IN THE SUPREME COURT OF THE STATE OF NEVADA

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.	Electronically Filed Dec 08 2020 06:57 p.m. Elizabeth A. Brown Clerk of Supreme Court Case No. 82178 District Court No.: 20 OC 00163 1B First Judicial District Court Carson City, Nevada

APPELLANTS' SUPPLEMENTAL BRIEFING PURSUANT TO ORDER DIRECTING SUPPLEMENTAL BRIEFING DECEMBER 8, 2020

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I. NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

JESSE LAW
MICHAEL MCDONALD
JAMES DEGRAFFENREID III
DURWARD JAMES HINDLE III
EILEEN RICE, and
SHAWN MEEHAN

There are no parent corporations such as those described in NRAP 26.1(a) that require disclosure in this matter. The attorneys and law firms who have appeared on behalf of these parties in the District Court proceedings and who are expected to continue to appear are:

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Dated: this 8th day of December, 2020.

BY: */s/Shana D. Weir*
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II. INTRODUCTION

On December 8, 2020, at approximately 4:30 p.m., the Court ordered that in a mere 2.5 hours, Appellants were to submit a "supplemental brief identifying the specific portions" of the 35-page district court order ("Order") that is the subject of this appeal, "by page and paragraph number, and accompanied by citations to the record in support of their arguments." To put this Herculean task in context, the Order contains 177 discrete findings of fact, many of which contain their own citations to the record. Appellants' draft appendix of record stretches over 13 volumes, and exceeds 2,500 pages. Appellants are concerned that they are being requested to brief their entire appeal in just a couple hours; if that is true, Appellants hereby register their express request that the Court permit further supplemental briefing on a practicable timetable.

While Nevada Rules of Appellate Produce ("NRAP"), rule 2 permits this Court to alter and/or suspend its own rules and process an appeal as the Court directs, the Court cannot and should not do so at the total expense of due process. (See Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).) Particularly given the critical, nationally important issues at stake in this appeal. Appellants intend no disrespect, but must register their objection to the lightspeed process imposed here.

Nevada law provides a detailed statutory procedure to contest an election,

including Presidential elections. An election contest is proven and warrants a remedy from the Nevada judiciary if there is a reasonable doubt about the outcome of the election, where one or more of the following occurs:

- Malfeasance by election officials
- Illegal or improper votes being cast and counted
- Errors by election officials
- Offers of value were made to alter the election outcome
- A malfunction of any voting device

Appellants have been subject to a truncated process to date, through no fault of their own. Appellants filed a timely election contest on November 17, 2020, challenging the results of the presidential election under the statutory scheme. Appellants also acted with dispatch by moving the district court ex parte to set an initial hearing, authorize discovery and set the contest for trial. The district court unreasonably delayed the initial hearing and then unreasonably limited Appellants to only 15 depositions -- half of what they requested. The district court did not, however, state that declarations or non-deposition evidence would not be considered at trial. The parties completed as much discovery as could be accomplished over a four-day period from November 29 to December 2. On December 4, 2020, the District Court conducted a trial by oral argument of counsel with no witnesses.

At the trial, the district court foreshadowed that is was operating under several

faulty assumptions regarding what Appellants were required to prove, what their burden of proof was and what evidence could be considered. Specifically, the district court gave away that it thought that Appellants were required to prove that Appellants could close the 33,000 vote gap to obtain any relief, that the Court did not understand the alternative ground of a successful contest if there was reasonable doubt as to the outcome of the election, that the "reasonable doubt" language in NRS 293.410 placed some high burden of proof on Appellants, and that the district court was only required to consider deposition testimony as evidence.

Unfortunately, the Order issued by the district court adopted the errors and misconceptions that the district court foreshadowed at trial. Even worse, however, the Order mirrored Respondents' trial brief almost to the letter and failed to consider, analyze or weigh the overwhelming evidence presented by Contestants establishing reasonable doubt as to the outcome of the election.

The evidence submitted by Contestants is compelling and tells a story of widespread incompetence, malfeasance, errors, disregard for the law and machine malfunctions in the way that Nevada and, in particular, Clark County, conducted the election. The result of these election problems and irregularities is that Nevada and Clark County counted over 200,000 illegal and improper ballots in the election. The evidence of the 200,000 + illegal and improper ballots counted comes from the violation of the "all" signature requirement by Clark County, the compelling

testimony of former Colorado Secretary of State Scott Gessler, the testimony of Jesse Kamzol, the testimony of Michael Basilice and the corroborating testimony, and declarations submitted by Appellants. This massive scale of illegal and improper ballots that were counted casts reasonable doubt on the outcome of the election and requires the statutory remedy of nullification.

Contrary to Respondents' hyperbole, Appellants are not seeking to disenfranchise anyone, let alone millions of Nevada voters. Disenfranchisement is preventing or discouraging people from voting. No Nevadan was prevented from voting in this election cycle. In fact, the opposite was true. Nevada indiscriminately mailed out hundreds of thousands of unsolicited ballots based on inaccurate voting rolls. In Nevada, even if you were not allowed to legally cast a vote, you were still able to vote.

Contestants are not seeking to disenfranchise voters or invalidate legally cast votes. Contestants are seeking to enforce Nevada law, which allows for the nullification of an election when widespread voting irregularities cast reasonable doubt on the fairness of the election. Nullification is not disenfranchisement. Requesting a statutory remedy for massive voting irregularities that were enabled, aided and abetted by election officials is not disenfranchisement. To the contrary, the failure to root out fraudulent and invalid ballots that dilute the legal votes of Nevadans is disenfranchisement, and that is what Appellants challenge seeks to root

out. *Purcell v. Gonzalez*, 127 S.Ct. 5 (2006).

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the District Court erred in entering the Order Granting Motion to Dismiss Statement of Contest by applying a "clear and convincing evidence" burden of proof, rather than a "preponderance of the evidence" burden.

B. Whether the District Court erred in conflating the two alternative elements of NRS 293.410(c) with respect to what Appellants were required to prove in the election contest – i.e. "an amount [of votes] that is equal to or greater than the margin between the contestant and the defendant, or otherwise in an amount sufficient to raise reasonable doubt as to the outcome of the election."

C. Whether the District Court erred in concluding that Appellants' claims regarding Clark County's use of the Agilis machine to verify the signatures on over 130,000 mail in ballots in Clark County without any human signature verification was barred under the doctrine of issue preclusion as a result of the "Order Denying Emergency Petition for Writ of Mandamus," entered October 29, 2020, in the *Kraus* case.

D. Whether the District Court erred in not finding that Clark County's use of the Agilis machine for mail ballot signature verification purposes was a violation of NRS 293.8871.

E. Whether the District Court erred by failing to enforce the express and

unambiguous language of NRS 293.8874(1)(a) which requires a review of a mail in ballot signature against "all signatures of the voter available in the records of the clerk" and by allowing both the Agilis machine and human signature verifiers in Clark County to verify signatures on hundreds of thousands of mail in ballots by reviewing only one signature on file with the clerk.

F. Whether the District Court erred in declining to consider the supplemental declaration of Appellants' expert witness Jesse Kamzol.

G. Whether the District Court erred in refusing to consider declarations, expert reports and other significant relevant evidence.

H. Whether the District Court erred in its reliance on the testimony and opinions of Dr. Michael Herron.

IV. LEGAL ARGUMENT: STANDARDS OF REVIEW

The following standards of review are applicable to the issues presented herein.

All questions of law are reviewed de novo. *Franchise Tax Bd. of State of California v. Hyatt*, 407 P.3d 717, 733 (Nev. 2017), *cert. granted sub nom. Franchise Tax Bd. of California v. Hyatt*, No. 17-1299, 2018 WL 1335506 (U.S. June 28, 2018); *Matter of L.J.A.*, 401 P.3d 1146 (Nev. 2017).

An order on a motion to dismiss is reviewed de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008).

A district court's conclusions of law are reviewed de novo. *White v. Cont'l Ins. Co.*, 119 Nev. 114, 116, 65 P.3d 1090, 1091 (2003).

Questions of statutory interpretation are reviewed de novo. *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. Adv. Op. 31, 416 P.3d 249, 253 (2018); *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 125 Nev. 449, 456, 215 P.3d 697, 702 (2009). When interpreting a statute, if the statutory language is "facially clear," this court must give that language its plain meaning. *Id*.

The Nevada Supreme Court "review[s] questions of statutory interpretation de novo." *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) (citing *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004)).

A district court's application of law to facts is reviewed de novo. *24/7 Ltd v. Schoen*, 399 P.3d 916 (Nev. 2017) (*citing Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579, 97 P.3d 1132, 1135 (2004); *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004)).

A district court's findings of fact are reviewed for abuse of discretion. *Collins v. Burns*, 103 Nev. 394, 399, 741 P.2d 819, 822 (1987), *distinguished on other grounds by Goodrich & Pennington Mortg. Fund, Inc. v. J.R. Woolard, Inc.*, 120 Nev. 177, 101 P.3d 792 (2004).

A district court's decision to admit expert testimony is reviewed for abuse of discretion. *In re Mosley*, 120 Nev. 908, 921, 102 P.3d 555, 564 (2004); *LVMPD v.*

Yeghiazarian, 129 Nev. 760, 764, 312 P.3d 503, 507 (2013).

A district court's decision to admit or deny expert testimony is reviewed for abuse of discretion. *Khoury v. Seastrand*, 132 Nev. Adv. Op. 52, 377 P.3d 81, 90 (2016) (*citing FCH1, LLC v. Rodriguez*, 130 Nev., Adv. Op. 46, 335 P.3d 183, 190 (2014) (reviewing for an abuse of discretion a district court's decision to allow physician testimony without an expert witness report and disclosure)); *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008).

A district court's evidentiary rulings are reviewed for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009); *Mclellan v. State*, 124 Nev. 263, ——, 182 P.3d 106, 109 (2008).

Decisions regarding the scope of a witness' testimony are reviewed for an abuse of discretion. *Johnson v. Egtedar*, 112 Nev. 428, 436, 915 P.2d 271, 276 (1996).

A district court's decision regarding the competency of a witness is reviewed for abused of discretion. *Fraser v. State*, 126 Nev. 711, 367 P.3d 769 (2010).

V. LEGAL ARGUMENT: DISCUSSION OF ISSUES

A. Whether the District Court erred in entering the Order Granting Motion to Dismiss Statement of Contest by applying a "clear and convincing evidence" burden of proof, rather than a "preponderance of the evidence" burden.

[Order at 27-28, ¶¶ 135 – 139]

Clear and convincing evidence is not the Contestant's burden of proof for this statutory election contest because the election contest statute is written more in the nature of negligence and malfeasance (preponderance of the evidence) than it is in intentional and fraudulent conduct (clear and convincing evidence). The fact that the District Court claimed that Contestants would have lost even if the District Court applied a preponderance of evidence standard (see Order ¶ 139), carries little weight and does not cure the decision to apply the wrong burden of proof. This is especially true because the District Court did not independently apply the preponderance of the evidence standard, but simply repeated mantra-like that Appellants did not meet any evidentiary standard.

The District Court improperly viewed the term "reasonable doubt as to the outcome of the election", which appears in NRS 294.410 2 (c), as being somehow relevant to Contestants' burden of proof in the election contest. Further, the District Court misinterpreted the term "reasonable doubt" as suggesting a higher burden than preponderance of the evidence. As such, the District Court improperly imposed a clear and convincing evidence burden on Contestants.[1]

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[1] Presumably, the District Court mistakenly conflated this standard with the requirement in criminal matters that the government must prove the defendant guilty beyond a reasonable doubt. *E.g.*, *Mathews v. State*, 134 Nev. 512, 515, 424 P.3d 634, 638 (2018). But if anything, showing reasonable doubt about the election is closer to the burden of persuasion on a defendant. To paraphrase the U.S. Supreme Court's seminal definition of a reasonable doubt jury instruction in the

This was a fundamental error by the District Court. Whether there was proof of reasonable doubt in the outcome of the election was not the burden of proof for Contestants in the statute. Whether there was proof of reasonable doubt in the outcome of the election was one of several grounds upon which the Court could afford Contestants a remedy under the statute.

With respect to the proper burden of proof, most of the operative words in NRS 293.410 which describe the grounds for a successful election contest are in the nature of negligence and not intentional conduct. For example, the statute uses the operative words "malfeasance," "illegal or improper votes," "errors," and "malfunction." Malice or intentional conduct are not required to prove these concepts. Malfeasance, for example, is wrongdoing, especially by a public official in the "performance of his official duties." *In re Removal from Office of Bukky*, No. 6-109, 1977 WL 199374, at *6 (Ohio Ct. App. Apr. 4, 1977) (citing *Jones v. Eighth Judicial District Court*, 67 Nev. 404, 219 P.2d 1055 (Nev. 1950). Thus, Contestants allege that it was malfeasance (wrongdoing) for Clark County election officials to allow the Agilis and human verifiers to verify hundreds of thousands of mail in signatures by only checking the ballot signature against one signature on file as

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criminal context, "if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt." *Hopt v. People*, 120 U.S. 430, 439 (1887). The better analogy would be to substitute the term "defendant's guilt" for "the outcome of the election" in NRS 293.410(2)(c).

opposed to checking it "against all signatures of the voter available in the records of the clerk." The truncated and incomplete verification process used by Clark County was in direct contravention of the statute. There was no discretion afforded to the Clark County election officials to disregard the all signature requirement. Failure to check the mail in ballot signatures against *all* signatures was wrong. It was wrongdoing. It was malfeasance.

The same analysis is true for "illegal or improper votes," "errors," and "malfunction". None on these terms necessarily require malice or intentional misconduct. If a Nevadan mails in a ballot that is not their ballot because they thought the government would allow it, that ballot is an "illegal or improper" ballot that was wrongfully and negligently cast. If Clark County grossly misjudges the number of humans that will be required to verify signatures on mail in ballots and, as a result, improperly rushes through the signature verification process, that is an error in conducting the election and not an intentional act of fraud. If the Agilis is unable to verify the quantity of mail in ballot signatures that it was expected to verify due to poor quality signature images in Clark County, that inability is a malfunction of the voting machine because it did not perform in the way it was intended.

As such, the more reasonable reading of the burden of proof that the Nevada legislature intended for an election contest is the preponderance of the evidence standard that applies to civil negligence matters, *Nassiri v. Chiropractic Physicians'*

Bd., 130 Nev. 245, 251, 327 P.3d 487, 491 (2014), and not the clear and convincing evidence standard that is applied to fraud or punitive damage matters. *Hindenes v. Whitney by Vogelheim*, 101 Nev. 175, 178, 697 P.2d 932, 934 (1985). Accordingly, Contestants were only required to prove by a preponderance of the evidence that there was a reasonable doubt about the outcome of the election.

B. Whether the District Court erred in conflating the two alternative elements of NRS 293.410(c) with respect to what Appellants were required to prove in the election contest – i.e. "an amount [of votes] that is equal to or greater than the margin between the contestant and the defendant, or otherwise in an amount sufficient to raise reasonable doubt as to the outcome of the election."

[Order at 21, ¶ 107; 29-30, ¶ 147; 30, ¶¶ 1489-153; 31, ¶ 154-156]

In order to obtain some remedy under the Nevada election contest statute, Contestants **were not** required to prove that there are sufficient illegal or improper votes that should not have gone to Biden and/or uncounted votes that should have gone to Trump such that the 33,000 vote gap between Biden and Trump was closed. The judge wrongly suggested during oral argument that this was the standard that he had in mind. Because the District Court did not independently analyze this grounds for an election contest, this Court should reverse the decision.

Pursuant to NRS 293.410(2)(c), Appellants were required to demonstrate that illegal or improper votes were cast and counted "in an amount that is equal to or greater than the margin between the contestant and the defendants" *or* "otherwise in an amount sufficient to raise a reasonable doubt as to the outcome of the election."

The disjunctive use of the word "or" means that one of the two is sufficient, and that Appellants did not need to prove both. Therefore, Appellants were required to demonstrate that either: (1) 33,596 illegal or improper votes were improperly counted, or (2) a "sufficient" amount of illegal or improper votes were improperly counted such that "a reasonable doubt as to the outcome of the election" exists. Neither requires a determination for whom the votes were cast.

This standard is consistent with the election contest rules in other states. For example, in Georgia, a contestant "only ha[s] to show that there were enough irregular ballots to place in doubt the result." *Howell v. Fears*, 275 Ga. 627, 628, 571 S.E.2d 392, 393 (2002); *see also Mead v. Sheffield*, 278 Ga. 268, 271, 601 S.E.2d 99, 101 (2004) ("The fallacy in the trial court's analysis [of an election contest] is demonstrated by the impossibility of determining how the 481 electors would have voted.").

The District Court erred by failing to consider whether Appellants' evidence satisfied either test independently, and specifically by failing to consider the latter test. Instead, the District Court reached its conclusions based solely on Appellants' purported failure to prove that more than 33,596 votes for Vice-President Biden were improperly counted. This holding ignores Nevadans' right to cast a secret ballot and misapprehends the clear intent of the contest statute: if the will of the voters is reasonably in doubt due to legal problems with the election process, nullifying the

doubtful election result actually protects the right to vote and ensures government by consent as guaranteed by the Nevada Constitution. *See* Nev. Const. art. II, § 1A. If there are illegal, fraudulent, or invalid votes in a number sufficient to put the election results into reasonable doubt, as the evidence demonstrates *infra*, this Court should not shrink from enforcing the constitutional rights of Nevada voters to have this election contest adjudicated and these results nullified.

C. Whether the District Court erred in concluding that Appellants' claims regarding Clark County's use of the Agilis machine were barred under the doctrine of issue preclusion as a result of the "Order Denying Emergency Petition for Writ of Mandamus," entered October 29, 2020, in the *Kraus* case.

[Order at 25-27, ¶¶ 127-134].

It was error for the District Court to conclude that issue preclusion barred Appellants' claims regarding Clark County's use of the Agilis machine and whether meaningful opportunities were afforded by county registrars for observation of ballot processing and vote tabulation because the required issue preclusion element of a "final decision on the merits" was not satisfied from the *Kraus* case or by the Kraus Order.

Citing to the "Order Denying Emergency Petition for Writ of Mandamus" entered October 29, 2020 in *Kraus* (the "Kraus Order"), Judge Russell determined that "each of the four requirements for issue preclusion is . . . satisfied as to Contestants' grounds for contest related to the lawfulness of the Agilis machines and

meaningful observation of ballot tabulation." Order at 27, ¶ 133. Judge Russell further found that "issue preclusion provides alternative grounds to dispose of these issues[.]" *Id.* at ¶ 134.

In Nevada, "the following factors are necessary for application of issue preclusion: '(1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; ... (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation' and (4) the issue was actually and necessarily litigated." *Five Star Cap. Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008), *quoting University of Nevada v. Tarkanian*, 110 Nev. 581, 879 P.2d 1180 (1994).

Defendants argued that issue preclusion applied to the Statement of Contest as to Clark County's use of the Agilis machine and the meaningful observation issue by virtue of the Kraus Order. In their Motion to Dismiss ("MTD"), however, Defendants argued exclusively the "finality" component of the second required element of issue preclusion, while ignoring the component that the decision be "on the merits." Defendants cited to *Kirsch v. Traber*, 134 Nev. 163, 166-67, 414 P.3d 818 (2018) for its discussion of when a judgment or decision becomes "final," and that case's reliance and adoption of the definition of finality from the Restatement (Second) of Judgments § 13 for the same, concluding on that basis that "[Kraus]

constituted a final decision for purposes of issue preclusion." MTD at 10, ll. 14 – 17 -- 11, ll. 13. Defendants presented no analysis or argument as to whether the Kraus Order was a decision "on the merits," instead just including that phrase as an afterthought. Moreover, neither *Kirsch*, nor the Restatement (Second) of Judgments § 13, address when a decision is "on the merits."

In a wholesale adoption of Defendants' arguments set forth in both the MTD and their Trial Statement, Judge Russell entered the following finding in the Order:

> This Court issued a thorough, well-reasoned opinion in *Kraus* denying petitioners mandamus relief, which constituted a final decision on the merits *because it was neither tentative nor subject to further determination*. *See Kirsch v. Traber*, 134 Nev. 163, 166-67, 414 P.3d 818, 821-22 (2018); *Hoffman v. Second Jud. Dist. Ct.*, No. 60119, 2013 WL 7158424, at *4 (Nev. Dec. 16, 2013).

Order at 26, ¶ 130 (emphasis added).

Under *Kirsch*, cited by both Defendants and the Court, and the Restatement cited by Defendants, the factors of "tentative" or "subject to further determination" speak only to a decision's finality, not whether the decision was "on the merits."

In fact, the *Kraus* Order was not "on the merits," nor could it have been, because the District Court in *Kraus* determined that the Petitioners lacked standing – that there was no actual justiciable controversy. Kraus Order at 13, l. 13. The issue of standing is jurisdictional. Nevada law requires an actual justiciable controversy as a predicate to judicial relief. *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443 (1986) (cited in the Kraus Order, at 6, ll. 10-12). Axiomatically, if an actual

justiciable controversy is a predicate to judicial relief, then no judicial relief can be granted without it. If a litigant does not present an "existing controversy," then the litigant has no standing to obtain judicial relief. *See Leavitt v. Siems*, 330 P.3d 1, n.1 (Nev. 2014).

By analogy to the federal system, a "court [must] satisfy itself of its jurisdiction over the subject matter [through standing] before it considers the merits of a case. 'For a court to pronounce upon [the merits] when it has no jurisdiction to do so, is . . . for a court to act *ultra vires*.'" *Ruhrgas AG v. Marathon Oil Co., et. al.* 526 U.S. 574 (1999), *quoting Steel Co. v. Citizens for a Better Environment*, 523 US 83, at 101-102 (1998).

Indeed, there could not have been a decision "on the merits" in *Kraus* because the District Court's inquiry necessarily ended when it determined that there was no standing and thus no actual justiciable controversy for which to enter relief. Without an actual justiciable controversy, the court lacks subject matter jurisdiction which, pursuant to NRCP 41(b), is specifically identified as a disposition that does *not* operate as an adjudication on the merits.

Thus, the second element of issue preclusion was not satisfied. The Kraus Order had no preclusive effect on the issues of Clark County's use of the Agilis machine and the meaningful observation issue in the present case.

D. Whether the District Court erred in not finding that Clark County's use of the Agilis machine for mail ballot signature

verification purposes was a violation of NRS 293.8871.

[Order at 5, ¶17; 9, ¶46; 30, ¶149; 32, ¶165]

NRS 293.8874(1), as enacted in Assembly Bill 4, Sec. 4, 32d Special Session (Nev. 2020), requires "the clerk or an employee in the office of the county clerk shall check the signature used for the mail ballot in accordance with" detailed procedures. Those procedures do not include relying on artificial intelligence software to verify matching signatures. Moreover, neither the Election Ordinance of Clark County, nor the Nevada State Constitution, make any provision for the electronic verification of signatures. Rather, human verification is required in every instance.

In violation of Nevada law, the Clark County Election Department allowed the Agilis machine to solely verify 30% of the signatures accompanying the mail-in ballots without ever having human eyes inspect those signatures. While the use of electronic means (e.g. the Agilis machine) is permitted under NRS 293.8871 for ballots to be "processed and counted," there is no authority for the proposition that the term "processed" is the equivalent of signature checking. Law school basics of statutory construction and interpretation compel the conclusion that "processed" must not include signature checking, because there is a subsequent statutory section – NRS 293.8874 – that specifically and solely addresses the issue and procedure for checking mail ballot signatures. That process involves human eyes. Nowhere in that section does it specifically authorize electronic means for signature checking,

nor does it state that "processing" and "signature checking" are the same thing.

E. Whether the District Court erred by failing to enforce the express and unambiguous language of NRS 293.8874(1)(a) which requires a review of a mail in ballot signature against "all signatures of the voter available in the records of the clerk" and by allowing both the Agilis machine and human signature verifiers in Clark County to verify signatures on hundreds of thousands of mail in ballots by reviewing only one signature on file with the clerk.

[Order at 5, ¶17; Pg. 9, ¶46; Pg. 11, ¶53. Pg. 15, ¶76; Pg. 30, ¶149]

Even if the Agilis machine were legally allowed by NRS 293.8871 to perform signature verification without human review (it is not), it was not exempt from complying with the other signature verification requirements of Nevada law.

NRS 293.8874(1)(a) mandates that mail in ballot signatures be checked against "*all* signatures of the voter in the records of the clerk" and not just one signature. It is undisputed, however, that the Agilis machine was incapable of checking the ballot signature against more than one signature. These facts were established through the testimony of two adverse witnesses - Joe Gloria, the Clark County Registrar of Voters, and Jeff Ellington, the President of Runbeck Election Services who sold the Agilis machine to Clark County. It is also undisputed that the Agilis verified signatures on over 130,000 ballots by checking the ballot envelope signature against only a single signature on file with the clerk and not all signatures. Depo. J. Gloria at 15:6-16, 22:17-20; 19:10-23; 23:8-17; Depo. J. Ellington at 34:22-25; 35:1-5, 11-15; 59:8-25; 60:1-25; 61:1-25.

The District Court completely ignored these facts and failed in any way in its order to discuss the statutory mandate to check mail in ballot signatures against all signatures on file.

Furthermore, it was not just the Agilis that violated NRS 293.8874(1)(a). Joe Gloria admitted that the Clark County humans did not follow NRS 293.8874(1)(a) mandates during the first phase of signature review of the mail in ballots that were rejected by the Agilis. Rather, the testimony of Mr. Gloria was that the first phase human signature verifiers in Clark County only checked the mail in ballot signature against the same single reference signature that the Agilis looked at. It was only when a mismatch in phase one caused a signature to go to a phase two human review that all signatures of the clerk may have been referenced and compared by Clark County. As a result, in addition to the 130,000 signatures verified improperly by the Agilis in express violation of the statutory requirements, there were tens and perhaps hundreds of thousands of additional improperly verified signatures by human verifiers in Clark County.

These blatant and direct violations of the statute amount to malfeasance, errors in the administration of the election by Clark County and invalid ballots being counted in the hundreds of thousands by Clark County.

F. Whether the District Court erred in refusing to consider declarations, expert reports and other significant relevant evidence.

[Order at 12, ¶57-59, ¶61, ¶63; 13, ¶65-66; 16, ¶81, ¶83; 17, ¶87, ¶89; 18, ¶94; 19, ¶97; 20, ¶101, ¶103; 21, ¶¶107-108; 22, ¶¶111-112; 24, ¶120; 25, ¶125]

The District Court's Order is silent on the evidence submitted by Appellants because the District Court improperly ignored and failed to consider most, if not all, of Appellants' evidence. In particular, the Court improperly ignored the testimony of Appellants' expert witnesses—Scott Gessler, Jesse Kamzol and Michael Baselice. These three witnesses were highly qualified, grounded their opinions in sound scientific methodologies, and offered valuable expert testimony based on decades of experience and research.

Mr. Gessler provided unrefuted and persuasive testimony that the Nevada rejection rate for mail in ballots was not believable and should have been at least 4% (26,800 ballots), and not a mere 1%. Mr. Kamzol's data analysis showed invalid ballots of various types ranging from 20,000 to over 100,000. Mr. Baselice supervised an extensive phone survey of Nevadans who voted by mail and concluded that thousands of those alleged voters did not cast ballots.

Despite this, the District Court improperly concluding that *all* of Appellants' experts' testimony was irrelevant or of little evidentiary value, while simultaneously stating that *all* of Appellees' experts' testimony was persuasive and of significant evidentiary value. This is particularly problematic given that Appellees' expert did not understand the difference between allegations and evidence and applied the

wrong standard of proof in reaching his conclusions.

1. Scott Gessler

Appellant's expert witness Scott Gessler was highly qualified to provide expert testimony in the area of election administration, election worker staffing issues, proper auditing and utilization of the Agilis machine for signature verification, training of election personnel, human signature verification of mail in ballots, election observation and the typical rejection rate for mail in ballots in high volume mail in ballot states.

Mr. Gessler's expertise was extensive and compelling. There was no basis for the court to find all of his opinions and conclusions to be "unsound" and to completely disregard his testimony and his report. Order at 13, ¶ 66.

Mr. Gessler received a B.A. from Yale University, a J.D. from the University of Michigan Law School, and an M.B.A. from the J.L. Kellogg School of Management at Northwestern University. He also served as the Colorado Secretary of State from January 2011 until January 2015. In Colorado, the Secretary of State serves as the state's chief election officer. In that capacity, Mr. Gessler's responsibilities included: supervising the conduct of primary, general, congressional vacancy, and statewide ballot issue elections in Colorado; enforcement of the Colorado election code; interpretation of the election code and promulgation of statewide regulations; statewide coordination and compliance with all federal

election laws, including the Voting Rights Act ("VRA"), the National Voter Registration Act ("NVRA"), the Help America Vote Act ("HAVA"), and the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"); training, review, and oversight of local countywide election officials and local election practices and procedures; maintenance and modifications to the statewide voter database and state voter registration systems, maintenance of the statewide voter rolls, testing and certification of voting equipment, implementation and enforcement of campaign finance laws, and development of election policies; development of statewide election legal strategy and responses to legal actions; and management of office personnel, policies, and procedures.

As Secretary of State for Colorado, Mr. Gessler implemented various new programs and initiatives involving the administration of Colorado's elections. These included:

a. Participation in Election Registration Information Center ("ERIC") program, launched by the Pew Charitable Trusts. As Secretary of State, I evaluated the ERIC program and ensured Colorado was one of the very first states to join. During my time Colorado served as one of the first states to use voter registration and driver's license matching to improve voter registration efforts, as well as improve the accuracy of voter rolls.

b. Development of a program to remove non-citizens from the voter

registration rolls. During my time as Secretary of State, Colorado became the first state to match driver's license and voter roll information to identify potential non-citizens on the voter rolls, and Colorado and Florida were the first two states to obtain access to the Systematic Verification for Entitlements ("SAVE") program for purposes of maintaining voter rolls.

c. A re-evaluation and adjustment to Colorado's procedures for removing the names of deceased voters from the voter registration database.

d. The expansion and rebuilding of online voter registration in Colorado, which enabled voters not only to register online but also to maintain their registration records online and remove their names from Colorado's voter rolls. To my knowledge, this system has been the most popular and heavily used system nationwide, from 2012 until the present. For this, Colorado was awarded the 2013 "State Technology Innovator Award" from the National Association of State Chief Information Officers.

e. The review of all election procedures and the implementation of process mapping to improve and refine statewide and local procedures for election administration. This includes voter list maintenance and voter registration procedures and policies.

f. A complete rewriting and streamlining of Colorado's election regulations.

g. Implementation of Colorado's transition from in-person voting to a statewide vote-by-mail system. Prior to 2013, Colorado had an in-person voting system. In 2013 Colorado enacted a universal vote-by-mail system, and starting in late 2013 Colorado election officials sent ballots by mail to active voters, all of whom had the opportunity to vote by mail. As Colorado's chief election officer, I implemented the new legislation and oversaw Colorado's transition to an all-mail ballot state.

h. In response to new legislation, the development of an online, statewide electronic poll book and real-time access to the statewide voter database, to allow election-day voter registration and voting throughout the state. Colorado developed this complete system overhaul in nine months and at the time was the only state to have such a system.

i. Development of new online training programs for the public and for local election officials. For this program, Colorado won the 2014 "Ideas Award" from the National Association of Secretaries of State.

j. Development and implementation of the "Accountability in Colorado Elections" ("ACE") program, which provides online, interactive maps for election information, including voter registration statistics, registration by districts, voter turnout, election cost statistics, and county election activity and legal compliance information. For this project, Colorado was a finalist for the 2016 "Ideas

Award" from the National Association of Secretaries of State.

k. The launch and improvement of a statewide electronic delivery system for ballots to military and overseas civilian voters, which resulted in a substantial increase in military and overseas civilian voter turnout.

Mr. Gessler's offered and explained the following opinions and conclusions in his report and at his deposition. None of these opinions and conclusions was challenged or refuted in any material way by Respondents, including his opinion that Mr. Gessler provided unrefuted and the Nevada rejection rate for mail in ballots was not believable and should have been at least 4% (26,800 ballots), and not a mere 1%.

Mr. Gessler's other unrefuted opinions included the following:

1. Nevada's decision in early August to conduct a universal mail-ballot system did not allow enough time to implement a reliable system.

2. A signature rejection rate of one percent is very unlikely, in light of the poor quality of Nevada's signature exemplars.

3. Evidence shows that Nevada had sloppy voter rolls, which severely undermines the reliability of an all-mail ballot election

4. Alarming reports of systemic problems, combined with the lack of watcher access, indicates that Nevada's election was marred by system problems.

2. Jesse Kamzol

Jesse Kamzol gave credible and reliable exert testimony on the subjects of data science and analysis by analyzing the lists of individuals who voted on the Election and crosschecking it with other sources to identify voters who voted from non-Nevada addresses, including those who had notified the U.S. Postal Service that they had changed their address to an out-of-state address, non-existent addresses, non-residential addresses (i.e. vacant property or a commercial address), deceased voters, and voters who cast more than one ballot. Each of these categories is comprised of improper or fraudulent votes, ballots that should not have been cast or counted. That they were disenfranchised honest voters by cancelling out their votes by allowing the improper ballots.

Mr. Kamzol explained his experience and methodology clearly in his deposition. He has substantial experience in using data sets to learn information about consumers and voters. Specifically, he has knowledge about cross-referencing various data sets so as to obtain more specific information about a particular individual than would otherwise be available with a single data set (such as the voter rolls). Exhibit 120, Kamzol Dep. 11:14 – 12:12. This allowed Mr. Kamzol to use multiple data sets to determine which voters cast multiple ballots, voted from ineligible addresses, voted after moving out of Nevada, or had a ballot cast on their behalf after they were deceased. Exhibit 120, Kamzol Dep. 22:11-42:17. As Mr. Kamzol explained in his deposition, he uses various methodologies to ensure that

the matching is accurate and complete. Exhibit 120, Kamzol Dep. 93:19 – 95:9. He also erred on the side of caution and removed matches that were doubtful. Exhibit 120, Kamzol Dep. 42:21 – 42:25. He testified that he also used a proven methodology of canvassing matches by person and by telephone so as to confirm the accuracy of a data set. Exhibit 120, Kamzol Dep. 36:20 – 22; 39:22-25. He further explained that he was confident in his result up to a margin of error of plus or minus five percent and that all of his decisions were made to a reasonable degree of certainty. Exhibit 120, Kamzol Dep. 56:24 – 57:7; 20:4-7.

Pursuant to the *Hallmark v. Eldridge* test, Mr. Kamzol was qualified to give expert testimony. 124 Nev. 492, 498 (2008). Likewise, the relevant factors show that Mr. Kamzol's testimony should have been given far greater weight than given by the District Court. *See Higgs v. State*, 126 Nev. 1043 (2010). Jesse Kamzol's expertise was shown by his substantial work experience, practical experience in that field, especially in regard to matching data sets.

Mr. Kamzol's testimony was helpful to the trier of fact because his experience in matching data sets was subject to testing and was tested and is generally accepted in his community. The testimony is based on particularized facts, specifically various data sets that were then confirmed with the list of voters who participated in the Election. Mr. Kamzol explained that his methodology for matching data resulted in a margin of error of less than 5 percent. Mr. Kamzol also provided the basis for

his conclusions by naming the data sets he analysed, which allow others to verify his data.

The District Court also wrongfully denied the Kamzol supplemental declaration because Contestants offered him for a subsequent deposition. Mr. Kamzol rendered supplemental opinions based data as to non-U.S. citizens who obtained identifications through a Department of Motor Vehicles subpoena. By cross-referencing that data with the voter rolls, Mr. Kamzol was able to identify 3,987 non-U.S. citizens who voted in the Election. The DMV did not produce the data underlying the supplemental declaration until roughly the same time as Mr. Kamzol's deposition, meaning that he did not have any time to cross-refrencing the subpoenaed material before his deposition; it was not Contestants' fault that they did not receive the subpoenaed data earlier and the District Court's refusal to consider the evidence left Contestants with evidence obtained during an extremely abbreviated discovery period that was impossible to use to advance their claims. (See Hearing Transcript, p. 11.) Rather than permit him to be cross-examined on short notice or after hours, the district court erroneously struck the declaration, thereby unfairly excluding evidence that was critical for Contestants' claims. *Hansen v. Universal Health Servs. of Nevada, Inc*., 115 Nev. 24, 29, 974 P.2d 1158, 1161 (1999).

3 Michael Baselice

It was error for the Court to completely dismiss and disregard all testimony and opinions from Mr. Baselice. He was qualified and his opinions were valid. The main criticism of Mr. Baselice was that he could not explain precisely the source of the phone numbers he used to enhance the voter registration list that he used for his phone survey. While answering this question would have been ideal, the failure to answer did not call into question his entire survey and all of his opinions. Moreover, defense expert, Dr. Michael Herron, acknowledged that the concerns about not knowing the source of the phone numbers was largely alleviated by the fact that the phone surveyors asked each respondent his or her name and confirmed that it was the Nevada voter they thought they were speaking with before proceeding with the survey. In other words, the concern about the phone list being inaccurate was alleviated by respondents confirming their name at the beginning of the phone call.

4. Other undisputed testimony.

The District Court failed to consider undisputed evidence that voting machines used in Clark County during in person voting lacked security and exhibited troubling irregularities. Two separate, unrelated whistleblowers came forward offering credible, undisputed testimony of the lack of security measures on the voting machines and eye witness observation of vote totals changing from the end of voting on one day to the start of voting the next day. The Order did not even

address these undisputed facts that called into account unexplained voting irregularities and the totality of the circumstances regarding the unreliable vote totals.

Whistleblower 1, pursuant to order of the District Court, is identified as John Doe 1. As laid in his declaration and then his deposition, John Doe 1 is an IT professional and his job duties as a poll worker included maintaining the electronic voting machines during early and day of in-person voting, and registering vote totals after voting concluded each day and before it started in the morning. Ex. 60, John Doe 1 Decl., ¶¶2, 3, 7-10; Ex 123, John Doe 1 Deposition, 7:1-17, 8:18-9:2. Whistleblower 2 was also an IT professional and had similar job duties during the election. Ex. 62, Montenegro Decl., ¶1, 8. Whistleblower 1 and Whistleblower did not know each other.

Whistleblower 1 testified that the electronic voting machines did not have any security, let alone adequate security, including lack of adequate password protection and no data encryption. Ex. 60, John Doe 1 Decl., ¶6, 12, 15; Ex 123, John Doe 1 Deposition, 12:20-13:25, 26:2-27:12. The lack of security made the machines and the vote totals susceptible to change. *Id.* Mr. Montenegro also confirmed that the electronic voting machines and vote totals were susceptible to manipulation. Ex. 62, Montenegro Decl., ¶4-6.

Whistleblower 1 also testified that the voting data (including vote

totals) from each voting machine is stored on a removable USB drive. Whistleblower 1 was able to observe one of the USB drives and confirmed that it contained no password protection or data encryption, allowing it be altered with minimal computer and/or hacking skills. During in-person early voting, Whistleblower 1 was required to remove USB drives from the electronic voting machines each night and log the machine's vote totals (hand write) on a sheet of paper that was turned into the election department. There were multiple days where the total vote counts provided on the pre-printed log sheet in the morning did not match the vote counts provided to the election department the night before. On some days, the vote totaled more than the machine had logged; and on some days, the vote total was less. In other words, votes appear to have been added to or deleted from these drives overnight during the early voting period. Ex. 60, John Doe 1 Decl., ¶8-11; Ex 123, John Doe 1 Deposition, 9:16-11:3. Mr. Montenegro confirmed the vote totals on the voting machines did not match up the external record. Ex. 62, Montenegro Decl., ¶9.

G. Whether the District Court erred in its reliance on the testimony and opinions of Dr. Michael Herron.

[Order at 6, ¶¶ 21-22; 13, ¶¶ 70-71; 14, ¶¶ 72-75; 15, ¶¶76-77; 15, ¶¶79]

It was error for the Court to consider and rely on the opinions of defense expert Joe Herron for three fundamental reasons: (1) Mr. Herron mistakenly thought that Contestants' evidence was in the pleading and based his conclusions on lack of

evidence in the pleading; (2) Mr. Herron used an incorrect intentional fraud standard only for all of his conclusions and opinions; and (3) Mr. Herron's methodology to conclude that there was no voter fraud in Nevada was seriously flawed and inherently ridiculous.

Desperate to convince this Court otherwise, Defendants have offered the report and testimony of their designated expert witness, Dr. Michael C. Herron, a university political scientist. The Court should completely disregard Dr. Herron's opinion as to the sufficiency of Contestants' evidence to support this election contest. As was made clear during his deposition on December 2, 2020, Dr. Herron misunderstood that the Statement of Contest is the equivalent of a pleading in which Contestants merely alleged what they were prepared to prove to support their election contest pursuant NRS Section 293.410. Instead, Dr. Herron believed that the Statement of Contest contained the evidence that supported Contestants' allegations and looked almost entirely to the Statement of Contest to find the evidence to support the allegations. When Dr. Herron found no evidence in the Statement of Contest, he concluded there was no evidence to support the claims and allegations. Depo. M. Herron, at 72:5-9; 73: 19-25; 75:14-24; 79:4-6; 80:13-19; 83:21-25; 87:21-89:9. Accordingly, all of the conclusions that Dr. Herron reached in his report that there is "no evidence" to support an allegation should be disregarded.

Second, Dr. Herron analyzed the Statement of Contest through a faulty lens. Specifically, rather than evaluating the Statement of Contest based on what a contestant is required to allege pursuant to NRS Section 293.410, Dr. Herron applied a much different and much more stringent standard. Dr. Herron utilized the following definition of voter fraud to evaluate all of the allegations in the Statement of Contest: "An intentional act of deception aimed at subverting electoral processes.". This definition, of course, cannot be reconciled with the Nevada statutory requirements to prove a valid election contest. Dr. Herron never read NRS 293.407 or 293.410 and had no knowledge or understanding of what they state. *Id*. at 92:2-15; 93:4-10; 94:1-25; 103:4-23. Because Dr. Herron utilized a faulty "intent to deceive" standard for all of the opinions and conclusions in his report, all of his opinions and conclusions are questionable and cannot be relied upon.

Finally, Dr. Herron's report and testimony about reported voter fraud in elections prior to 2020 based on internet searches for news reports about voter fraud is inherently irrelevant and of no value to the Court. Whether Dr. Herron could find reported evidence of fraud in prior elections has no value in evaluating whether there were election improprieties as defined by NRS 293.410 in the November 3, 2020 General Election in Nevada.

VI. CONCLUSION AND RELIEF SOUGHT

In sum, even on this highly accelerated briefing schedule, Appellants have

established that there were unlawful structural defects in Nevada's 2020 General Election, creating clear doubt as to the result. Based on the foregoing, this Court should therefore 1) reverse the district court, 2) issue a new and different order sustaining Appellants challenge to Nevada's 2020 General Election, and 3) issue Appellants the relief requested by this action. That President Trump be declared the victor of the Election in Nevada and that Contestants McDonald, DeGraffenreid, Hindle, Law, Rice, and Meehan be certified as the duly elected electors for the State of Nevada; or, in the alternative, that Defendants' election to the office of elector be declared null and void, that the results of the Nevada 2020 General Election be annulled, and that no candidate for elector for the office of President of the United States of America be certified from the State of Nevada.

VII. ATTORNEY'S CERTIFICATE (NRAP 28.2)

a. I hereby certify that this brief 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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 pt. Times New Roman; or

[ ] This brief has been prepared in a monospaced typeface using (N/A).

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains _____ words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed 30 pages.

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 8th day of December, 2020

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANTS' SUPPLEMENTAL BRIEF** was served upon all counsel of record this 8th day of December, 2020, by electronically filing the document using the Nevada Supreme Court's electronic filing system.

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