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,

Contestants-Appellants,

vs.

JUDITH WHITMER, an individual; SARAH MAHLER, an individual; JOSEPH THRONEBERRY, an individual; ARTEMISA 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.,

Defendants-Appellees.

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Case No.: 82178

First Judicial District Court
Case No.: 20 OC 00163 1B

DEFENDANTS-APPELLEES' MOTION FOR SUMMARY AFFIRMANCE BY DECEMBER 8, 2020

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N.R.A.P. 26.1 DISCLOSURE

Pursuant to N.R.A.P. 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in N.R.A.P. 26.1(a) that must be disclosed.

DATED this 7th day of December, 2020.

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Based on the arguments below, Defendants-Appellees ("Defendants") respectfully request that this Court summarily affirm by Tuesday, December 8, 2020, the district court's order denying and dismissing the contest filed by Contestants-Appellants ("Contestants") regarding the election of Nevada's presidential electors.

* * *

Defendants are the presidential electors chosen by the people of Nevada to cast their votes in favor of President-elect Joe Biden and Vice President-elect Kamala Harris at the December 14, 2020 meeting of the electoral college. *See* Nevada Revised Statutes ("NRS") 298.065(1); 3 U.S.C. § 7. Defendants received 703,486 votes to Contestants' 669,890 votes—a margin of 33,596 votes. *See* Order Granting Mot. to Dismiss Statement of Contest ("Order") ¶ 1. Those results were certified by this Court, the Governor of Nevada, and the Secretary of State of Nevada.

Wielding farfetched claims of fraud, Contestants seek to have themselves installed in Defendants' place. Despite Contestants' woefully deficient statement of contest, the district court permitted Contestants to proceed with discovery. They were given the opportunity to depose witnesses, including state and county election officials; subpoena documents; inspect sealed election materials and equipment; and ultimately put on their evidence of supposed fraud. The result—complete and

overwhelming defeat. The district court held not only that Contestants failed to prove each and every ground for contest asserted, but also that they failed to establish *any* elements of these grounds, as a matter of fact or law, under any applicable burden of proof.

The district court's order was grounded in a thorough review of the record and based on credibility determinations as to the witnesses.[1] And even though the district court could have excluded much of Contestants' evidence either on hearsay grounds or because the expert opinions proffered by Contestants were not reliable, it nevertheless considered all of the evidence. *See* Order ¶¶ 58–66, 120, 125–26. Conversely, the district court found that Defendants' fact witnesses—Joseph P. Gloria, the Registrar of Voters for Clark County; Wayne Thorley, Nevada's former Deputy Secretary of State for Elections; Jeff Ellington, the President and COO of Runbeck Election Services, the manufacturer of the Agilis Ballot Sorting System—were credible because of their experience, lack of bias, and firsthand knowledge. *See id.* ¶¶ 67–69. Similarly, the court found that Defendants' expert witness, Dr. Michael Herron—who has been credited as an expert on election administration

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[1] *See* Order ¶ 59 ("Most of these declarations were self-serving statements of little or no evidentiary value."); *id.* ¶ 79 ("Based on this testimony, the Court finds that there is no credible or reliable evidence that the 2020 General Election in Nevada was affected by fraud."); *id.* ¶ 117 ("The Court finds Doe 3' s account not credible."); *id.* ¶ 120 ("As reflected herein, the Court finds that the expert testimony provided by Contestants was of little to no value.").

and voter fraud by several courts, holds advanced degrees in statistics and political science, and has published on relevant topics in peer-reviewed journals—was credible and his methodology and conclusions reliable. *See id.* ¶¶ 70–71.

Contestants have had their day in court and, despite wholesale rejection of their claims and paltry evidence by the district court, have filed a notice of appeal. Defendants now move for suspension of the normal rules of appellate procedure to allow for expedited consideration of the matter on the record. *See* Nevada Rule of Appellate Procedure ("NRAP") 2 ("On the court's own or a party's motion, the court may—to expedite its decision or for other good cause—suspend any provision of these Rules in a particular case and order proceedings as the court directs, except as otherwise provided in Rule 26(b)."); *Nev. Pol'y Rsch. Inst. v. Clark Cnty. Reg'l Debt Mgmt. Comm'n*, No. 61560, slip op. at 2 (Nev. Aug. 24, 2012) (granting request for expedited review of appeal); *Cook v. Maher*, 108 Nev. 1024, 1025 n.1, 842 P.2d 729, 729 n.1 (1992) (per curiam) (granting motion for immediate decision under NRAP 2).[2]

This Court should grant Defendants' motion for two reasons. *First*, Contestants' appeal is frivolous. In order to succeed, Contestants would have to prove that the district court's factual findings were clearly erroneous. *See Trident*

[2] If the Court feels that consideration of the entire record would assist in its immediate review, then it can order transmittal of the record from the district court.

Constr. Corp. v. W. Elec., Inc., 105 Nev. 423, 426, 776 P.2d 1239, 1241 (1989) ("This court has held numerous times that findings of fact and conclusions of law must be upheld if supported by substantial evidence, and may not be set aside unless clearly erroneous."). This is an impossible task, as even a cursory review of the district court's order shows that it is grounded in the record and based on credibility determinations that will not be revisited on appeal. *See Krause Inc. v. Little*, 117 Nev. 929, 934, 34 P.3d 566, 569 (2001) ("This court has repeatedly stated that it will not weigh the credibility of witnesses because that duty rests with the trier of fact"); *Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004) (same). The Court would also have to disagree with each of the district court's well-considered and well-supported legal conclusions that were based on those factual findings.[3]

Second, immediate resolution of the appeal is needed to bring certainty and stability to the people of Nevada—and the entire nation—in advance of pending

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[3] While the district court concluded that a clear and convincing evidence standard applied to Contestants' suit, *see* Order ¶¶ 135–38, and that all of the necessary elements of issue preclusion were satisfied as to several of Contestants' claims, *see id.* ¶ 133, it ultimately "reache[d] and rule[d] on the merits of *all* of Contestants' claims," *id.* ¶ 134 (emphasis added), and concluded that "Contestants' claims fail on the merits . . . under *any* [] standard." *Id.* ¶ 139 (emphasis added). Accordingly, in order to reverse the district court's ultimate determination, this Court would have to hold that the district court's factual findings were clearly erroneous since no one ground was rejected solely as a matter of law.

deadlines related to the casting and counting of votes by presidential electors. *See* 3 U.S.C. § 7 (setting December 14 as date for meeting of electors); NRS 298.065(1) (adopting date set in 3 U.S.C. § 7); *see also* 3 U.S.C. § 5 (giving conclusive effect in Congress's counting of electoral votes to votes from states in which "final determination of any controversy or contest concerning the appointment" of electors has been completed by "safe harbor" of December 8). Because it is clear that the district court's decision resolved this election dispute, this Court should not indulge any attempt by Contestants to further prolong these proceedings. As Justice Brian Hagedorn of the Wisconsin Supreme Court recently explained when that court declined to entertain a request to overturn the results of Wisconsin's presidential election,

> [s]omething far more fundamental than the winner of Wisconsin's electoral votes is implicated in this case. At stake, in some measure, is faith in our system of free and fair elections, a feature central to the enduring strength of our constitutional republic. It can be easy to blithely move on to the next case with a petition so obviously lacking, but this is sobering. The relief being sought by the petitioners is the most dramatic invocation of judicial power I have ever seen. Judicial acquiescence to such entreaties built on so flimsy a foundation would do indelible damage to every future election. . . .
>
> I do not mean to suggest this court should look the other way no matter what. But if there is a sufficient basis to invalidate an election, it must be established with evidence and arguments commensurate with the scale of the claims and the relief sought. These petitioners have come nowhere close. While the rough and tumble world of electoral politics may be the prism through which many view this litigation, it cannot be so for us. In these hallowed

halls, the law must rule.

Wis. Voters All. v. Wis. Elections Comm'n, No. 2020AP1930-OA, slip op. at 3 (Wis. Dec. 4, 2020) (Hagedorn, J., concurring); *see also Donald J. Trump for President, Inc. v. Boockvar*, No. 20-2078, 2020 WL 6821992, at *1 (M.D. Pa. Nov. 21, 2020) ("[T]his Court has been presented with strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence. In the United States of America, this cannot justify the disenfranchisement of a single voter, let alone all the voters of its sixth most populated state. Our people, laws, and institutions demand more.").

For these reasons, Defendants respectfully request that this Court immediately dispose of this appeal and summarily affirm the district court's order no later than December 8, 2020.

DATED this 7th day of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2020, a true and correct copy of the **DEFENDANTS-APPELLEES' MOTION FOR SUMMARY AFFIRMANCE BY DECEMBER 8, 2020** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

By: *Is/ Dannielle Fresquez*
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