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IN THE SECOND JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

FREDERICK H. KRAUS; PUBLIC INTEREST LEGAL FOUNDATION.,

Petitioner,

vs.

CARRIE-ANN BURGESS, in her official capacity as Washoe County Interim Registrar of Voters,

Respondent,

and

FRANCISCO V. AGUILAR, in his Official Capacity as NEVADA SECRETARY OF STATE,

Intervenor.

Case No. CV24-01051

Department No.: 4

ORDER DENYING MOTION TO DISMISS PETITION FOR WRIT OF MANDAMUS

On May 10. 2024, Petitioners FREDERICK H. KRAUS and PUBLIC INTEREST LEGAL FOUNDATION (collectively "KRAUS & PILF"), by and through their attorney David C. O'Mara, Esq. of the O'Mara Law Firm, P.C., filed *Petition for Writ of Mandamus Pursuant to NRS 34.160 for Washoe County Registrar of Voters to Determine Whether Commercial Addresses on Voter Roll are Accurate as Required by NRS 293.530* (hereinafter "*Petition*").

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On May 28, 2024, Proposed Intervenors – Respondents RISE ACTION FUND, the INSTITUTE FOR PROGRESSIVE NEVADA, and the NEVADA ALLIANCE FOR RETIRED AMERICANS, by and through its attorneys Bradley Schrager, Esq. and Daniel Bravo, Esq. of Bravo Schrager LLP, and David R. Fox, Esq. of Elias Law Group LLP, filed a *Motion to Intervene as Respondents*. On June 11, 2024, KRAUS & PILF filed a *Response in Opposition to Motion to Intervene as Respondents*. On June 18, 2024, the RISE ACTION FUND, the INSTITUTE FOR PROGRESSIVE NEVADA, and the NEVADA ALLIANCE FOR RETIRED AMERICANS filed their *Reply in Support of Motion to Intervene as Respondents*. On July 16, 2024, the Court entered its *Order Denying Motion to Intervene as Respondents*.[1]

On June 17, 2024, Proposed Intervenor-Respondent FRANCISCO AGUILAR, in his official capacity as Nevada Secretary of State, by and through his counsel Nevada Attorney General Aaron D. Ford, Senior Deputy Attorney General Laena St-Jules, and Deputy Attorney General Devin A. Oliver, filed a *Motion to Intervene as Respondent*. On July 1, 2024, KRAUS & PILF filed a *Response in Opposition to Motion to Intervene as Respondent*. On July 8, 2024, FRANCISCO AGUILAR filed a *Reply in Support of Motion to Intervene as Respondent*. On July 25, 2024, the Court entered its *Order Granting Motion to Intervene as Respondent*.

On July 15, 2024, Respondent CARRIE-ANN BURGESS, by and through her counsel Washoe County District Attorney Christopher J. Hicks and Deputy District Attorney Elizabeth Hickman, filed a *Motion to Dismiss Petition for Writ of Mandamus* (hereinafter "*MTD*"). On July 22, 2024, RISE ACTION FUND, the INSTITUTE FOR PROGRESSIVE NEVADA, and the NEVADA ALLIANCE FOR RETIRED AMERICANS filed a *Brief of Amici Curiae in Support of Respondent's Motion to Dismiss Petition for Writ of Mandamus*. On July 25, 2024, KRAUS & PILF filed a *Response in Opposition to Respondent's Motion to Dismiss*. On August 1, 2024, BURGESS filed a *Reply in Support of Motion to Dismiss Petition for Writ of Mandamus*. Thereafter, the matter was submitted to the Court for its consideration.

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[1] The Court did allow leave to RISE ACTION FUND, the INSTITUTE FOR PROGRESSIVE NEVADA, and the NEVADA ALLIANCE FOR RETIRED AMERICANS to file an *amici curiae* brief.

The Court begins by noting that the *MTD* is brought as a NRCP 12(b)(5) Motion to Dismiss for failure to state a claim. The Court further notes that the instant matter centers around a Petition for Writ of Mandamus. As such, the Court will assess if a NRCP 12(b)(5) Motion to Dismiss is applicable towards a Petition for Writ of Mandamus.

NRS 34.300 states the following: "[e]xcept as otherwise provided in NRS 34.150 to 34.290, inclusive, the provisions of NRS and Nevada Rules of Civil Procedure relative to civil actions in the district court are applicable to and constitute the rules of practice in the proceedings mentioned in NRS 34.150 to 34.290, inclusive." However, just because NRS 34.300 makes the Nevada Rules of Civil Procedure applicable to the instant matter, it is possible that a NRCP 12(b)(5) Motion to Dismiss is still inapplicable in the instant matter.

With this in mind, NRCP 12(b)(5) states the following: [e]very defense to a claim for relief in any **pleading** must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . . (5) failure to state a claim upon which relief can be granted". (**emphasis added).** NRCP 7 states the following: "[o]nly these **pleadings** are allowed: (1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a third-party complaint; (6) an answer to a third-party complaint; and (7) if the court orders one, a reply to an answer. (**emphasis added**).

Here, as noted above, the instant matter centers around a Petition for Writ of Mandamus. As highlighted *supra*, NRCP 7 contains an enumerated list of documents that are pleadings. A writ of mandamus is not found within the enumerated list of documents set forth in NRCP 7. The Court notes that under the negative-implication canon, "the expression of one thing implies the exclusion of others." Sunrise Hosp. & Med. Ctr., LLC v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark, 544 P.3d 241, 246 (Nev. 2024). Applying the negative-implication canon to NRCP 7, the Court finds that only the documents contained within the NRCP 7's enumerated list constitute a pleading. Given that a Petition for Writ of Mandamus is not contained within the NRCP 7's enumerated list, the Court finds that a Petition for Writ of Mandamus does not constitute a pleading.

Next, the Court reiterates that NRCP 12(b) pertains to defenses for "a claim for relief in any **pleading**. . . .". (**emphasis added**). Also, when analyzing a Motion to Dismiss pursuant to NRCP 12(b)(5), the Court "must construe the **pleading** liberally and draw every fair intendment in favor of the [non-moving party]." Vacation Village, Inc. v. Hitachi America, Ltd., 110 Nev. 481,484 (1994). Moreover, NRCP 12(d) states, in pertinent part, the following: "[i]f, on a motion under **Rule 12(b)(5)** or 12(c), matters outside the **pleadings** are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." (**emphasis added**).

Hence, the Court finds that a NRCP 12(b)(5) Motion to Dismiss is only an available avenue of dismissal in connection to a pleading. The well-established body of caselaw concerning NRCP 12(b)(5) Motions to Dismiss explicitly focuses on pleadings – as demonstrated above. Moreover, applying the NRCP 12(b)(5) Motion to Dismiss standard to a Petition for Writ of Mandamus would provide for an absurd result. For example, here, the Court would be required to construe the *Petition* liberally when deciding the instant motion. However, if the Court did not find it appropriate to dismiss the *Petition*, the Court would later be required to analyze the *Petition* again; however, it would no longer be required to liberally construe it. Clearly, such an action would be the antithesis of securing "the just, speedy, and inexpensive determination of [this] action." NRCP 1.

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In light of the foregoing considerations, the Court finds that although the Nevada Rules of Civil Procedure are applicable in the instant matter, a NRCP 12(b)(5) Motion to Dismiss is not an available avenue for dismissal of a Petition for Writ of Mandamus. As such, the Court is unable to consider the instant motion.

Based on the foregoing and good cause appearing,

IT IS HEREBY ORDERED that CARRIE-ANN BURGESS' *Motion to Dismiss Petition for Writ of Mandamus* is **DENIED**.

DATED this 20 day of August, 2024.

Connie J. Steinheimer

DISTRICT JUDGE

CERTIFICATE OF SERVICE

CASE NO. CV24-01051

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 20 day of August, 2024, I electronically filed the **ORDER DENYING MOTION TO DISMISS PETITION FOR WRIT OF MANDAMUS** with the Clerk of the Court by using the ECF system.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

Personal delivery to the following: [NONE]

Electronically filed with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

DEVIN A. OLIVER, ESQ. for FRANCISCO V. AGUILAR, SECRETARY OF STATE

LAENA ST-JULES, ESQ. for FRANCISCO V. AGUILAR, SECRETARY OF STATE

ELIZABETH HICKMAN, ESQ. for CARRIE-ANN BURGESS

DAVID C. O'MARA, ESQ. for PUBLIC INTEREST LEGAL FOUNDATION, FREDERICK H KRAUS

BRADLEY SCHRAGER, ESQ.

Deposited in the Washoe County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada:

RICHARD A. MEDINA, ESQ.

KAYLAN HUGHES LYTLE-PHILLIPS, ESQ. for PUBLIC INTEREST LEGAL FOUNDATION, FREDERICK H KRAUS

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