

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

Jesse Law, an individual; Michael McDonald; an individual; James DeGraffenreid III, an individual; Durward James Hindle III, an individual; Eileen Rice, an individual; Shawn Meehan, an individual, as candidates for presidential electors on behalf of Donald J. Trump,

Appellants,

vs.

Judith Whitmer, an individual; Sarah Mahler, an individual; Joseph Throneberry, an individual; Artemesia Blanco, an individual; Gabrielle D'Ayr, an individual; and Yvanna Cancela, an individual, as candidates for presidential electors on behalf of Joseph R. Biden, Jr.,

Respondents.

Case No. 82178

First Judicial District Court Case
No.: 20 OC 001631B
(Assigned to Judge James T. Russell)

**APPELLANTS' MOTION TO DISQUALIFY JUSTICE JAMES W.
HARDESTY FROM PARTICIPATING IN PROCEEDINGS ON THIS
APPEAL; DECLARATION AND CERTIFICATE OF SHANA D. WEIR**

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Pursuant to Nevada Revised Statutes (“NRS”) 1.225 and Nevada Rules of Appellate Procedure (“NRAP”), rule 35, Appellants hereby move to disqualify Justice James W. Hardesty from participating in proceedings on this appeal. As elaborated below, Justice Hardesty has recently made public statements tending to demonstrate that he entertains actual bias or prejudice for or against one of the parties to the action; namely, in that he has prejudged the quality of the vote that is the subject of this action. Accordingly, due process, fairness, and propriety require that Justice Hardesty not further participate in these proceedings.

I. RELEVANT FACTS.

On November 24, 2020, Secretary of State Barbara Cegavske met with the full Supreme Court for the purpose of opening and canvassing the vote in the 2020 General Election, pursuant to NRS 293.295(2). These proceedings were apparently televised on C-SPAN, a recording of which is publicly available at <https://www.c-span.org/video/?478346-1/nevada-certification-2020-election-results>.

Ms. Cegavske made opening comments, and then Justice Pickering asked whether any other Justice wished to speak. Justice Hardesty then commented as follows:

I just want to commend the Secretary of State and her office for the extraordinary work they did under very difficult circumstances. They are to be congratulated for

carrying out an extraordinarily successful election. The turnout is incredible.

Other Justices made comments, and then the votes were opened and canvassed. The process took approximately 20 minutes, throughout which time the video recording remained on.

Appellants did not discover that the above statements were made until December 5, 2020, when they reviewed certain news articles regarding the above statements. (See Declaration and Certificate of Shana D. Weir.) Given the extreme press of time, Appellants have made this motion at their first reasonable opportunity.

II. APPLICABLE RULES.

NRS 1.225 governs motions for disqualification in the Supreme Court. The relevant portions of the statute are below (particularly relevant provisions highlighted):

1. A justice of the Supreme Court or a judge of the Court of Appeals shall not act as such in an action or proceeding when the justice or the judge entertains actual bias or prejudice for or against one of the parties to the action.
2. A justice of the Supreme Court or a judge of the Court of Appeals shall not act as such in an action or proceeding when implied bias exists in any of the following respects:
 - (a) When the justice or the judge is a party to or interested in the action or

proceeding.

[. . .]

3. A justice of the Supreme Court or a judge of the Court of Appeals, upon his or her own motion, may disqualify himself or herself from acting in any matter upon the ground of actual or implied bias.

4. Any party to an action or proceeding seeking to disqualify a justice of the Supreme Court or a judge of the Court of Appeals for actual or implied bias shall file a charge in writing, specifying the facts upon which such disqualification is sought. Hearing on such charge shall be had before the other justices of the Supreme Court or, if the charge concerns a judge of the Court of Appeals, the justices of the Supreme Court.

The justices of the Nevada Supreme Court are subject to the Code of Judicial Conduct. The CJC applies to “all judges,” and justices of the Supreme Court are included in the definition of “judge.” (NRS 1.428.) Canon 1 of the CJC is, “A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.” In furtherance of that canon, the justices of the Supreme Court are required to “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.” (Rule 1.2.) This rule is followed by various comments:

- Comm. 1: “Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety.”
- Comm. 2: “A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens”
- Comm. 5: “The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, temperament, or fitness to serve as a judge.”

Rule 2.11 of the CJC governs disqualification. It provides in relevant part that, “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to the following circumstances: (5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.”

III. DISQUALIFICATION IS WARRANTED UNDER NEVADA LAW, AND AS A MATTER OF DUE PROCESS.

Appellants submit that the above-quoted statement constitutes a display of “actual bias or prejudice . . . against one of the parties to the action” within the

meaning of NRS 1.225.2(1). Actual bias appears where there are facts demonstrating that a Justice “lacks impartiality or possesses fixed opinions on the merits” of a pending appeal. (*Goldman v. Bryan*, 104 Nev. 644, 651, 764 P.2d 1296, 1300 (1988).) Actual bias appears when a Justice makes statements that give ““fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment.” (*Ibid.*, citing *Berger v. United States*, 255 U.S. 22, 33–34, 41 S.Ct. 230, 233, 65 L.Ed. 481 (1921).)

Goldman is on point. In that case, a district judge was removed from his position, and appeals followed. As part of related administrative proceedings regarding Goldman’s removal from the bench, Nevada Supreme Court Justice Steffen had issued a document entitled, “Certificate In Lieu of Record,” which stated that no commitment could be made to Goldman that his temporary departure from his duties would foreclose further proceedings respecting his fitness for office. Goldman argued that “because Justice Steffen authored the certificate in lieu of record, Justice Steffen's impartiality might reasonably be questioned and therefore his disqualification from these proceedings is warranted.”

While the Nevada Supreme Court ultimately found Justice Steffen’s disqualification not to be required, this case is different in a critical way: here, Justice Hardesty was officially and directly involved in the canvass of the vote challenged in this case.

Disqualification is also warranted as a matter of constitutional due process. Given Justice Hardesty’s statements, absent his disqualification, “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” (*Withrow v. Larkin*, 421 U.S. 35, 47 (1975), cited by *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009).) Here, Justice Hardesty’s statements pose a clear risk of actual bias or prejudgment; at a minimum, they create the appearance of impropriety and would taint these proceedings.

“[U]nder the Due Process Clause, no judge ‘can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome.’” (*Id.* at p. 822, citing *In re Murchison* (1955) 349 U.S. 133, 136.) Here, since granting a challenge to the election would necessarily run contrary to the Supreme Court’s certification of the canvass, then this situation is like that in *Murchison*, where a judge had no pecuniary interest in the case but had determined in an earlier proceeding whether criminal charges should be brought and then proceeded to try and convict the petitioners. Unless Justice Hardesty is disqualified, it will be as if he sits in judgment of his own public statements.

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IV. CONCLUSION

For the reasons set forth above, Appellants request that pursuant to NRS 1.225 and NRAP 35, that Justice Hardesty be disqualified and not further participate in these proceedings.

Dated: this 8TH day of December, 2020. **WEIR LAW GROUP, LLC**

BY: */s/ Shana S. Weir*

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Dated: this 8TH day of December, 2020. **HARVEY & BINNALL, PLLC**

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**DECLARATION AND CERTIFICATE OF SHANA D. WEIR IN SUPPORT
OF MOTION TO DISQUALIFY**

I, Shana Weir, do hereby declare:

1. I am over the age of eighteen (18) and retained counsel for Appellants herein. By virtue of the same, I have capacity to testify to the matters stated herein, which are true and correct of my own personal knowledge. As to those matters to which I do not have personal knowledge, I believe them to be true.

2. On December 5, 2020, my co-counsel and I first became aware of news reports indicating that on November 24, 2020, Justice Hardesty had made certain public statements during the Supreme Court's meeting with Secretary of State Barbara Cegavske to open and canvass the vote in the 2020 General Election, pursuant to NRS 293.295(2), as documented and publicly available at <https://www.c-span.org/video/?478346-1/nevada-certification-2020-election-results>.

3. Once we reviewed the actual video of the statements later that day, we became even more concerned that the statements were evidence on the part of Justice Hardesty of bias and pre-judgment of Appellants' claims that were the subject of proceedings below and that are at issue on this appeal.

4. Pursuant to NRAP 35(C), I hereby certify that I am an active member of the Bar of the State of Nevada, and that I have read the foregoing motion and supporting documents. I hereby represent that Appellants' motion and its supporting documents are in the form required by NRAP 35. Based on my personal investigation and that of my co-counsel, I believe that the concerns raised in this motion are legally valid and that all supporting factual allegations are true. Appellant's motion is made in good faith, not for the purposes of delay or any other improper motive.

I, Shana D. Weir, declare under penalty of perjury that the foregoing is true and correct.

Executed on this 8th day of December, 2020.



SHANA D. WEIR

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANTS' MOTION TO DISQUALIFY JUSTICE JAMES W. HARDESTY FROM PARTICIPATING IN PROCEEDINGS ON THIS APPEAL; DECLARATION AND CERTIFICATE OF SHANA D. WEIR** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

DATED this 8th day of December, 2020

By: /s/ Shana D. Weir
an employee of Weir Law Group, LLC