

1 STEVEN B. WOLFSON  
Clark County District Attorney  
2 MARY-ANNE MILLER  
County Counsel  
3 NSB #001419  
500 S. Grand Central Parkway  
4 Las Vegas, NV 89106  
702.455.2164  
5 [Mary-Anne.Miller@ClarkCountyDA.com](mailto:Mary-Anne.Miller@ClarkCountyDA.com)  
6 *Attorneys for Respondent Joseph P. Gloria,  
Clark County Registrar of Voters*

7 **FIRST JUDICIAL DISTRICT COURT**  
8 **IN AND FOR CARSON CITY, STATE OF NEVADA**

9 FRED KRAUS, an individual registered to  
10 voter in Clark County, Nevada, DONALD  
J. TRUMP FOR RESIDENT, INC.; the  
NEVADA REPUBLICAN PARTY,

11 **Petitioners,**

12 **vs.**

13 BARBARA CEGAVSKE, in her official  
14 capacity as Nevada Secretary of State;  
JOSEPH P. GLORIA, in his official  
15 capacity as Registrar of Voters for Clark  
County,

16 **Respondents.**

Case No.: 20 OC 00142 1B

Dept. No.: II

**RESPONSE OF  
RESPONDENT  
JOSEPH P. GLORIA  
TO PETITION FOR  
EXTRAORDINARY AND  
INJUNCTIVE  
RELIEF**

17  
18 Comes now Defendant Joseph P. Gloria, Registrar of Voters for Clark County, by and  
19 through his counsel, Steven B. Wolfman, District Attorney, by Mary-Anne Miller, County  
20 Counsel and, as and for his response and opposition to the Petitioners' request for mandamus  
21 and injunctive relief, submits the following.

22 **1. Petitioners are not entitled to injunctive relief.**

23 Petitioners have set forth the standard for issuing an injunction but they cannot meet  
24 their burdens thereunder. As established below, they cannot prevail on the merits. Further,  
25 they lose in a balancing of the hardships. Very real damage which will occur to the voters'  
26 confidence in the process and the actual counting of the ballots in a timely manner if  
27 Petitioners' request to delay the process until they can operate cameras within secure areas of  
28 the county facility is granted.

1           Although voter confusion and distrust seems to be part of the intent behind their widely  
2 publicized request for relief, such is exactly the reason that the United States Supreme Court  
3 has warned courts to tread carefully where preliminary relief would disrupt a state voting  
4 system. When the preliminary relief sought would interfere with state voting procedures on  
5 the eve of an election, a court considering such relief must weigh, “in addition to the harms  
6 attendant upon issuance or nonissuance of an injunction, considerations specific to election  
7 cases and its own institutional procedures.” *Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S.Ct. 5,  
8 166 L.Ed.2d 1 (2006) (per curiam); *Short v. Brown*, 893 F.3d 671 (Ninth Cir. 2018); see also  
9 *Paher v. Cegavske*, 2020 WL 2748301 (D. Nev. May 27, 2020). Disrupting workers and  
10 delaying the procedures put in place to secure the privacy of the ballots and the health of the  
11 workers during this pandemic would work unjustifiable damage to the election system.

12           **2.       Petitioners are not entitled to a writ of mandamus**

13           Petitioners, who include a candidate and one of his pollwatchers, demand that the  
14 Secretary of State impose an entirely different observers plan than that submitted by the Clark  
15 County Registrar of Voters. When a petitioner seeks to compel a discretionary act, the court  
16 may not issue a writ of mandamus unless the target of the writ manifestly abused or arbitrarily  
17 or capriciously exercised its discretion. *Levin v. Second Judicial District Court*, 450 P.3d 911,  
18 2019 WL 5448653 (Nev. October 23, 2019); *Round Hill Gen. Improvement Dist. v. Newman*,  
19 97 Nev. 602, 603-04, 637 P.2d 534, 536 (1981); A manifest abuse of discretion is a clearly  
20 erroneous interpretation of the law or a clearly erroneous application of a law or rule. *State v.*  
21 *Eighth Judicial Dist. Court*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011).

22           Here, the Petitioner has the burden of demonstrating that extraordinary relief is  
23 warranted. *Pan v. Eighth Judicial District Court*, 120 Nev. 22, 228, 88 P.3d 840, 844 (2004).  
24 During the hearing for a temporary restraining order in this case, Counsel for Respondent  
25 Cegavske read into the record the Secretary of State’s implicit approval of Clark County’s  
26 observation plan, and no further action remains to be directed or reviewed.

27 ...

28 ...

1           3.     *Both the Secretary and the Registrar acted within their discretion*

2           The statute directing a county to submit to the state a plan for review is very broad,  
3 contains no specifics, and provides the Secretary wide discretion in what she deems sufficient.  
4 NRS 293B.354. The Petitioners blatantly insert words into this provision that do not appear  
5 there, claiming lofty aspirations not adopted by the Nevada Legislature.

6           In their quest for a determination that they have the right to unfettered unrecording of  
7 all aspects of what they, but not the Nevada Legislature, have determined to be part of the  
8 counting process, Petitioners claim that they are entitled to "meaningfully" observe "the  
9 totality of the process", whatever they decide that may be.

10           The statutes at issue however do not provide those terms or an absolute right to such a  
11 lofty goal; instead, they read as follows:

12           1.     The county clerk shall allow members of the general public to observe  
13 the conduct of voting at a polling place.

14           2.     A member of the general public shall not photograph the conduct of  
15 voting at a polling place or record the conduct of voting on audiotape or any  
16 other means of sound or video reproduction. (NRS 293.274).

15           1.     The county or city clerk shall allow members of the general public to  
16 observe the counting of the ballots at the central counting place if those  
17 members do not interfere with the counting of the ballots.

18           2.     The county or city clerk may photograph or record or cause to be  
19 photographed or recorded on audiotape or any other means of sound or video  
20 reproduction the counting of the ballots at the central counting place. (NRS  
21 293B.353)

22           In other words, poll watchers can observe as long as they are not disruptive to the  
23 process. Observation is not the same as concurrent auditing, though. These statutes provide  
24 for observation of the *counting* of ballots, not the recording and broadcasting of every  
25 phrase of the election process. Although the Petitioners are not the individuals elected by the  
26 voters or appointed by government officials to conduct elections, the Petitioners want to  
27 loom, either in person or by means of a camera lens, over the shoulder of each election  
28 worker who is conducting signature verification by use of the County's database. That  
database contains information deemed confidential by law. See, e.g., NRS 293.5002 and  
NRS 293.558.

...

1 The signature verification process for a mail ballot voter is the equivalent of a  
2 prospective voter checking in at a polling place. Clearly, the observer have no right to film  
3 that and in fact, they are specifically precluded from doing so. *See* NRS 293.274(2)(“A  
4 member of the general public **shall not** photograph the conduct of voting at a polling place  
5 or record the conduct of voting on audiotape or any other means of sound or video  
6 reproduction.” (emphasis added)).

7 Petitioners also want to monitor calls to the Election Department’s call center, where  
8 voters can cure signature problems by providing that protected confidential personal  
9 information. Voters may also discuss medical issues that are proving an impediment to their  
10 voting or the voting of household members.

11 Essentially, Petitioners want to treat areas of the election department as if it were a  
12 public sidewalk, but the election department’s ballot processing center is not a public forum.  
13 *See Poniktera v. Seiler*, 104 Cal. Rptr. 3d 291 (CA. 4th District 2010). In discussing polling  
14 places which are even more accessible to the public than the election warehouse, the courts  
15 have concluded that their review of poll watchers policies is limited to whether the policy is  
16 a reasonable, content-neutral regulation. They have upheld an anti-recording policy as a  
17 “reasonable means of ensuring an orderly and peaceful voting environment, free from the  
18 threat of contention or intimidation.” *Marlin v. District of Columbia Bd. Of Elections and*  
19 *Ethics*, 236 F.3d 716 (D.C. Cir. 2001). In *Poniktera*, in addition to wanting to film, the  
20 plaintiff wanted the court to adopt his suggested method of ballot box security rather than the  
21 one implemented by the registrar of voters. The court denied his request noting that the  
22 registrar of voters was not violating any state law or rule.<sup>1</sup>

23 In *Donald J. Trump for President, Inc. v. Boockvar*, \_\_\_ F. Supp. 3d \_\_\_, 2020 WL  
24 5997680 (W.D. Penn. October 10, 2020), the plaintiff challenged the planned use of mail  
25 ballot drop boxes and restrictions on poll watchers. Plaintiffs wanted implementation of  
26

27 \_\_\_\_\_  
28 <sup>1</sup> Petitioners cite ballot security as somehow supporting their petition by providing affidavits of observers who clearly  
are mixing up statutory processes for duplicating ballots and those for spoiling ballots with identifying information on  
them. *See* Affidavit of Joseph Gloria, attached, explaining the process.

1 those security measures that they deemed appropriate (guards, signature comparison and poll  
2 watchers), claiming a risk of voter fraud. The court noted that the theory of harm was  
3 speculative and that the plaintiffs were essentially asking the court to second-guess the  
4 judgment of election officials. Put differently, the Court wrote: “[J]udges can have a lot of  
5 power—especially when issuing injunctions. And sometimes we may even have a good  
6 ideas or two. But the Constitution sets out our sphere of decision-making, and that sphere  
7 does not extend to second-guessing and interfering with a State’s reasonable,  
8 nondiscriminatory election rules.” *Id.*, citing *New Georgia Project v. Raffensperger*,  
9 \_\_\_ F.3d \_\_\_, 2020 WL 5877588 (11th Cir. October 2, 2020).

10 In denying Plaintiffs’ claim, the *Boockvar* court noted that “First, there is not an  
11 individual constitutional right to serve as a poll watcher, rather, the right to do so is  
12 conferred by statute.”(citations omitted). Second, poll watching is not incidental to the right  
13 of free association and thus, has no district First Amendment protection....Third, poll  
14 watching does not implicate core political speech (citations omitted)” *Id.* The court denied  
15 the claim even amid assertions of possible heightened election fraud. See also *Turner v.*  
16 *Cooper*, 583 F. Supp. 1160 (N.D. Ill. 1983)

17 Because Petitioners have established NO statutory or constitutional right for the relief  
18 that they have requested, their petition should be denied.

19 **4. The challenge procedures are not unconstitutional**

20 As an obvious Hail Mary, the petition also sets forth an anemic attempt at an Equal  
21 Protection challenge, claiming, erroneously that there is no method to challenge a mail ballot  
22 voter. NRS 293.547 contains just such a procedure, but perhaps that is not to the Petitioners’  
23 liking at this late date. Petitioner Kraus, the only petitioner in this action with the standing to  
24 challenge any voters, and only those residing in his election precinct, has not identified how  
25 his right to challenge those voters has been significantly impeded. The written method  
26 actually provides a much simpler process than making him run around to the 129 vote  
27 centers in Clark County, hoping to catch a voter in his precinct. Given the timeframe in  
28

1 which mail ballots can be sent in, the deadline for written challenges serves a legitimate  
2 election purpose.

3 Assuming, arguendo, that the right to challenge voters is afforded the same  
4 protections as the right to vote, the fact that Mr. Kraus would have to challenge mail ballot  
5 voters in a different manner than he would in-person voters is not sufficient to support his  
6 claim for extraordinary relief. The U.S. Constitution explicitly provides state legislatures  
7 with authority to regulate the “Time, Places and Manner of holding Elections.” U.S. Const.  
8 art. I Section 4, clause 1. When a claimant has alleged that a state has burdened voting rights  
9 through the disparate treatment of votes, the Supreme Court has directed the application of  
10 the *Anderson-Burdick* framework.

11 The *Anderson-Burdick* balancing test is applied where it is alleged that an election  
12 law or policy violates the right to vote. See: *Anderson v. Celebrezze*, 460 U.S. 780, 788–89,  
13 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S.Ct.  
14 2059, 119 L.Ed.2d 245 (1992). [w]hen a state election law provision imposes only  
15 ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights  
16 of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the  
17 restrictions.” *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059 (quoting *Anderson*, 460 U.S. at 788,  
18 103 S.Ct. 1564; see *Crawford v. Marion Co. Ed. Bd*, 553 U.S. 187, 128 S.Ct. 1610 (2008)  
19 (internal quotation and citations omitted) (“[E]venhanded restrictions that protect the  
20 integrity and reliability of the electoral process itself are not invidious.”).

21 That one method of voter challenge is different than another, when the differences are  
22 easily attributable to the nature of the vote and neither advantages or disadvantages any  
23 group of voters, is a natural result of the complicated election process and does not constitute  
24 an Equal Protection violation. See, e.g., *Short v. Brown*, 893 F.3d 671 (9<sup>th</sup> 2018).

25 **5. *The County’s use of a signature verification does not violate any statute or***  
26 ***rights of the Petitioners***

27 AB 4 of the 32<sup>nd</sup> Special Session of the Nevada Legislature (2020) expressly allows  
28 the use of a machine to process mail ballot signatures. Section 22 provides:

1 1. For any affected election, the county or city clerk, as applicable, shall  
2 establish procedures for the processing and counting of mail ballots. 2.  
3 The procedures established pursuant to subsection 1: (a) May authorize  
4 mail ballots to be processed and counted by electronic means; and (b)  
5 Must not conflict with the provisions of sections 2 to 27, inclusive, of  
6 this act.

7 Petitioners persist, however, in disseminating inaccurate information about the  
8 machine. See Letter of Brian Hardy, attached.<sup>2</sup> The manufacturer does NOT recommend  
9 any particular tolerance. The machine is set to a default setting of 50 and the users are  
10 advised to check the machine's efficacy against each user's database. After testing, the  
11 County is utilizing a calibration of 40, but that is in no way equivalent to 40% of anything.  
12 In fact, the machine's match rate to the County's election database has hovered around 30%,  
13 far lower than the 98.45% suggested by Petitioners on page 9 of their Petition. The Registrar  
14 could lower the calibration, ensuring a higher match rate, but he has chosen to be more  
15 conservative in this contentious election. See Affidavit of Joseph Gloria, attached as Exhibit  
16 1.

17 Petitioners' claim that use of the machine gives mail ballot voters an enhanced ability to  
18 defraud the system is submitted totally without supporting evidence. The use of the  
19 signature verification machine is justified by the increased participation of vote by mail due  
20 to the COVID-19 pandemic and, as such, is a reasonable government action that survives  
21 constitutional scrutiny. See *Wexler v. Anderson*, 452 F.3d 1226 (11<sup>th</sup> Cir. 2006)(use of  
22 different voting machines with different potentials for voter error not an EP violation).

### 23 **Conclusion**

24 Petitioners' arguments about the role of poll watchers to deter voter fraud disregards  
25 other aspects of the regulatory framework mandated by the Legislature and the Secretary of  
26 State to ensure ballot integrity. *Republican Party of Pennsylvania v. Cortez*, 218 F. Supp. 3d

27 \_\_\_\_\_  
28 <sup>2</sup> The letter also claims that Section 23 of AB 4 completely vitiates the authorization to use a machine provided in  
Section 22 because it provides: "The clerk or employee shall check the signature used for the mail ballot against all  
signatures in the records of the clerk." Petitioners would have this mean that a machine can't be used and the clerk has  
to look at all signatures, even if a match is made on the first inspection. Given that the entire scheme of those legislative  
sections are to ensure signatures are not rejected arbitrarily, this strict construction, which renders Section 22 nugatory,  
is absurd. The Nevada Supreme Court interprets statutes within a statutory scheme harmoniously with one another to  
avoid an unreasonable or absurd result. *Horizons at Seven Hills v. Ikon Holding*, 132 Nev 363, 373 P.3d 66 (2016).

1 396 (E.D. Penn. 2016)([W]hile poll watchers may help guard the integrity of the vote, they  
2 are not the Election Code’s only, or even best, method of doing so”). If these Petitioners  
3 cannot dissuade enough voters to discard their plans to vote by mail, secondarily they want  
4 to audit every step of the process in a way that will scare away workers and prove so  
5 disruptive to the process that they can succeed where they failed in their litigation earlier this  
6 summer—shutting down the ability of a voter to vote by mail with confidence. That  
7 determination of how mail ballots are processed should be left to the Legislature and not to  
8 an individual candidate. The relief requested should be wholly denied.

9 DATED this 26<sup>th</sup> day of October, 2020.

10 STEVEN B. WOLFSON  
11 DISTRICT ATTORNEY

12 By: /s/ Mary-Anne Miller  
13 MARY-ANNE MILLER  
14 County Counsel  
15 State Bar No. 001419  
16 500 South Grand Central Pkwy. 5<sup>th</sup> Flr.  
17 Las Vegas, Nevada 89155-2215  
18 *Attorneys for Respondent Joseph P. Gloria,*  
19 *Clark County Registrar of Voters*

20 **CERTIFICATE OF MAILING**

21 I hereby certify that on the 26<sup>th</sup> day of October, 2020, I served a copy of the document  
22 by emailing a copy of the above and foregoing **Response of Respondent Joseph Gloria to**  
23 **Petition for Mandamus** addressed as follows:

24 Billie Shadron, Clerk  
25 [bshadron@carson.org](mailto:bshadron@carson.org)

26 David Omara, Esq.  
27 [david@omaralaw.net](mailto:david@omaralaw.net)

28 Brian R. Hardy, Esq.  
[bhardy@maclaw.com](mailto:bhardy@maclaw.com)

[Districtcourtclerk@carson.org](mailto:Districtcourtclerk@carson.org)

Gregory Zunino, Esq.  
[gzunino@ag.nv.gov](mailto:gzunino@ag.nv.gov)

Craig Newby, Esq.  
[cnewby@ag.nv.gov](mailto:cnewby@ag.nv.gov)

Daniel Bravo, Esq.  
[dbravo@wrslawyers.com](mailto:dbravo@wrslawyers.com)

Bradley Schrager, Esq.  
[bschrager@wrslawyers.com](mailto:bschrager@wrslawyers.com)

Afeni Banks  
An Employee of the Clark County District  
Attorney’s Office – Civil Division