

August 12, 2022

Mark Wlaschin
Office of the Secretary of State, Elections Division
101 North Carson Street, Suite 3
Carson City, Nevada 89701
NVElect@sos.nv.gov

Re: Proposed Amendments to Chapters 293 and 293C of the Nevada Administrative Code

Dear Mr. Wlaschin:

On behalf of the Brennan Center for Justice at NYU School of Law, All Voting is Local, ACLU of Nevada, and Silver State Voices,¹ we write to provide comment opposing the proposed amendments to Chapters 293 and 293C of the Nevada Administrative Code, made available by the Office of the Secretary of State on July 26, 2022.

These proposed regulations come as a growing number of Nevada counties consider adopting hand count procedures for all ballots.² Their desired departure from mechanical recording devices is being driven by unfounded claims about the unreliability of electronic tabulators currently in use, the devices' vulnerability to hackers, and conspiracy theories about election fraud during the 2020 presidential election.³ Not only is there strong evidence rebutting these claims and availability of well-tested means of verifying the accuracy of these tabulators,⁴ hand counting thousands of votes

¹ The Brennan Center for Justice is a nonpartisan law and policy institute that works to reform, revitalize — and when necessary — defend our country's systems of democracy and justice. This comment does not reflect the views, if any, of the NYU School of Law.

All Voting is Local, a nonpartisan organization, exists to expose and dismantle threats to voter freedom in order to make voting safe, fair, and accessible, to build a democracy for us all. For more information about All Voting is Local, visit <https://allvotingislocal.org> and follow us on Twitter @votingislocal.

ACLU of Nevada is a non-partisan organization that works to defend and advance the civil liberties and civil rights of all Nevadans, including assuring that all eligible Nevada voters have the opportunity to cast their vote and that their vote is counted accurately.

Silver State Voices (SSV) was founded as a civic engagement coordination hub among progressive 501(c)3 organizations in Nevada that work to address overwhelming disparities in our democracy among historically underrepresented and marginalized communities. SSV believes that democracy works best and its outcomes are most just when the voices of all Nevadans are heard.

² Sean Golonka, "Nye County's New Top Election Official Wants to Hand Count Ballots, Distrusts Voting Machines," Nevada Independent (August 3, 2022), <https://thenevadaindependent.com/article/nye-countys-new-top-election-official-wants-to-hand-count-ballots-distrusts-voting-machines>.

³ Board of County Commissioners Regular Meeting, Nye County Board of Election Commissioners, https://nyecounty.granicus.com/MediaPlayer.php?view_id=4&clip_id=1653 (last visited Aug. 9, 2022).

⁴ See Nevada Secretary of State, "Facts vs. Myths: Nevada 2020 Post-General Election," <https://www.nvsos.gov/sos/home/showpublisheddocument?id=9191> ("All voting machines undergo extensive pre-election and post-election examinations to ensure they function as expected. The NV Gaming Control Board tests and certifies our systems. The post-election audits and recounts conducted in Nevada confirmed that the machines accurately tabulated the votes cast.")

containing multiple contests relies exclusively on humans who are subject to fallibility and limitations, which experts have warned may lead to a less accurate outcome.⁵

The use of a hand count as the primary method of counting Nevada’s ballots and determining the results of an election diminishes the accuracy, efficiency, and security of elections, and violates Nevada law, as well as voter protections enshrined in Nevada’s state constitution. And while the proposed regulations are an admirable attempt to ensure higher standards for a hand count, the regulations are not enough to address the underlying accuracy issues and remediate the legal deficiencies of hand count processes.

Therefore, we recommend that the Secretary of State issue regulations prohibiting the use of hand counts as the primary method of counting ballots and determining election results where this process cannot guarantee the accuracy and timeliness that state law requires.

Hand Count Procedures Fail to Meet Minimum Accuracy Standards Set by State Law.

Nevada state law permits the board of county commissioners of any county or the city council to purchase and adopt for use at elections any mechanical voting system and mechanical recording device.⁶ They may adopt a mechanical voting system or mechanical recording device for some of the precincts or districts in the same county or city, while the remainder of the precincts or districts in that county or city use different recording devices.⁷ However, such authority does not diminish the mandate under Nevada law that the Secretary of State and each county and city clerk ensure that every voting system used in the state of Nevada meets or exceeds the standards for voting systems established by the United States Election Assistance Commission, including, without limitation, the error rate standards.⁸ These baseline voting system requirements assure protection of privacy, security, and accuracy of every ballot, and state law directs the Secretary of State and every county clerk to uphold these standards.

Under the Help America Vote Act, the U.S. Election Assistance Commission (EAC) adopts voluntary voting system guidelines (VVSG) that describe basic functionality, accessibility, and security capabilities for voting systems, and provides for testing of voting equipment to ensure that certified machines meet these guidelines.⁹ As part of this program, tabulators are tested against a set error rate to ensure that the machines accurately record and process marks that a voter makes on a ballot (either by hand or using a voting machine). Specifically, voting machines that are tested

⁵ Amber Phillips, “Why Hand-Counting Ballots Is Such a Bad Idea,” Washington Post (April 8, 2022), <https://www.washingtonpost.com/politics/2022/04/08/hand-count-election-explained/>; Verified Voting, “Election Officials Need a Helping Hand, Not Hand Count Legislation” (April 7, 2022), <https://verifiedvoting.org/blog-hand-counts-4-7-22/>; Rachel Orey, Christopher Thomas and Grace Gordon, “How Ballot Tabulators Improve Elections,” Bipartisan Policy Center (April 25, 2022), <https://bipartisanpolicy.org/explainer/how-ballot-tabulators-improve-elections/>.

⁶ Nev. Rev. Stat. § 293B.105.

⁷ Nev. Rev. Stat. § 293B.110.

⁸ Nev. Rev. Stat. § 293.2696(5).

⁹ U.S. Election Assistance Commission, Requirements for the Voluntary Voting System Guidelines 2.0 (February 10, 2021), https://www.eac.gov/sites/default/files/TestingCertification/Voluntary_Voting_System_Guidelines_Version_2_0.pdf; Help America Vote Act, 52 U.S.C. § 20922.

under the current VVSG must “accurately interpret at least 1,670,000” ballot marks consecutively without any error to be certified as in compliance.¹⁰ Although the EAC’s guidelines are not by themselves binding, Nevada state law incorporates these standards and requires all voting systems used in the state to meet or exceed them, including the EAC’s minimum acceptable error rate.

If a Nevada county were to stop using electronic voting equipment that meets these standards to count ballots, any replacement process — even a hand count process — would need to similarly satisfy minimum standards for error rates. The state statute incorporating EAC standards applies to all “voting systems,” a term that is broader than the more specific term “mechanical voting system” used elsewhere in state law. This latter term is defined in Nevada law as “a system of voting whereby a voter may cast a vote: 1. On a device which mechanically or electronically compiles a total of the number of votes cast for each candidate and for or against each measure voted on; or 2. By marking a paper ballot which is subsequently counted on an electronic tabulator, counting device or computer.”¹¹ By using the broader “voting systems” term to set minimum baseline standards for accuracy, security, and privacy, Nevada law protects the election system regardless of the exact processes by which voters cast their ballot and have their vote counted.

But studies have repeatedly found that hand count voting procedures produce more errors than vote counts using electronic equipment.¹² And these results are not surprising. As a report from the Bipartisan Policy Center put it, “[h]umans are notoriously poor at completing rote, repetitive tasks. . . . Tabulators, by contrast, are designed intentionally for this sort of repetition.”¹³ In that same report, an election official noted to the Bipartisan Policy Center “that she had four sets of workers hand count the same ballots only to receive four different results.”¹⁴

This is not to say that hand counting has no place in a secure and accurate election process. Post-election audits that require election workers to count a sample of ballots by hand are an efficient and effective way to verify the accuracy of electronic voting equipment and build trust in the

¹⁰ U.S. Election Assistance Commission, Voluntary Voting System Guidelines Version 2.0, Test Assertions Version 1.1, 4,

<https://www.eac.gov/sites/default/files/TestingCertification/VVSG%202.0%20Test%20Assertions%20v1.1.pdf>.

Previous versions of the VVSG set a similar error rate. See Voluntary Voting System Guidelines 1.0, National Certification Testing Guidelines, 126,

https://www.eac.gov/sites/default/files/eac_assets/1/28/VVSG.1.0_VOL_2.508compliant.FINAL.pdf.

¹¹ Nev. Rev. Stat. § 293B.033.

¹² See, e.g., Stephen Ansolabehere et al., *Learning from Recounts*, 17 Election Law Journal 100 (2018), <https://www.liebertpub.com/doi/10.1089/elj.2017.0440> (concluding that “Scanning paper ballots produces a more accurate election night count than hand counting”); Stephen N. Goggin, et al., *Post-Election Auditing: Effects of Procedure and Ballot Type on Manual Counting Accuracy, Efficiency, and Auditor Satisfaction and Confidence*, 11 Election L.J. 36 (2012), <https://www.liebertpub.com/doi/10.1089/elj.2010.0098>; Stephen N. Goggin and Michael D. Byrne, *An Examination of the Auditability of Voter Verified Paper Audit Trail (“VVPAT”) Ballots*, ACCURATE (2007), <https://accurate-voting.rice.edu/wp-content/uploads/2007/08/evt07-goggin.pdf> (finding hand counting audits conducted by a highly educated group of university students resulted in only 57.5% of participants’ counts providing the correct election results).

¹³ Rachel Orey, Christopher Thomas and Grace Gordon, “How Ballot Tabulators Improve Elections,” Bipartisan Policy Center (April 25, 2022), <https://bipartisanpolicy.org/explainer/how-ballot-tabulators-improve-elections/>.

¹⁴ Id.

election process.¹⁵ Hand count procedures can also be appropriate for a recount of a particularly close race. But each of these scenarios has something in common: election workers reviewing ballots can focus on only one race at a time, allowing for processes that help workers track vote totals, including using the physical placement of ballots into stacks as an aide. By contrast, for the 2022 general election workers will need to count voter choices for dozens of races on every ballot.

In jurisdictions with very few registered voters, election workers may be able to produce a final count that is comparably accurate to what a tabulator would produce and in a similar timeframe. Some jurisdictions across the country already do so. But according to data from Verified Voting, just 0.6 percent of registered voters live in jurisdictions where ballots are hand counted.¹⁶ Most of these are small towns with fewer than 1,000 voters. By-and-large, jurisdictions larger than this have simply found hand counts far too inaccurate, costly, and time-consuming compared to machine counts.¹⁷

Nevada state law wisely protects every voter's ballot by requiring every voting system in the state to meet basic standards for accuracy. The Secretary of State and county clerks should not allow the transition to processes that violate this statute and fail to ensure similar levels of accuracy.

Hand Count Procedures Violate Nevada Voters' Constitutional Right to Have Their Vote Accurately Counted and Their Elections Fairly Resolved.

For similar reasons, counties that adopt hand count procedures as the primary method of counting ballots may also violate voting rights protected by the state constitution, including the right "to a uniform, statewide standard for counting and recounting all votes *accurately* as provided by law."¹⁸ The difficulty of reaching sufficiently *accurate* vote counts in all but the smallest jurisdictions with hand counting as the primary method threatens voters' rights under this clause.

But diminished accuracy is not the only way that constitutionally-protected voting rights may be impacted. Because hand counts take far longer to complete than machine counts — particularly when workers need to check results multiple times after inconsistencies arise — these processes may lead to missed certification deadlines or insufficient time to fully resolve audits, recounts, and post-election disputes. This possibility became apparent earlier this year when Esmerelda County nearly became the first county to ever miss a certification deadline because of the seven hours it took to count just 317 ballots.¹⁹ In larger counties and in higher turnout elections, it may not be achievable to complete a full and accurate hand count within the post-election window defined by

¹⁵ Christopher Deluzio, "A Smart and Effective Way to Safeguard Elections," Brennan Center for Justice (July 25, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/smart-and-effective-way-safeguard-elections>.

¹⁶ Verified Voting, "Election Officials Need a Helping Hand, Not Hand Count Legislation" (April 7, 2022), <https://verifiedvoting.org/blog-hand-counts-4-7-22/>.

¹⁷ Nye County, where there has been a strong push for hand counting all ballots, has an estimated population of 53,450 residents. United States Census Bureau, <https://www.census.gov/quickfacts/nyecountynevada> (last visited Aug. 9, 2022).

¹⁸ NV Const. Art. 2, § 1A(10) (emphasis added).

¹⁹ Ken Ritter, Gabe Stern and Scott Sonner, "Last Nevada County Approves Primary Results After Hand Count," AP (June 25, 2022), <https://apnews.com/article/2022-midterm-elections-new-mexico-nevada-voting-presidential-652df50bc2b535d2303ddd4c5fda6ea5>.

state law,²⁰ violating the state constitution’s right to “have complaints about elections and election contests resolved fairly, accurately and efficiently as provided by law.”²¹

While the Nevada legislature granted power to boards of county commissioners to determine a county’s use and purchase of any mechanical voting system and mechanical recording device, this authority is limited by the Nevada Constitution. The Nevada Constitution is the supreme law of Nevada, which controls any conflicting statutory provisions. Here, the board of commissioners’ adoption of hand counting for all ballots conflicts with the Nevada Constitution unequivocally outlining rights of voters to a “uniform statewide standard for counting and recounting all votes accurately as provided by law.” As such, such action is unconstitutional and cannot be permitted.

The Secretary of State Should Issue Regulations Prohibiting the Use of Hand Counts as the Primary Method of Counting Ballots.

The Secretary of State serves as the Chief Officer of Elections and is responsible for the execution and enforcement of state and federal law relating to Nevada’s elections.²² As Chief Officer, the Secretary of State retains broad power to adopt regulations as necessary to carry out the provisions of state and federal law related to elections.²³ This includes the mandate that every voting system used in the state of Nevada meet or exceed the EAC’s standards for voting systems,²⁴ Nevadans’ rights under the Nevada Constitution to a uniform, statewide standard for counting all votes accurately,²⁵ and deadlines for certification that state law sets out.²⁶ Additionally, the Legislature granted the Secretary of State plenary power to adopt regulations for the conduct of elections, so long as they are not inconsistent with state law.²⁷

Because of the violations of state law and the Nevada Constitution raised in this comment, the Secretary of State should issue regulations prohibiting the use of hand counts as the primary method of counting ballots and determining election results, permitting these counting procedures only as a secondary measure to verify the accuracy of machine counts or to adjudicate ballots that electronic tabulators cannot reliably read. Alternatively, the Secretary should prohibit hand count procedures for the vast majority of Nevada counties that have too many voters to arrive at an accurate and timely count in a high turnout election.

Nevada’s voters and state legislatures wisely adopted standards into state law to guarantee a fair, accurate, and secure election system. Counties should not be permitted to depart from these standards without a compelling justification that relies on more than unfounded speculation.

²⁰ Nev. Rev. Stat. § 293.387; 395.

²¹ NV Const. Art. 2, § 1A(10).

²² See Nev. Rev. Stat. § 293.124.

²³ Id.

²⁴ Nev. Rev. Stat. § 293.2696(5).

²⁵ NV Const. Art. 2, § 1A(10).

²⁶ Nev. Rev. Stat. § 293.387; 395.

²⁷ See Nev. Rev. Stat. § 293.247.

Sincerely,

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