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**IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE**

FREDERICK KRAUS, PUBLIC
INTEREST LEGAL FOUNDATION,

Petitioners,

v.

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

Respondent,

Case No.: CV24-01051

Dept. No.: 4

**RESPONSE IN OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS**

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1 Mr. Kraus and the Public Interest Legal Foundation (“Petitioners”) respond to the
2 Respondent’s Motion to Dismiss, and request denial of her motion.

3 INTRODUCTION

4 Petitioners gave Respondent forty-eight locations that Petitioners believed to be commercial
5 addresses on Nevada’s voter rolls in Washoe County. Pet. Ex. A. The Foundation did not seek to
6 have any registrant removed but, rather, for the Respondent to examine the problems with the
7 addresses as Nevada law requires *actual* residences be used. *See* NRS 293.486(1). The
8 Foundation’s data is reasonable, reliable, and based on data maintained by the Respondent.
9 Respondent failed to examine the forty-eight problematic addresses identified in the Petition.

10 Respondent asserts three theories in her motion to dismiss: (I) that Petitioners failed to
11 follow the process for challenging voter registrations; (II) that mandamus is not permitted for
12 discretionary acts, and (III) that Petitioners’ data is not reasonable or reliable. Ironically, in seeking
13 to support her motion to dismiss the Petitioners’ request for her to look into a set of addresses,
14 Respondent examined a small portion of the addresses presented in the Petition. Alarming, even
15 in just this small sample, Respondent admits that she sent ballots to individuals at two addresses
16 and the ballots were both returned as undeliverable. Mot. to Dismiss 9:1, 14.

17 Respondent’s Motion should be denied. First, the Motion is based on the incorrect premise
18 that Petitioners seek to *challenge* and/or remove specific voters. Petitioners have been clear: they
19 seek for Respondent to review the validity of *addresses*, not *registrants*. The various state and
20 federal laws Respondent raises regarding the removal of registrants are not germane to Petitioners’
21 request.

22 Second, Respondent purports that mandamus actions are not permitted for discretionary
23 acts. This is flat wrong. The Nevada Supreme Court has held that “[a] writ of mandamus is available
24 to compel the performance of an act that the law requires as a duty resulting from an office, trust,
25 or station *or to control an arbitrary or capricious exercise of discretion.*” *Int’l Game Tech., Inc. v.*
26 *Second Jud. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (Nev. 2008) (emphasis added.)

27 Finally, Respondent characterizes the Petitioners’ data as “not reasonable and reliable.”
28 Mot. to Dismiss 2:15. But the Petitioners’ data consists of addresses pulled directly from Nevada’s

1 own statewide voter list. Further, Respondent’s selective review of ten of the addresses, including
2 recently returned ballots as undeliverable, demonstrate the reliability of Petitioners’ data. Whether
3 a commercial address *is* a commercial address and whether a registrant lives or does not live at a
4 commercial address is not a complex question subject to legitimate fears of want of “reliability.”

5 STANDARD OF REVIEW

6 “A claim should be dismissed for failure to state a claim ‘*only* if it appears beyond a doubt
7 that the [nonmoving party] could prove no set of facts, which, if true, would entitle it to relief,’ . .
8 .” *Freeman Expositions, LLC v. Eighth Jud. Dist. Ct. in and for Cnty. of Clark*, 520 P.3d 803, (Nev.
9 2022) (citing Nev. R. Civ. P. 12(b)(5)) (emphasis added.)

10 The Court has discretion to issue a writ of mandamus relating to the performance of an
11 official duty. *See* NRS 34.160. The Nevada Supreme Court has held that “[a] writ of mandamus is
12 available to compel the performance of an act that the law requires as a duty resulting from an
13 office, trust, or station or to control an arbitrary or capricious exercise of discretion.” *Int’l Game*
14 *Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (Nev. 2008).

15 ARGUMENT

16 I. Petitioners Sought Review of Addresses, not Challenges of Registrants.

17 This case has never involved challenges to voters. The relief Petitioners have requested is
18 for the Washoe County Interim Registrar of Voters to examine the forty-eight facially problematic
19 commercial addresses identified in the Petition. *See* Pet. Ex. A. Respondent contends that
20 “Petitioners do not follow, or even acknowledge, the specific statutory procedures in place in
21 Nevada law allowing a person to challenge another person’s right to vote based on the registered
22 voter’s residence.” Mot. to Dismiss 2:7-9. True enough. Petitioners do not follow those provisions
23 because they do not seek any relief remotely connected to them.

24 Petitioners have identified forty-eight commercial addresses in Washoe County from the
25 state’s own voter roll. *See* Pet. Ex. A. The resulting list sent to Respondent included dozens of
26 addresses where it would be physically impossible for someone to reside in, contrary to what is
27 required by NRS 293.486(1). Indeed, the Foundation determined, independently, that the registrant
28 is not possibly residing at the location. Under Nevada law, “for the purposes of preregistering or

1 registering to vote, the address at which the person actually resides is the street address assigned to
2 the location at which the person actually resides.” NRS 293.486(1). *See also* Pet. Ex. A. Petitioners
3 identified and highlighted those addresses for Respondent, in hopes that such errors could be
4 corrected. Correction of errors is in Respondent’s best interest as well. *See* Face the State: Cari-
5 Ann Burgess, Part One, 2 NEWS KVTN (Apr. 20, 2024) at 1:19
6 [https://www.2news.com/video/face-the-state-cari-ann-burgess-part-one/video_27ecl1a13-3595-](https://www.2news.com/video/face-the-state-cari-ann-burgess-part-one/video_27ecl1a13-3595-5e9e-89ee-024dc960d923.html)
7 [5e9e-89ee-024dc960d923.html](https://www.2news.com/video/face-the-state-cari-ann-burgess-part-one/video_27ecl1a13-3595-5e9e-89ee-024dc960d923.html). (Respondent Burgess stating “I have a great passion for elections
8 and making sure that they’re done and done right”); Face the State: Cari-Ann Burgess, Part Two, 2
9 NEWS KVTN (Apr. 20, 2024) at 8:24 [https://www.2news.com/video/face-the-state-cari-ann-](https://www.2news.com/video/face-the-state-cari-ann-burgess-part-two/video_62818e05-4677-5520-a02f-889a72557012.html)
10 [burgess-part-two/video_62818e05-4677-5520-a02f-889a72557012.html](https://www.2news.com/video/face-the-state-cari-ann-burgess-part-two/video_62818e05-4677-5520-a02f-889a72557012.html). (Respondent Burgess
11 stating, “Making sure that our voter rolls are clean is something that is very important to me.”)

12 Petitioners sent a letter to Respondent on April 11, 2024, including all addresses in question
13 alongside photographic evidence of the addresses as provided by Respondent’s own voter roll. Pet.
14 Ex. A. Under Nevada law, part of Respondent’s authority as county clerk is to “determine whether
15 a registered voter’s current residence is other than that indicated on the voter’s application to
16 register to vote.” NRS 293.530. Respondent’s office, after initially indicating that it was going to
17 review the addresses provided, arbitrarily chose not to do so, citing provisions of law that are not
18 relevant to the Petitioners’ request. *See* Pet. Ex. B.

19 Respondent was put on notice of forty-eight addresses in her county that appeared to be
20 commercial buildings or completely empty lots, she arbitrarily ignored such evidence and chose
21 not to use authority as the registrar of voters to determine whether the residences are accurate. The
22 process for challenging the residence of a voter is not in question today, and therefore the statutory
23 analysis of NRS 293.535 is unnecessary. Respondent abused her discretionary power when she was
24 put on notice of flagrant commercial addresses on her voter registration roll and chose to ignore
25 such evidence.

26 Because the Petitioners do not challenge any person’s voter registration, the specific
27 statutory provisions Respondent cites do not align with the actual relief sought, and therefore are
28 inapplicable, and do not support the granting of Respondent’s Motion.

1 **II. Respondent’s Failure to Act Was Arbitrary and Capricious.**

2 Respondent argues that a mandamus may not be used to compel a discretionary act. Mot. to
3 Dismiss 2:24. However, the Nevada Supreme Court has explicitly stated that a “writ of mandamus
4 is available to... control an arbitrary or capricious exercise of discretion.” *Int’l Game Tech., Inc. v.*
5 *Second Jud.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (Nev. 2008). “An arbitrary or capricious exercise
6 of discretion is one ‘founded on prejudice or preference rather than on reason’ or ‘contrary to the
7 evidence or established rules of law.’” *State v. Eighth Jud. Dist. Ct.*, 127 Nev. 927, 932 (Nev. 2011)
8 (quoting Black’s Law Dictionary).

9 Respondent recently stated in an interview that “we [Washoe County Registrar of Voters]
10 are doing our due diligence in making sure the voter rolls are clean.” Face the State: Cari-Ann
11 Burgess, Part Two, 2 NEWS KVTN (Apr. 20, 2024) at 6:28, [https://www.2news.com/video/face-](https://www.2news.com/video/face-the-state-cari-ann-burgess-part-two/video_62818e05-4677-5520-a02f-889a72557012.html)
12 [the-state-cari-ann-burgess-part-two/video_62818e05-4677-5520-a02f-889a72557012.html](https://www.2news.com/video/face-the-state-cari-ann-burgess-part-two/video_62818e05-4677-5520-a02f-889a72557012.html). When
13 asked about making sure the voter rolls were clean, concerning issues such as deceased voters or
14 people who have moved out of state on the voter rolls, Respondent stated, “Oh absolutely, we work
15 on those all the time.” Face the State: Cari-Ann Burgess, Part Two, 2 NEWS KVTN (Apr. 20, 2024)
16 at 7:30, [https://www.2news.com/video/face-the-state-cari-ann-burgess-part-two/video_62818e05-](https://www.2news.com/video/face-the-state-cari-ann-burgess-part-two/video_62818e05-4677-5520-a02f-889a72557012.html)
17 [4677-5520-a02f-889a72557012.html](https://www.2news.com/video/face-the-state-cari-ann-burgess-part-two/video_62818e05-4677-5520-a02f-889a72557012.html).

18 Respondent’s exercise of discretion here is arbitrary because it is founded on preference
19 rather than reason. *See State v. Eighth Jud. Dist. Ct.*, 127 Nev. at 932. Respondent chose to recast
20 the Petitioners’ request as one relating to challenging or removing voters, rather than the actual
21 request to examine known commercial addresses. Respondent arbitrarily relied upon a prohibition
22 on removing registrants within 90 days of an election as a reason to not examine the addresses
23 Petitioners presented. *See* Pet. Ex. B. No removal was sought and, therefore, no prohibition on
24 removal could serve as a reasonable basis for inaction.

25 Respondent used her discretion as Washoe County Interim Registrar of Voters to refuse to,
26 at the least, investigate or even examine, forty-eight addresses presumed to be commercial use,
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1 some of which included completely vacant lots¹, government offices², and U.S. Post Office
2 Approved Postal Provider.³ See Pet. Ex. A. Ignoring even one flagrant and glaring example of a
3 commercial address on the voter roll is discretion founded on preference when Respondent has
4 conceded that one of her duties is to conduct list maintenance. See Face the State: Cari-Ann
5 Burgess, Part Two, 2 NEWS KVTN (Apr. 20, 2024) at 6:40; 7:30
6 [https://www.2news.com/video/face-the-state-cari-ann-burgess-part-two/video_62818e05-4677-](https://www.2news.com/video/face-the-state-cari-ann-burgess-part-two/video_62818e05-4677-5520-a02f-889a72557012.html)
7 [5520-a02f-889a72557012.html](https://www.2news.com/video/face-the-state-cari-ann-burgess-part-two/video_62818e05-4677-5520-a02f-889a72557012.html).

8 This Court is equipped to issue a mandamus in the face of arbitrary or capricious discretion.
9 “[W]rits of mandamus serve ‘to control an arbitrary or capricious exercise of discretion’” *Clark*
10 *Cnty. Dep’t of Fam. Servs. v. Eighth Jud. Dist. Ct. (In re J.B.)*, 550 P.3d 333 (Nev. 2024) (quoting
11 *Div. of Child & Fam. Servs. v. Eighth Jud. Dist. Ct.*, 92 P.3d 1239, 1942 (Nev. 2004).) Respondent’s
12 inaction amounts to arbitrary exercise of discretion as her discretion is based on preference over
13 reason. See *State v. Eighth Jud. Dist. Ct.*, 127 Nev. at 932. Respondent’s discretion would be based
14 on reason had she taken notice of the forty-eight addresses presented to her as potentially
15 problematic and investigated them as she claims her staff already does for other concerns on the
16 voter roll. There is no basis founded in reason to ignore conspicuous errors in the Respondent’s
17 own voter roll.

18 **III. The Data Submitted Is Reasonable and Reliable**

19 The Respondent claims that the data Petitioners submitted is not reasonable or reliable. But
20 the data Petitioners provided is the Respondent’s *own data*. The Petitioners submitted a list of
21 addresses taken directly from the state’s voter roll. To assist the Respondent, the Petitioners also
22 provided pictures they had taken along with their notes about each location. But, at the heart,
23 Petitioners simply asked the Respondent to review her own voter roll. To now say that the data
24 provided was not reasonable or reliable calls into question whether reliance on Respondent’s own
25 voter roll is reasonable or reliable.

26 Further, to support the Motion to Dismiss, Respondent did review *some* of the addresses

27 ¹ Petition at 11.

28 ² Petition at 37-38.

³ Petition at 12.

1 provided by Petitioners. Yet, even as to the addresses the Respondent chose to look into, her review
2 only amplified the need for a complete review of the list.

3 Each address the Respondent reviewed is home to at least one—and sometimes more—
4 registered voter. In other words, Respondent confirmed that the addresses provided are present on
5 the current voter roll. Respondent contends that some addresses are used by voters that are now
6 inactive and, therefore, “it is not reasonable or reliable to utilize this information to take action to
7 correct the list...” Mot. to Dismiss at 11:20-21. The Petitioners never claimed to be limiting their
8 research to active registrants. As is stated above, the Petitioners are focused on proper addresses,
9 not specific registrants. But even more fundamentally, ensuring the accuracy of voter rolls is not
10 limited to those voters who are presently in active status. Nevertheless, that the Petitioners’ data is
11 reliable is confirmed by Respondent’s own mini investigation.

12 CONCLUSION

13 Respondent mischaracterizes the relief sought by Petitioners. Consequently, the Motion to
14 Dismiss relies on statutory provisions that are inapplicable here. Respondent is ignoring potentially
15 improper addresses while conceding her office is responsible for list maintenance. That is the
16 essence of an arbitrary and capricious failure to act. Petitioners provided reliable data directly from
17 the state’s voter roll. The data is not subject to credible challenge in so far as they are
18 unquestionably commercial addresses where registrants are improperly registered, and without
19 injunctive relief here, the Respondent will continue to send ballots to places where nobody actually
20 resides. This Court should deny the Motion to dismiss.

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CERTIFICATE OF SERVICE

I hereby certify on this 29th day of July, 2024, a true and correct copy of **RESPONSE IN OPPOSITION TO MOTION TO INTERVENE AS RESPONDENT** was served by electronically filing with the Clerk of the Court using the Odyssey eFileNV system and serving all parties with an email-address on record, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R.
Dated: July 29, 2024

By: /s/ David C. O'Mara
David C. O'Mara, Esq.,
Counsel for Petitioners