

IN THE SUPREME COURT OF THE STATE OF NEVADA

REPUBLICAN NATIONAL
COMMITTEE,

Petitioner,

v.

CLARK COUNTY; CLARK COUNTY
ELECTION DEPARTMENT; and JOE
P. GLORIA, in his official capacity as
Clark County Registrar of Voters,

Respondents.

Electronically Filed
Nov 08 2022 12:21 PM
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court Case No.
85604

District Court Case No.
A-22-858609-W

**PETITION FOR WRIT OF MANDAMUS
From the Clark County District Court
The Honorable Timothy C. Williams**

**AMICUS BRIEF IN SUPPORT OF REPUBLICAN NATIONAL
COMMITTEE'S PETITION FOR WRIT OF MANDAMUS**

V.R. Bohman (NV 13075)
SNELL & WILMER L.L.P.
3883 Howard Hughes Pkwy.,
Suite 1100
Las Vegas, NV 89169
vbohman@swlaw.com
Telephone: (702) 784-5200

*Attorneys for Amicus Curiae,
Restoring Integrity and Trust
in Elections, Inc.*

Brett W. Johnson (AZ 021527)*
Tracy A. Olson (AZ 034616)*
Charlene A. Warner (AZ
037169)*
1 E. Washington St.
Suite 2700
Phoenix, Arizona 85004
Telephone: 602.382.6000
Facsimile: 602.382.6070
E-Mail:
bwjohnson@swlaw.com
tolson@swlaw.com
cwarner@swlaw.com
**Pro Hac Vice Application
Forthcoming*

NRAP 26.1 Disclosure Statement

Amicus Curiae, Restoring Integrity and Trust in Elections, Inc. (“RITE”), is a 501(c)(4) non-profit corporation. As a non-profit organization, no parent corporation or publicly held company owns 10% or more of RITE’s stock.

This filing is Amicus’ first appearance in the case and Snell & Wilmer, LLP has exclusively represented Amicus in its participation in this matter.

Table of Contents

	Page
STATEMENT OF INTEREST OF AMICUS CURIAE	1
INTRODUCTION & SUMMARY OF THE ARGUMENT	1
ARGUMENT	4
I. Voters Lose Confidence When Sensitive Functions Like Signature Matching Are Conducted by Partisans Largely Immune from Traditional Accountability.	4
II. Nevada Law Demands Balanced Participation in the Non- Ministerial Process of Conducting Signature Verification.	9
CONCLUSION	17

Table of Cases

Page(s)

Cases

<i>Albios v. Horizon Comm'ns, Inc.</i> , 122 Nev. 409 (2006)	10, 12
<i>Baker v. Carr</i> , 369 U.S. 186 (1962)	6
<i>Davidson v. Davidson</i> , 132 Nev. 709 (2016)	10
<i>Hunter v. Hamilton County Bd. of Elections</i> , 850 F. Supp. 2d 795 (2012).....	7
<i>Law v. Whitmer</i> , 477 P.3d 1124 (Nev. 2020).....	14
<i>League of Women Voters of Ohio v. Brunner</i> , 548 F.3d 463 (6th Cir. 2008)	6
<i>Ne. Ohio Coal. for Homeless v. Husted</i> , 696 F.3d 580 (6th Cir. 2012)	7
<i>S. Nevada Homebuilders Ass'n v. Clark Cnty.</i> , 121 Nev. 446 (2005)	10

Statutes

10 Ill. Comp. Stat. Ann. 5/19-8.....	8
Ariz. Rev. Stat. §§ 16-551, 16-552.....	8
Colo. Rev. Stat. § 1-7.5-107.3	8
Ind. Code §§ 3-6-5-2, 3-11.5-4-5	8
Iowa Code §§ 49.12, 49.13, 53.18, 53.23	8
Ky. Rev. Stat. Ann. § 117.087	8
Mich. Comp. Laws §§ 168.672, 168.674, 168.766, 168.767	8
N.J. Stat. Ann. §§ 19:6-17, 19:63-17	8
N.Y. Election Law § 9-209.....	8
NRS § 293.030.....	13
NRS § 293.269927.....	2, 3, 10, 11
NRS § 293.269927(1)–(2).....	14
NRS § 293.269927(3)	14, 15, 17
NRS § 293.269927(3)(b).....	4, 8
NRS § 293.269927(4)	16
NRS § 293B.360.....	10, 11, 12, 16

NRS § 293B.360(2).....	4, 8, 13
NRS §§ 293.269937.....	5
Ohio Rev. Code Ann. §§ 3501.06, 3509.06	8
S.D. Codified Laws § 12-1-5, 12-19-10.....	8
Tex. Elec. Code Ann. § 87.027	8

STATEMENT OF INTEREST OF AMICUS CURIAE

RITE respectfully submits this brief as Amicus Curiae in support of Plaintiff-Petitioner, Republican National Committee (“Petitioner”). RITE is a 501(c)(4) non-profit organization committed to the ensuring the rule of law in voting and election administration. Recognizing that the Fourteenth Amendment of the United States Constitution provides for the equal protection of *all* members of the electoral franchise, RITE has a particular interest in defending states’ duly enacted election laws and supporting laws and policies that promote secure elections and enhance voter confidence in the electoral process. RITE’s expertise and national perspective on voting rights and election law will assist the Court in reaching a decision upholding election integrity. This brief is authorized by NRAP 29(a) (amicus curiae other than certain governmental entities “may file a brief only by leave of court granted on motion or at the court’s request or if accompanied by written consent of all parties.”) Further, counsel for all other parties have consented to the filing of this brief.

INTRODUCTION & SUMMARY OF THE ARGUMENT

Mail ballots are increasingly used by many Americans as an expedient means of exercising the elective franchise. However, it is nearly a foregone conclusion that the convenience of mailing ballots

without in-person verification also creates the need for heightened security. To effectuate the process of a mail ballot review, Nevada relies on a signature verification process that trusts human judgment to manually determine whether a ballot that has been rejected by an electronic machine will be counted or returned to a voter for further action. *See* NRS § 293.269927. But because the task of signature review inherently invokes the reviewer’s discretion, Nevada employs a bipartisan collective, a board, which helps ensure that no partisan interest influences the validity of ballots. *Id.* § 293B.360.

However, localities like Clark County attempt to circumvent this essential safeguard by ignoring the statutory scheme’s various requirements governing the mail-in ballot signature verification process. In doing so, they purport to comply with the statutorily prescribed review and verification of mail-in ballot signatures, but without employing the statutorily required safeguards related to who must conduct this review: the clerk, her employees and mail ballot inspection boards. Instead, Clark County employs a politically unbalanced and unchecked group of “temporary” employees who are vested with the incredible power to count votes or return them to the voter.

First, when persons other than the clerk or her employees engage in the signature review process for mail ballots outlined in NRS § 293.269927, they necessarily act as an officer of a mail ballot inspection board under § 293B.360(1). Thus, the members of these boards must be politically balanced. *Id.* § 293B.360(2).

Second, contrary to the district court's order, the signature verification process is discretionary—not ministerial. This discretionary nature underscores the risk for fraud in the mail-in ballot system when counties, such as Clark County, refuse to implement the statutory safeguards meant to balance and check this discretionary process.

Given these important interests, the legal deficiencies in the district court ruling, and the proximity of the upcoming election, this case is of immediate statewide importance. RITE therefore urges this Court to accept Petitioner's Writ of Petition and reverse the district court's legally deficient ruling.

ARGUMENT

I. Voters Lose Confidence When Sensitive Functions Like Signature Matching Are Conducted by Partisans Largely Immune from Traditional Accountability.

The statutory scheme at issue highlights the Legislature’s concern regarding the perils of perceived partisanship in determining which ballots will be counted and which will not. In passing these election laws, the Legislature codified its intent to safeguard the election process by balancing not only poll workers and observers, but most importantly the people who make up boards deciding whether various ballots count, or can be discarded. *See* NRS § 293B.360(2) (special election boards “must represent all political parties as equally as possible.”).

As established by the record, Clark County has not balanced the poll worker ranks and especially the pairings (*i.e.*, boards) reviewing signature authentication under § 293.269927(3)(b). *See* Pet. App’x at 0179–80 (citing a mere 12-30% election workers conducting signature reviews as Republican, which is at times half of the number of Democrat election workers conducting the same task). Instead, the County is attempting to invent a loophole by using “temporary” poll workers (predominantly from one political party) to make *ultimate decisions* that

would normally be appropriately handled by a politically balanced board. *Id.* at 5. The district court's dismissal of the statutory requirement that voters receive equal representation by political parties in the signature review process of mail-in ballots will cause voters serious, irreparable harm in several ways.

To start, the County's one-sided procedure defies voter perception and expectation that a bipartisan board (and not an individual) will decide whether a suspect ballot should be counted. *See* NRS §§ 293.269937, 293B.360(2).

The harm from politically imbalanced adjudications is compounded here due to the nature of mail-in ballot adjudication: the voter is not present when a potential administrative error would occur. Because mail-in ballots are tabulated out of the voter's presence, break down in the legislatively designed and secured system for adjudicating those ballots is particularly susceptible to diminishing voter confidence. Signature verification often requires human judgment, which is subject to impropriety without bipartisan oversight, balance, and accountability. Even if such misconduct or error is hopefully rare, giving effect to the processes set forth in law is vitally important (especially in today's

polarized society) to foster public confidence in the system. After all, how can there be faith in the system if the County refuses to implement the necessary safeguards?

The negative impact of refusing to employ bipartisan boards is further intensified when one majority political party dominates the poll worker ranks whose individual, subjective, and potentially arbitrary or even biased decisions are not susceptible to double check or confirmation by the minority political party. *See Baker v. Carr*, 369 U.S. 186, 206 (1962) (“A citizen’s right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from . . . a refusal to count votes from arbitrarily selected precincts.”).

While the district court dismisses the process as simply ministerial, a reviewer’s decision is an essential judgment call in which he or she is undoubtedly responsible for determining the validity of a voted ballot—which embodies the most sacrosanct act by a citizen in a democracy. In effect, this is one of *the most* substantive acts in election administration. And such discretionary decisions are subject to a much higher risk of error, arbitrary or unfair treatment, and even fraud. *See League of*

Women Voters of Ohio v. Brunner, 548 F.3d 463, 478 (6th Cir. 2008) (“The Due Process Clause is implicated . . . in the exceptional case where a state’s voting system is fundamentally unfair.”); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 593-97 (6th Cir. 2012) (equal protection and due process violations where votes were not counted due to poll worker error in directing voters to the correct precinct); *Hunter v. Hamilton County Bd. of Elections*, 850 F. Supp. 2d 795, 836–840 (2012) (election board members implicated equal protection because in rejecting certain wrong-precinct provisional ballots, they did not apply uniform standards in exercising their discretion).

This is exactly why bipartisan observers have “been in use for at least 100 years as a way to promote election integrity, with the idea that if both parties are watching, it’s much harder for either to tamper with the votes.” *See Who’s Observing at the Polls?* (October 2016);¹ *see also* Grace Gordon & Rachel Orey, *Fortifying Election Security Through Poll Worker Policy* (October 2022)² (“Intentionally selecting election workers from both major political parties serves as a transparency mechanism

¹ Available at <https://www.ncsl.org/research/elections-and-campaigns/who-s-observing-at-the-polls.aspx>.

² Available at https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2022/10/BPC_Poll-Worker-Policy_RV4.pdf.

and affirms that the two parties have the same insight into the election process and thus can validate the results.”). This is also why using politically balanced election boards is routine in other states. *See, e.g.*, Ariz. Rev. Stat. §§ 16-551, 16-552; Colo. Rev. Stat. § 1-7.5-107.3; 10 Ill. Comp. Stat. Ann. 5/19-8; Ind. Code §§ 3-6-5-2, 3-11.5-4-5; Iowa Code §§ 49.12, 49.13, 53.18, 53.23; Ky. Rev. Stat. Ann. § 117.087; Mich. Comp. Laws §§ 168.672, 168.674, 168.766, 168.767; N.J. Stat. Ann. §§ 19:6-17, 19:63-17; N.Y. Election Law § 9-209; N.D. Cent. Code Ann. §§ 16.1-07-12, 16.1-07-13.1, 16.1-15-15; Ohio Rev. Code Ann. §§ 3501.06, 3509.06; S.D. Codified Laws § 12-1-5, 12-19-10; Tex. Elec. Code Ann. § 87.027.

Indeed, the Legislature recognized that verifying and matching signatures is inherently politically charged, and therefore determined that mail ballot inspection boards should be bipartisan so that the boards can “represent all political parties as equally as possible.” NRS § 293B.360(2); *see also* § 293.269927(3)(b) (requiring double authentication of ballot signatures). Together, these provisions serve Nevada’s important state interest of maintaining public confidence in elections as they ensure that election procedures are followed fairly and without undue partisan bias; a balanced poll-worker force decreases the

chances of real or perceived improprieties and increases confidence in the electoral system. *See, e.g., Ben Weiss, Many Election Poll Workers Are Placed by Party Machines, Some May Influence Votes* (Dec. 19, 2017)³ (noting the issues associated with the recent increase in the “injection of political partisanship into the cogs of the electoral process,” but noting that the “system is set up as a bipartisan system to prevent abuse [with] both sides watching each other to make sure that elections are conducted” fairly).

Accordingly, the County cannot evade the critical protections built into the legislatively-designed election administration system by simply reclassifying an act as “ministerial” or a statutorily mandated group of signature reviewers as something other than a county-created board.

II. Nevada Law Demands Balanced Participation in the Non-Ministerial Process of Conducting Signature Verification.

The district court’s Order contains two legal errors that underscore RITE’s interests in this case and why it is important that this Court grant Petitioner’s Writ Petition.

³ Available at <https://www.gothamgazette.com/city/7374-many-election-poll-workers-are-placed-by-party-machines-some-may-influence-votes>.

First, the district court improperly reads NRS §§ 293.269927 and 293B.360 in a silo by superficially concluding that training temporary employees that effectuate the mail-in ballot signature verification process does not create a mail ballot inspection board. *See* Pet. App’x at 0469–70. The district court’s failure to read these statutes together misapplies the Legislature’s intended structure and safeguards, and renders § 293B.360 superfluous, violating core principles of statutory construction.

This Court’s “goal in construing statutes is to uphold the intent of the Legislature and harmonize the statutes, if possible.” *Davidson v. Davidson*, 132 Nev. 709, 713 (2016). Moreover, this Court will read statutes in “the context of” the entire statute “and the statutory scheme in which it appears,” *S. Nevada Homebuilders Ass’n v. Clark Cnty.*, 121 Nev. 446, 452 (2005), and “construe statutes such that no part of the statute is turned to mere surplusage.” *Albios v. Horizon Comm’ns, Inc.*, 122 Nev. 409, 422 (2006).

When read wholistically, as required, the law necessitates that counting, when done by persons other than clerk employees, must be done by politically balanced mail ballot inspection boards.

There are two ways signatures that fail machine analysis can be reviewed. First, they can be reviewed by the county clerk or her employees. NRS § 293.269927. Second, they can be reviewed by mail ballot inspection board officers specifically authorized by § 293B.360 to “facilitate the processing and computation of votes cast at any election conducted under a mechanical voting system.” In other words, if the task at hand is too large for the clerk and her employees, she can reach beyond her office to fulfill her election administration duties.

Regardless of the means chosen, the electorate can have faith in the integrity of its election administration. If mail ballots are handled exclusively by the county clerk, Nevadans can rely upon the normal checks and balances of legal and democratic accountability that protect the integrity of the signature matching process. And if county clerks make use of the second option, Nevadans can rely on the balanced partisanship of the mail ballot inspection boards to promote fair signature adjudication.

Contrary to the district court’s order below, however, there is no third choice. Clerks cannot inspect mail ballots using individuals who are neither clerk employees nor part of a balanced board, as this would strip

the statute of the safeguards enacted by the Legislature to guard against misconduct in the signature matching process.

Indeed, if the third choice existed, NRS § 293B.360 would be rendered nonsensical. Any clerk empowered to use an unbalanced group of partisan outsiders could simply ignore § 293B.360's demand for partisan balance. However, the district court's reading would transform § 293B.360 into the legislative equivalent of a vestigial organ—a statute that serves no function. That is not how statutory interpretation works. *See Albios*, 122 Nev. at 422.

The same issues exist if county clerks can evade § 293B.360 by hiring temporary workers in the name of expediency to overcome a shortfall in election administration labor. No county clerk will bother with complying with § 293B.360 if they can simply augment their mail ballot inspection labor force with temporary workers. Further, temporary workers dramatically attenuate the accountability safeguards described above because they are harder to hold judicially and democratically accountable. And because they are temporary, they may have more incentive to misbehave on the job. Thus, the expediency allowed by the district court not only leaves § 293B.360 in tatters, but also undermines

the election integrity protections the Legislature embedded in that statute.

The language used in the Nevada Election Code confirms the proper reading, as it clearly distinguishes between the County Clerk and her “employees,” and “election board officers,” who are appointed (not hired) by the Clerk. *See* NRS § 293.030. Thus, when mail ballots are inspected by persons other than the Clerk or her employees, those ballots are being inspected by a *particular type* of election board officer—namely, the officers of the mail ballot inspection board. And when they are so inspected, the persons inspecting them must be balanced from a partisan perspective. *Id.* § 293B.360(2).

Second, the district court wrongly concludes that the signature verification process for mail-in ballots is a ministerial process. *See* Pet. App’x at 0469. A review of the statutory procedure for manual signature verification demonstrates that the act of signature verification is clearly and unambiguously a substantive, discretionary role—not a ministerial one. The non-ministerial nature of the task further explains why the Legislature demanded that the “boards” that review signatures be politically balanced. It defies logic to conclude that the Legislature would

have wanted partisan temporary workers to conduct this sensitive task rather than balanced boards in those instances when the County Clerk’s permanent employees lack the capacity to inspect mail ballots.

Nevada utilizes Agilis machines to initially process and sort mail-in ballots. *Law v. Whitmer*, 477 P.3d 1124, at *3 (Nev. 2020) (unpublished disposition). As a part of its sorting technology, the Agilis machine employs “automatic signature verification software” that “takes a picture of the signature on the ballot envelope,” “compares the signature from the envelope” to those in the voter’s registration file, “and, using a logarithmic algorithm, scores the signature.” *Id.* If the signature is scored above the threshold setting chosen by the County (which is itself concerning that different counties may set different thresholds), the ballot is sorted for counting; if the signature’s score falls below the threshold, the signature is “flagged for further review.” *Id.*; *see also* NRS § 293.269927(1)–(2).

The “further review” of signatures that cannot be matched by machine is conducted manually by the County Clerk’s office. NRS § 293.269927(3). First, the “clerk or employee shall check the signature used for the mail ballot against all signatures of the voter available in

the records of the clerk.” *Id.* § 293.269927. Then, “[i]f at least two employees in the office of the clerk believe there is a reasonable question of fact as to whether the signature used for the mail ballot matches the signature of the voter,” the clerk must reach out to the voter for confirmation. *Id.* § 293.269927(3)(b).

The statutory requirement to judge whether a signature does or does not match a voter’s verified signature is the antithesis of ministerial for several reasons. An action is ministerial when it is done “in obedience to a legal order without exercise of personal judgment or discretion.” *Ministerial*, Merriam-Webster.⁴ Here, by contrast, the process of matching signatures flagged for further review is defined by the exercise of the personal judgment of the people undertaking that task.

To start, the very fact that the signatures are dissimilar enough to require human review, following robust computer analysis, establishes that personal judgement is required to decide whether they match (and the ballot can be counted) or that they do not (and the ballot cannot be counted).

⁴ Available at <https://www.merriam-webster.com/dictionary/ministerial>.

Moreover, Nevada law requires employees to distinguish between “multiple, significant and obvious” differences in voter signatures from “slight dissimilarities.” NRS § 293.269927(4). The demarcation between “obvious” and “slight” is clearly not a bright line and must be resolved by the exercise of personal judgment. In other words, the signature reviewer needs to decide “reasonable question[s] of fact.” *Id.* § 293.269927(3). If the resolution of reasonable questions of fact were “ministerial,” the judicial system could arrive at equally just outcomes through the expediency of replacing the courts with bureaucrats or, as here, temporary workers.

The personal judgment inherent in post-machine signature matching review is further underscored by the type of training the Clark County Clerk’s office has provided its employees. For instance, to execute the manual signature review in 2020, Clark County hired “a forensic signature expert and former FBI agent” to train its *permanent* staff and to inform its training program for temporary election workers. *Law*, 477 P.3d at *4. This is a substantial amount of high-level training—and taxpayer dollars—for a mere ministerial task. And if the governmental act was purely objective and ministerial, there would be no need to have

double review to make reasonable determinations of fact under NRS § 293.269927(3).

CONCLUSION

By counting and rejecting ballots from identically situated voters, the temporary workers serving as signature reviewers are performing a vital discretionary task implicating the fundamental right to vote and the integrity of the electoral system. The loophole the County seeks to use here must be closed. It is this simple: when a determination occurs related to whether a ballot should be counted—for whatever reason outside the normal process (*e.g.*, unclear marks, signature mismatch, etc.)—it is imperative that statutory safeguards in the form of checks and balances are effectuated by bipartisan boards utilized to safeguard the sanctity of the vote.

Under the district court's order, the County's substantial imbalance in the political makeup of these signature reviewers risks arbitrarily and systematically denying certain voters the right to vote.

For these reasons, RITE respectfully urges this Court to accept Petitioners' Writ Petition, reverse the district court's order and reaffirm Clark County's obligation to engage in practices that facilitate secure and fair elections.

DATED: November 8, 2022

SNELL & WILMER L.L.P.

/s/ V.R. Bohman

V.R. Bohman (NV 13075)

Brett W. Johnson (AZ 021527)*

Tracy A. Olson (AZ 034616)*

Charlene A. Warner (AZ 037169)*

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that the **AMICUS BRIEF** complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2010 processing program in 14-point Century Schoolbook type style. I further certify that this brief complies with the page- or type-volume limitations of NRAP 29(e) because it contains approximately 3180 words.

Finally, I hereby certify that I have read the **AMICUS 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 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.

DATED: November 8, 2022

SNELL & WILMER L.L.P.

/s/ V.R. Bohman

V.R. Bohman (NV 13075)

Brett W. Johnson (AZ 021527)*

Tracy A. Olson (AZ 034616)*

Charlene A. Warner (AZ 037169)*

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On November 8, 2022, I caused to be served a true and correct copy of the foregoing **AMICUS BRIEF** upon the following by the method indicated:

- ☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.
- ☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.
- ☒ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below:

Honorable Timothy C. Williams
Department XVI
Eighth Judicial District Court
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89155

/s/ Maricris Williams

An Employee of SNELL & WILMER L.L.P.