRS 293.285(2)(a)-(b), provide verification by either (a) answering personal data questions stemming from the voter’s voter registration application or (b) providing (either orally or in writing) personal data that verifies the voter’s identity. The County will not seek to prioritize verification via identification, and will instead ensure that voters subject to the signature verification process are aware of all three statutorily-prescribed options for verification. With this instructive guidance for its poll workers, the County is confident it will adhere to the second mandate set forth in the Order.

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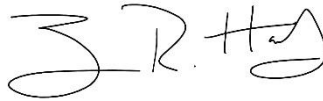
///

October 24, 2022

Page 3

As always, if you have any comments, questions or concerns, please feel free to contact the undersigned directly. Unless we hear from you otherwise, we will assume that Nye County's procedures for its parallel process as set forth above sufficiently comply with the Order.

Sincerely,

A handwritten signature in blue ink, appearing to read "B.R. Hardy" followed by a stylized flourish or second signature.

Brian R. Hardy, Esq. &
Harry L. Arnold, Esq.

BRH:HLA

CC: Mark Kampf, Timothy Sutton

Encl: Observer Form; Observer Declaration

APP0064



State of Nevada

Secretary of State Barbara K. Cegavske

Processing and Counting of Ballots Observer Acknowledgment

In accordance with the Nevada Revised Statute (NRS) 293B.353 and 293.0335, and Nevada Administrative Code (NAC) 293 Chapter 293/R098-21/R108-21 I, _____, by signing this form and placing my initials next to each provision, hereby acknowledge that during the time I observe the processing and counting of ballots at the central counting place:

_____: I am prohibited from:

1. Talking to workers within the central counting place other than the county or city clerk or a person designated by the county or city clerk to address questions from observers;
2. Using a mobile telephone or computer within the central counting place;
3. Advocating for or against a candidate, political party or ballot question;
4. Interfering with the statutory duties of county or city election personnel; and
5. Interfering with the processing and counting of ballots.

_____: I may be removed from the central counting place by the county or city clerk for violating any provision of title 24 of the NRS or any of the provisions described above.

_____: The county or city clerk may:

- a. Limit the number of persons in the central counting place who are observing the processing and counting of ballots for reasons of public safety or to protect voter privacy or maintain order.
- b. Remove from a central counting place a person observing the processing and counting of ballots for violating any provision of title 24 of NRS or any of the provisions described above.

_____: A person observing the processing and counting of ballots at the central counting place may remain in an area designated by the county or city clerk without interfering with the processing and counting of ballots. The designated area must allow for meaningful observation, but must not be located in an area that would allow an observer to infringe on the privacy and confidentiality of the ballot of a voter.

_____: A person observing the processing and counting of ballots at a central counting place must wear a name tag denoting the person's full name.

_____: The county and city clerk shall retain the signed acknowledgments for at least 180 days following the election.

_____: "Advocate" includes, without limitation, speaking, displaying or disseminating written material and wearing identifying clothing, buttons or other paraphernalia.

_____: "Meaningful observation" means a person may observe the identification of voters who appear at a polling place to vote, the distribution of a ballot or voting machine card to a voter, the movement of a voter to a voting booth, the return of a ballot or voting machine card by a voter and the exiting of a polling place by a voter. The term does not include allowing a person to:

1. View the personal information of a voter, a voter's ballot, or selections on a voting machine; or
2. Listen to any conversation between election board officers or between a voter and an election board officer.

_____: Any person who disseminates to the public information relating to the count of returns for early voting before the polls close is guilty of a gross misdemeanor.

Signature

Date

Printed Name

OBSERVER DECLARATION

I hereby declare as follows:

1. I am over the age 18 and, pursuant to NRS §53.045, affirm under penalty of perjury under the laws of the State of Nevada that the following is true and correct.

2. I am being afforded the opportunity to observe the processing and counting of ballots and, in doing so, understand acknowledge that under both state and federal law I must adhere to certain standards of conduct and that I do not interfere with, obstruct or otherwise impede the election or its processes including, but not limited to, affirming the following:

_____: I will not release, or cause to be released, any information about the vote count prior to the close of all polls as determined by the Nevada Secretary of State, including but not limited to, any of the names (or frequency thereof) that are read aloud during the hand count process;

_____: I will not collaborate, conspire or coordinate with other observer(s) to develop a cumulative understanding of the vote count and overall election results;

_____: I will not record or tally (whether manually, electronically or through any other means) or actively seek to remember the frequency of any names that are read aloud during the hand count process;

_____: I will not seek to subvert the Nevada Supreme Court's order in Case No. 85507, which bars the public dissemination of election results prior to the close of all polls as determined by the Nevada Secretary of State, including but not limited to, any of the names (or frequency thereof) that are read aloud during the hand count process;

_____: I understand during my observation of the hand count process my image and likeness may be captured by camera (video and audio recording), and hereby irrevocably grant Nye County the right to use any recording containing my image and likeness, and hereby release Nye County from all liability stemming from such recordings or the use thereof.

3. I understand that if I violate or attempt to violate any of the above affirmations or undertake any efforts to interfere with, obstruct or otherwise impede the election or its processes that I may be subject to legal penalties and/or excluded from further observation of the process.

Dated this ____ day of _____, 2022

Signature

Printed Name

Chris Peterson

From: Craig A. Newby <CNewby@ag.nv.gov>
Sent: Monday, October 24, 2022 4:54 PM
To: bhardy@maclaw.com; harnold@maclaw.com
Cc: Sadmira Ramic
Subject: FW: Nye County Response to 10/22/22 Correspondence re Supreme Court Writ [IWOV-iManage.FID1215712]
Attachments: Response to October 22 Correspondence.pdf

This Message Is From an External Sender

This message came from outside your organization.

Hello Brian and Harry:

I am in receipt of your clients' response letter. By way of this email, the Secretary is requesting a written response from the writ petitioners regarding compliance with the writ, as noted in the original email. I expect to receive any such response from the writ petitioners by mid-day tomorrow.

Thank you,

Craig Newby
Deputy Solicitor General
Nevada Office of the Attorney General

From: Harry L. Arnold <harnold@MACLAW.com>
Sent: Monday, October 24, 2022 12:56 PM
To: Mark Wlaschin <mwlaschin@sos.nv.gov>; SOS Elections Division <nvelect@sos.nv.gov>
Cc: Brian R. Hardy <bhardy@maclaw.com>
Subject: Nye County Response to 10/22/22 Correspondence re Supreme Court Writ [IWOV-iManage.FID1215712]

WARNING - This email originated from outside the State of Nevada. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Mr. Wlaschin:

Please find attached correspondence sent on behalf of Nye County and Mr. Kampf detailing the County's plan for compliance with the Nevada Supreme Court writ issued Friday, the same of which will be put in the mail.

Should you have any questions or concerns, please feel free to contact myself or my colleague Brian Hardy (cc'd).

Thanks,
Harry



Harry L. Arnold, Esq.

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October 25, 2022

Nevada Secretary of State
c/o Mark Wlaschin
Deputy Secretary of State for Elections
101 N. Carson Street, Suite 3 Carson City, NV 89701



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Via email to mwlaschin@sos.nv.gov and cnewby@ag.nv.gov

***Re: Nye County Compliance with Nevada Supreme Court Order Granting in Part
Petition for Writ of Mandamus in case No. 85507***

Dear Mr. Wlaschin and Mr. Newby:

The ACLU of Nevada writes in response to Nye County's letter, dated October 24, 2022, in regard to your office's request for Nye County to provide written explanation as to how they will comply with the Nevada Supreme Court Order in case No. 85507. As you are aware, the Nevada Supreme Court granted our Petition for a Writ of Mandamus with respect to our challenge of Nye County's hand count procedure and ordered Nye County and Mark Kampf to:

“Refrain from livestreaming the hand-count read-aloud process prior to the close of the polls on November 8, require *all observers* to certify that they will not prematurely release any information regarding the vote count before then, and ensure *public observers* do not prematurely learn any election results...”
(emphasis added).

Nye County's letter sent to your office yesterday sets forth its new procedure for hand counting ballots. This new procedure is in violation of the Order of the Nevada Supreme Court, and as such, we urge you to inform Nye County and Mark Kampf that their intended actions do not comply with the direct order of the Court. Nye County must refrain from moving forward with this proposed process. Failure to do so will likely result in further legal action undertaken by our office.

I. The Opinion of the Nevada Supreme Court states that a verbal read aloud of a selected candidate from a ballot coupled with public observers hearing this announcement constitutes a release of election results in violation of Nevada law.

Nye County insists that the Supreme Court did not explicitly bar the read-aloud element of the County's hand count process and that the Supreme Court's use of the term “election

APP0070



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results” only applies to the totality of returns and not the individual counting of the ballots. Therefore, the County claims it can continue the process of verbally announcing a selected candidate from each ballot even if observers of the count hear the announcements. The Court’s opinion makes clear that such a process is unlawful.

First, the Court specifically addressed the issue of the release of election results to in-person observers of the hand count that is to start on October 25 before the polls close. The Court pointed out that the record is unclear as to whether the read-aloud requirement stands, but specifically ruled that **“if the read-aloud requirement remains and observers are positioned to hear it, the observers, themselves members of the public, [...] are likely to learn election result information before the release of such information is statutorily authorized, even if they certify that they will not disclose this information to other.”** The Court goes on to say that “the record is insufficiently developed on this point, but we note that **if such observers hear results, this would violate the applicable statutes.**” The “read-aloud requirement” alluded to was discussed at the beginning of the Court’s opinion and described the process as “a volunteer ‘reader’ to verbally announce the selections on each ballot to three ‘talliers’, [...] [which will] be open to the public, and individuals may observe the process in person.” The language of the Court is plain and clear- if the reader reads aloud the selected candidate from each ballot and members who are observing hear this announcement, this is a release of election results and is not permitted under Nevada law.

Second, Nye County asks you to adopt their perceived definition of “election results” as “totality of vote count results,” and their sole basis for doing so is due to the Court using “vote count” in one part of its order and “election results” in another.

This distinction is misplaced, and, again, can be clarified from the Court’s opinion. The Court mandated Nye County and Mark Kampf to take two separate actions: 1) to “require all observers to certify that they will not prematurely release any information regarding the **vote count process** before then”; and 2) to “ensure public observers do not prematurely learn any **election results**.” (emphasis added). As such, the Court is requiring Nye County to assure that all observers- those participating in the count and those publicly observing- are prevented from releasing information on the hand count process itself. The second action is related to the release of election results described above, and a release of election results occurs when the “reader” reads aloud the selected candidate from each ballot **and** public observers hear this announcement. At no point in the opinion, nor during the course of this case, was a differentiation made between partial release of results and the final count of the votes. If the highest court of this state intended to make that distinction, it would have done so in its order.

II. Nye County's proposal separating the hand count into "4-6 different rooms" fails to satisfy the mandates of the Nevada Supreme Court order by releasing election results in violation of Nevada law.

The only offered explanation by Nye County as to how it intends on complying with the order so that observers do not prematurely learn any election results is the County's plans to have the hand count process separated into "4-6 different rooms with separate hand count teams tallying ballots simultaneously." This process fails to satisfy the mandates set forth by the Nevada Supreme Court because this process mirrors the proposed process struck down by the Court, specifically a reader verbally announcing a selected candidate from the ballot, three tallies tallying, and the process being open to the public. Separating the "teams" into separate rooms does nothing to eliminate the ultimate outcome of this process—the release of election result information prior to the permitted time under Nevada law. Readers will still be reading aloud the selected candidate and public observers present in these rooms will be able to hear these results. Suggesting it wouldn't be possible for observers to aggregate this data is an ideologically conclusory and illogical attempt to engage in a process that violates the order of the Court.

III. Conclusion

Nye County has failed to outline a process for hand counting all ballots which would comport with the directives of the Nevada Supreme Court. Early voting has already begun, and we are days away from Election Day. We implore you to not accept Nye County's newest illegal hand-count proposal.

Sincerely,



ACLU of Nevada
Voting Rights Attorney



AMERICAN CIVIL LIBERTIES UNION

Nevada

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General Counsel

HEIDI PARRY STERN
Solicitor General

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

555 E. Washington Ave. Suite 3900
Las Vegas, Nevada 89101

October 25, 2022

Via Electronic Mail

Brian R. Hardy
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Las Vegas, NV 89145
bhardy@maclaw.com

Sadmira Ramic
ACLU of Nevada
601 S. Rancho Drive, Suite B11
Las Vegas, NV 89106
ramic@aclunv.org

Re: October 21, 2022 Writ of Mandamus

Dear Mr. Hardy and Ms. Ramic:

I am litigation counsel for the Secretary of State. I am in receipt of the writ of mandamus from the Nevada Supreme Court, along with responses relating to my client's request for information on how Nye County plans to comply with the writ of mandamus.

From brief review, it is clear that you have differing interpretations of the writ as it pertains to how Nye County will "ensure public observers do not prematurely learn any election results," given that the court noted earlier "that if such observers hear results, this would violate the applicable statutes." Writ at 6, 10. Ultimately, pursuant to Nevada Rule of Appellate Procedure 40, the Nevada Supreme Court needs to clarify these differing interpretations to ensure compliance with Nevada law and its writ. We respectfully encourage you to seek direction on this limited issue, as only the Nevada Supreme Court can provide the final determination of this issue.

Sincerely,

/s/ Craig A. Newby

Craig A. Newby
Deputy Solicitor General
(702) 486-9246
cnewby@ag.nv.gov


**DECLARATION OF CÈSAR CARVAJAL IN SUPPORT OF
MOTION FOR CLARIFICATION**

I, Cèsar Carvajal, under penalty of perjury declare:

1. I am over the age of 18 and I am competent to testify.
2. I am an employee of Silver State Voices, a non-profit, non-partisan organization dedicated to promoting voter engagement and advancing voting rights.
3. I have personal knowledge of the facts set forth in this declaration.
4. I make this declaration in support of the Motion for Clarification.
5. On October 26, 2022, I visited the Nye County Development Services Center, located at 250 NV-160 #3, Pahrump, Nevada 89060.
6. The Nye County Development Services Center is a location where Nye County election workers are currently implementing Nye County's hand-count process and are counting ballots for the 2022 election.

7. As a public observer, I personally observed Nye County's hand-count election process.
8. While observing, I heard election workers read out loud the contents of multiple ballots cast in the 2022 election.
9. Each time a worker read out loud the contents of a ballot, the worker clearly identified each candidate the voter had selected for each race.
10. Upon information, belief, and my personal observations, the elections workers read each ballot out loud to comply with the election procedures set forth by Nye County Clerk Mark Kampf.
11. I declare under penalty of perjury that the foregoing is true and correct.

Dated October 26, 2022.

DocuSigned by:

Cesar Carvajal


**DECLARATION OF ATHAR HASEEBULLAH IN SUPPORT OF
MOTION FOR CLARIFICATION**

I, Athar Haseebullah, under penalty of perjury declare:

1. I am over the age of 18 and I am competent to testify.
2. I am the Executive Director of the American Civil Liberties Union (ACLU) of Nevada.
3. I have personal knowledge of the facts set forth in this declaration.
4. I make this declaration in support of the Motion for Clarification.
5. On October 26, 2022, I visited the Nye County Development Services Center, located at 250 NV-160 #3, Pahrump, Nevada 89060.
6. The Nye County Development Services Center is a location where Nye County election workers are currently implementing Nye County's hand-count process and are counting ballots for the 2022 election.
7. As a public observer, I personally observed Nye County's hand-count election process.

8. While observing, I heard election workers read out loud the contents of multiple ballots cast in the 2022 election.
9. Each time a worker read out loud the contents of a ballot, the worker clearly identified each candidate the voter had selected for each race.
10. Upon information, belief, and my personal observations, the elections workers read each ballot out loud to comply with the election procedures set forth by Nye County Clerk Mark Kampf.
11. I declare under penalty of perjury that the foregoing is true and correct.

Dated October 26, 2022.

DocuSigned by:

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Athar Haseebullah
Executive Director
American Civil Liberties Union of Nevada