IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA,
Appellant

vs.

JAMES WALTER DEGRAFFENREID III, DURWARD JAMES HINDLE III, JESSE REED LAW, MICHAEL JAMES MCDONALD, SHAWN MICHAEL MEEHAN, AND EILEEN A. RICE,
Respondents.

Electronically Filed
Nov 07 2024 04:17 PM
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO.: 89064
Dist. Ct. No.: C-23-379122-1; C-23-379122-2; C-23-379122-3; C-23-379122-4; C-23-379122-5; C-23-379122-6

RESPONDENTS' OPPOSITION TO STATE OF NEVADA'S COUNTERMOTION TO STRIKE

Richard A. Wright
WRIGHT MARSH, LEVY
300 S. Fourth St., Ste 701
Las Vegas, NV 89101
Counsel for Michael James McDonald

Monti Jordana Levy
WRIGHT MARSH, LEVY
300 S. Fourth St., Ste 701
Las Vegas, NV 89101
Counsel for Eileen A. Rice

Margaret A. McLetchie
MCLETCHIE LAW
602 South Tenth St.
Las Vegas, NV 89101
Counsel for Jesse Reed Law

Brian R. Hardy
MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
Counsel for Durward James Hindle, III

Sigal Chattah
CHATTAH LAW GROUP
5875 S. Rainbow Blvd. #204
Las Vegas, NV 89118
Counsel for Shawn Michael Meehan

George P. Kelesis
COOK & KELESIS, LTD
517 S 9th Street
Las Vegas, NV 89101
Counsel for James Walter Degraffenreid, III

I. INTRODUCTION

The State seeks to strike Respondents' motion to dismiss on the ground that it is "really a response to the State's reply brief" and thus allegedly violates NRAP 28 which "do[es] not allow for the filing of a response to a reply brief." Countermotion at 3-5.[1] The State's "sur-reply" arguments are vague, unintelligible, devoid of substance beyond conclusory assertions by counsel, and are facially meritless.

The State also moves "to strike the improper facts from the Answering Brief," but fails to identify those allegedly errant facts and its alleged legal basis for its Countermotion. The State's assertion that Respondents included irrelevant facts in the Opening Brief—let alone admitted to doing so—is false, particularly because it was the State's own factual distortions in its Opening Brief that required Respondent to provide responsive corrective facts pursuant to NRAP 28(b).

The State's Countermotion should be denied.

II. LEGAL ARGUMENT

A. The State's Attempt to Cast Respondents' Motion to Dismiss as a Reply Brief Fails.

The State offers nothing more than unsupported assertions to support its request to strike Respondents' motion to dismiss. Without any elaboration or explanation, they assert that Respondents' motion to dismiss "is really a response to

[1] The State's Response to Respondents' Motion to Dismiss and Countermotion to Strike is referred to herein as the "Countermotion."

the State's reply brief," that Respondents are "flouting this Court's briefing rules (including evading word count limits) by cloaking what is in substance a sur-reply with the title 'motion to dismiss,'" and complain that the Answering Brief word limit has been exceeded if the Court goes along with the State's groundless theory that the word-court of the motion to dismiss must be added to it. *See* Countermotion at 3-4. The State's arguments are meritless.

First, the State fails to explain exactly *how* Respondents' motion to dismiss is allegedly a sur-reply. This Court routinely rejects unsupported arguments and assertions of counsel in briefing practice, and this approach should equally be applied here as to the State's substance-free Countermotion to strike the motion to dismiss.[2]

Second, while Respondents briefly noted the issue in the Answering Brief (and used some of their word count to do so), the jurisdictional issues appropriately

[2] *See*, *e.g.*, *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 (2006) ("[Appellant] neglected his responsibility to cogently argue, and present relevant authority, in support of his appellate concerns. Thus, we need not consider these claims."); *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("Although we are concerned about the relevancy of the questions and the possibility of prejudice, we note that the issue has not been adequately briefed. It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."); *Las Vegas v. Bailey*, 92 Nev. 756, 757, 558 P.2d 622, 623 (1976) ("Although respondents filed a cross-appeal, which contended they were entitled to additional fees, they have advanced neither relevant nor authoritative argument on their behalf; therefore, the cross-appeal is dismissed.")

raised in Respondents' motion to dismiss are separate and apart from the issues raised by the State in its Opening Brief. In contrast, Respondents' Motion to Dismiss *seeks to dismiss the State's appeal for lack of subject matter jurisdiction,* an issue that can be raised at any time,[3] and which cannot be waived.[4] The propriety of Respondents filing their motion to dismiss and the fact that it is not any sort of sur-reply is demonstrated by the fact that the State's Countermotion rolls out a whole series of arguments over 13 pages attempting to address the jurisdictional defects identified by Respondents in the 19-page motion to dismiss, without touching on any of the issues identified in the State's Statement of Issues in its Opening Brief. *See* Opening Brief at 1-2.

Third, an answering brief and a motion to dismiss an appeal serve two clearly different functions, and not only were Respondents *not* obligated to raise the issues of their motion to dismiss in their Answering brief, it would have been procedurally improper to seek an order for dismissal of the appeal on jurisdictional grounds by conflating the motion to dismiss with the Answering Brief. *See*, *e.g.*, NRAP 27(a)(1)("An application for an order or other relief is made by motion unless these

---

[3] *See Meinhold v. Clark Cnty. Sch. Dist.*, 89 Nev. 56, 59, 506 P.2d 420, 422 (1973); *Stock Growers' & Ranchers' Bank v. Milisich*, 48 Nev. 373, 390, 233 P. 41, 46 (1925); *see also Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011).

[4] *See Mainor v. Nault*, 120 Nev. 750, 761 n.9, 101 P.3d 308, 315 n.9 (2005) (citing *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990)).

Rules prescribe another form."); *see also Howard v. State*, 128 Nev. 736, 746, 291 P.3d 137, 144 (2012) (denying relief because it was not sought by separate motion). But the State already knows this, as evidence by the fact that it has presented its own request for relief *by motion* in the form of a motion to strike.

Thus, Respondents properly submitted their motion to dismiss, which does not qualify as a "sur-reply" by any definition.

B. The State Request to Strike Allegedly "Improper Factual Statements" from Respondents Answering Brief Is Disingenuous: The Facts the State Complains of Were a Necessary Response to the State's Own Statement of the Case.

The State's Countermotion—which it admits it filed to retaliate against Respondents for filing their motion to dismiss—seeks to strike allegedly "improper factual statements" and/or "irrelevant facts" from Respondents' Answering Brief.[5] The substance of the State's argument as to the allegedly improper / irrelevant facts in the Answering brief is cryptic because the State's Countermotion does not specifically identify the factual assertions it is complaining about. Instead, the State offers the following argument:

> Under NRAP 28(a)(7), the statement of the case is to recite 'the facts *relevant to the issues submitted for review*.' (emphasis added). For that reason, this Court should also **strike all facts from the answering**

[5] *See* Countermotion at 3 (Heading "I") ("This Court should strike … the improper factual statements the GOP Electors asserted in the Answering Brief."; *see also id*. at 4 ("[Respondents] flouted this Court's rules by knowingly including irrelevant facts in their answering brief.")

brief that the GOP Electors expressly admitted are not relevant to any issue on appeal. *See*, *e.g.*, Answering Brief at 2 n.3, 9.

Countermotion at 5. (Emphasis added.)

1. The State's Arguments Fail on Procedural Grounds

The State does not cite any legal authority justifying its request to strike portions of Respondents' Answering Brief. It is possible the State intended to move under NRAP 28(h)—which states that briefs must be "free from burdensome, irrelevant, immaterial, or scandalous matters," and that briefs "that are not in compliance may be disregarded or stricken, on motion or sua sponte by the court. . . ." However, the State does not meet its burden and, again, fails to specify what should be stricken. Footnote 3 on page 2 of the Answering Brief contains no factual assertions. Page 9 of the Answering Brief does contain factual assertions under the heading of "Other Facts," but the State does not state which facts on page 9 it is referring to. Because the State has not identified specific factual assertions that it is taking issue with, Respondents cannot reasonably be expected to guess at what the State is arguing. In the context of motions to strike under NRCP 12(f) and FRCP 12(f)—which rely on language similar to the "burdensome, irrelevant, immaterial, or scandalous matters" language used in NRAP 28(h)—courts have repeatedly denied such motions when they failed to precisely identify the matters to be

stricken.[6] This Court should deny the State's motion to strike for the same reason.

2. ***The Facts Raised in Respondents' Answering Brief were Proper and Are Not Subject to Being Stricken.***

Even if Respondents assume *arguendo* that the entire "Other Facts" section in their Answering Brief is what the State is referring to[7] and seeking to strike in its irremediably vague Countermotion, the State's argument still fails because Respondents' Answering Brief properly included those facts to address the inaccurate background facts the State included in its Opening Brief to try to cast Respondents in a negative light. The State cannot open the door to irrelevant topics or inaccurate facts and then argue Respondents cannot contest them in their

---

[6] *See*, *e.g.*, *Banks v. Lombardo*, No. 2:20-cv-00556-APG-NJK, 2021 U.S. Dist. LEXIS 150830, at *4 n.3 (D. Nev. Aug. 11, 2021) (citations omitted) ("The motion does not identify particular allegations that Defendant Bryan seeks to strike, instead relying on vague references to the existence of 'largely immaterial' allegations or similar assertions . . . . motions to strike brought pursuant to **Rule 12(f) should not be used in a manner that transforms judges into 'editors, screening complaints for brevity and focus; they have better things to do with their time**'") (emphasis added); *Jaden Inv. Tr. v. Bank of Am., N.A.*, No. 2:13-cv-02063-MMD-PAL, 2014 U.S. Dist. LEXIS 9183, at *6 (D. Nev. Jan. 23, 2014) ("Even if the Motion to Strike was not barred by Rule 12(f), it would still fail because Plaintiff does not identify a "redundant, immaterial, impertinent, or scandalous matter" that Plaintiff wants stricken.")

[7] The State did, in its Reply brief (p.2, n.1) state that "[t]he GOP Electors also admit to addressing facts "not relevant to the questions on appeal" and cite the Answering brief at pp. 9-10. However, assuming these facts are what the State refers to here, the State still fails to specify why specific assertions should be stricken—and ignores that those facts were raised to address facts the State raised, as discussed below. An appellee is not required to ignore misstatements of fact and is not limited to addressing misstatements via a motion to strike.

Answering Brief. Moreover, the State admits it voluntarily waived its right to move to strike in its Reply Brief, and now further admits it is attempting to undo that waiver in what can only be characterized as a thinly veiled act of revenge. *See* Countermotion at 5 ("And although the State had previously suggested that it would refrain from filing a motion to strike the improper facts from the Answering Brief, *see* Reply Brief at 2 n.1, this change in circumstances has caused the State to have a change of heart.") Needless to say, revenge tactics are clearly inappropriate.

In conformity with NRAP 28(b), Respondents were both entitled and obligated to address the State's misrepresentations made in its Opening Brief in Respondents' Answering Brief. *See* NRAP 28(b) ("The respondent's brief . . . must conform to the requirements of Rule 28(a)(1)-(9) and (11), except that none of the following need appear **unless the respondent is dissatisfied with the appellant's statement**: . . . (4) the statement of the case . . . ."") (emphasis added); *see also Baughman & Turner v. Jory*, 102 Nev. 582, 583, 729 P.2d 488, 489 (1986) (finding uncontested facts from statement of the case to be deemed agreed upon and conceded). Respondents say exactly this in the introduction to the "Other Facts" section, noting that "[w]hile not relevant to the questions on appeal because none of the factual background pertains to Clark County, **Defendants nonetheless address the State's misrepresentations** that pending litigation was necessary for Defendants to challenge the 2020 election results." (Answering Brief at 9 (emphasis

added).)

The State cannot be permitted to make factual misrepresentations in its "Statement of the Case"—particularly when they involve *the same facts which the State now claims are irrelevant*—and then argue that Respondents' attempts to address the State's distortions constitute the interjection of irrelevant material that should be stricken. To remove any doubt as to this sleight-of-hand, the Court need only compare the State's misrepresentations against Respondents' response to them:

> When communicating with DeGraffenreid, Chesebro inquired about whether litigation was still pending in Nevada—in Chesebro's view, the existence of pending litigation was the only reason to cast alternate elector votes. 1-APP-0066. But he testified that never received an answer to his question—DeGraffenreid redirected him to the GOP Electors' lawyer Jesse Binnall, but DeGraffenreid did not otherwise answer Chesebro's question. 1-APP-0066, 5-APP-1055.

Opening Brief at 6.

> Respondents had no choice but to correct these misrepresentations:
>
> The State alleges that "in Chesebro's view, the existence of pending litigation was the only reason to cast elector votes." (OB, p. 6.) While Mr. Chesebro did testify to that at the grand jury proceedings, the State neglected to introduce exculpatory statements that Chesebro made during his video-taped proffer with the State that contradicted his false testimony to the grand jury.

Answering Brief at 9. Respondents then identified the exculpatory statements Chesebro made during his proffer with the State that contradicted his false testimony to the grand jury, as well as emails from Chesebro that contradicted the State's misrepresentations. *See* Answering Brief at 9-10.

Thus, it was the State that introduced the issue of, and misrepresentations concerning, Chesebro's testimony and alleged state of mind, not Respondents, and Respondents were required to address these misrepresentations.

Moreover, all the allegedly "irrelevant" material addressed in Respondents' Statement of Facts was contained in and supported by material in the State's Appendix. The State cannot argue that factual assertions based on material in its own Appendix are "irrelevant" and subject to being stricken.

At bottom, it is the State's false story that a pending, active case must exist for the Respondents to continue their challenge of the 2020 election results that meets the standard under NRAP 28(h) and, if anything, that false story should be stricken.

III. CONCLUSION

The State's Countermotion to Strike should be denied in its entirety. Jurisdictional issues are properly raised in a standalone motion to dismiss and Respondents cannot be prevented from addressing factual assertions made by the State, especially when they create an inaccurate picture of reality.

DATED this 7th day of November, 2024.

/s/ Richard A. Wright
Richard A. Wright
WRIGHT MARSH, LEVY
300 S. Fourth St., Ste 701
Las Vegas, NV 89101
Counsel for Michael James McDonald

/s/ Monti Jordana Levy
Monti Jordana Levy
WRIGHT MARSH, LEVY
300 S. Fourth St., Ste 701
Las Vegas, NV 89101
Counsel for Eileen A. Rice

/s/ Margaret A. McLetchie
Margaret A. McLetchie
MCLETCHIE LAW
602 South Tenth St.
Las Vegas, Nevada 89101
Counsel for Jesse Reed Law

/s/ Brian R. Hardy
Brian R. Hardy
MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
Counsel for Durward James Hindle, III

/s/ Sigal Chattah
Sigal Chattah
CHATTAH LAW GROUP
5875 S. Rainbow Blvd. #204
Las Vegas, Nevada 89118
Counsel for Shawn Michael Meehan

/s/ George P. Kelesis
George P. Kelesis
COOK & KELESIS, LTD
517 S 9th Street
Las Vegas, NV 89101
Counsel for James Walter Degraffenreid, III

CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 32(a)(9)(A):

I hereby certify that this motion 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 the MOTION TO DISMISS has been prepared in a proportionally spaced typeface (14-point Times New Roman font).

I further certify that this MOTION TO DISMISS complies with the type-volume limitation of NRAP 27(d)(2)(C) because it contains 2,332 words.

Finally, I hereby 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 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 this 7th day of November, 2024.

/s/ Margaret A. McLetchie

Margaret A. McLetchie, Nevada Bar No. 10931
MCLETCHIE LAW
602 S. Tenth Street
Las Vegas, Nevada 89101
Telephone: (702) 728-5300; Fax: (702) 425-8220
Email: efile@nvlitigation.com
Counsel for Jesse Reed Law

.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENTS' OPPOSITION TO STATE OF NEVADA'S COUNTERMOTION TO STRIKE** was filed electronically with the Nevada Supreme Court on the 7th day of November, 2024. Electronic service of the foregoing document shall be made in accordance with the Master Service List.

/s/ Alexander Loglia
Employee of McLetchie Law