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M E M O R A N D U M

TO: WASHOE COUNTY MANAGER'S OFFICE

FROM: NATHAN J. EDWARDS
Assistant District Attorney, Civil Division

SUBJECT: Legal Analysis of Proposed Election Integrity Resolution 2022

DATE: March 16, 2022

INTRODUCTION

As requested and in accordance with NRS 252.160 and 252.170, the District Attorney's Office has done a legal review of Commissioner Herman's proposed resolution on election integrity for inclusion in the staff report on the item to be heard at the March 22, 2022, county commission meeting. This review is divided into three parts. First, it addresses the overarching issue of legal authority to regulate elections, which serves as a guide for the analysis of individual components of the proposed resolution. Second, it uses the framework developed in the first part to address specific provisions of the proposed resolution itself. Third, it concludes with a summary of the review.

As with any legal analysis, it is not possible to predict with certainty how any future challenge in court may end up being decided. Indeed, as discussed in further detail below, the very "Dillon's Rule" framework applicable to an analysis of local government authority is itself built around a set of negative inferences and related presumptions that at best provide generalized direction rather than concrete or absolute conclusions. All that said, we have nonetheless endeavored to identify major issues involved with the proposed resolution with the ultimate goal of providing useful guidance to the county commission in its decision-making process.

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PART 1: DILLON'S RULE FRAMEWORK FOR ANALYZING LOCAL GOVERNMENT AUTHORITY

The framework for analyzing local government authority in virtually any arena must begin with the nature of the relationship between the local government in question and the state that created it. Nevada formally became a state by Proclamation of President Abraham Lincoln on October 31, 1864. See 13 United States Statutes at Large (1864), pp. 749-750. This proclamation followed the enactment of an earlier statute by Congress in March of that same year that empowered the inhabitants of the Territory of Nevada to adopt a state constitution based on certain parameters in order to achieve admission to the Union. See 13 United States Statutes at Large (1864), pp. 30-32. Nevadans did so and thereafter Nevada earned statehood on the day that Nevadans celebrate as Nevada Day.

Like all other states, Nevada's powers are based on its own Constitution, which in turn derives its authority from the United States Constitution and other federal laws. See U.S. Const. Art. VI; see also Nevada Const. Art. 1, sec. 2. Consistent with the tripartite model of representative (aka "republican") democracy created in the U.S. Constitution, Nevada also has divided its system of state government amongst a legislative, executive, and judicial branch. Nevada Const. Art. 3. Each branch is vested with specified powers.

Concerning elections, the Nevada Constitution vests a variety of powers expressly in the legislature. Foremost among these is found in Article 2, which deals with the Right of Suffrage. Section 6 of that Article provides as follows: "Provision shall be made by law for the registration of the names of the Electors within the counties of which they may be residents and for the ascertainment by proper proofs of the persons who shall be entitled to the right of suffrage, as hereby established, to preserve the purity of elections, and to regulate the manner of holding and making returns of the same; and the Legislature shall have power by law to prescribe any other or further rules or oaths, as may be deemed necessary, as a test of electoral qualification." For at least the last 112 years, the Nevada Supreme Court has regarded these provisions as "full authority" for the legislature "to pass all necessary legislation for general elections …" Riter v. Douglass, 32 Nev. 400, 109. P. 444, 448 (1910).

Under this authority, the Nevada Legislature has enacted comprehensive laws on elections. The vast majority is found in NRS Title 24. It consists of chapters 293 (elections), 293B (mechanical voting systems or devices), 293C (city elections),

293D (uniform military and overseas absentee voters act), 294A (campaign practices), 295 (certain state and local ballot questions), 298 (presidential electors and elections), 304 (election of United States senators and representatives), and 306 (recall of public officers).

As a key component of these legislative enactments, and consistent with the centralization of those powers at the state level (as opposed to local level), the legislature has named the Nevada Secretary of State (SOS) the "Chief Officer of Elections of this State." NRS 244.124(1). The SOS "is responsible for the execution and enforcement of the provisions of Title 24 of NRS and all other provisions of state and federal law relating to elections in this State." Id. The SOS is further empowered to carry out this mandate in the form of regulations. NRS 244.124(2). Those regulations are codified in the Nevada Administrative Code in the following chapters: 293, 293B, 293C, 293D, 294A, 295, 298, 304, and 306.

Considering the sweeping election powers outlined above, the resolution now proposed for adoption by the county commission to regulate election integrity immediately raises an issue of potential conflict between the state and county. This is because the scope of the county's power to act in any matter is defined by the state, and Washoe County is, after all, a political subdivision of the state. See, e.g., NRS 41.035, 277.100, 354.474. The legislature has adopted a framework for resolving these potential conflicts between the state and the local governmental entities that the state has created. The framework is known as Dillon's Rule, or what we now sometimes refer to as "Modified Dillon's Rule," set forth in NRS 244.137-244.146.

Without going into great detail, Dillon's Rule provides that counties have only the powers expressly granted to them, as well as any that are directly needed to carry out express powers. In case of any doubt over the existence of a power, Dillon's Rule holds that the power is presumed not to exist. It is a strict rule that confines counties to a narrow view of their ability to act, even on matters of local concern.

Because of this strictness, the Nevada legislature in 2015 modified the rule in NRS 244.137. Under the modified rule, the analysis is the same except for so-called "matters of local concern," in which case if there is any doubt over the existence of the power in question, the power is presumed to exist. NRS 244.137(6)(b). Thus the analysis of the proposed election integrity resolution hinges first on whether elections are a "matter of local concern."

NRS 244.143 defines "matter of local concern." To qualify, a matter must pass a three-part test. One, it must primarily affect or impact areas located in the county, or persons who reside, work, visit or are otherwise present in areas located in the county, and must not have a significant effect or impact on areas located in other counties. Two, it must not be within the exclusive jurisdiction of another governmental entity. Three, it must not concern: a state interest that requires statewide uniformity of regulation, the regulation of business activities that are subject to substantial regulation by a federal or state agency, or any other federal or state interest that is committed by the Constitution, statutes or regulations of the United States or this state to federal or state regulation. If a local action transgresses ANY of these three parts, it is not a matter of local concern and therefore any doubts about the existence of the power to take that action mean it is presumed not to exist.

As stated at the outset, this framework rests upon a set of inferences and presumptions. These give generalized guidance. But they do not generally provide concrete answers. Instead, for example, powers that are not expressly granted to local governments are "presumed" either to exist or not depending upon whether they pertain to matters of local concern. Presumptions are not absolute; they can be rebutted. But they do indicate the likelihood of success in a legal challenge on an issue, because they shift the burden to demonstrate otherwise from one side to the other.

Back to Dillon's Rule: as suggested above, the first question is whether election law is a so-called "matter of local concern." It almost certainly is not. There are several reasons. First, while proponents may argue that the county's election system only impacts elections in Washoe County, it seems reasonably clear that it would nonetheless have a significant impact on areas located in other counties, because elections in the county encompass both statewide and federal offices, not just county offices. This is even more pronounced given Washoe County's size in the state as the second-most populous county behind only Clark. Its impact is therefore even greater on other counties in those statewide and federal matters.

Second, it is not entirely clear that elections are not within the exclusive jurisdiction of the legislature and the Secretary of State by virtue of the Nevada Constitution's elections provisions and the delegation of full authority over elections to the SOS. See NRS 293.124. The exceptions carved out for county clerks or registrars of voters scattered throughout Title 24 do more to prove the general rule—i.e., that elections are the province of regulation by the state—than to show any kind of intent in the Constitution or the statutes to create a system of "shared" or "roughly

equal" authority between the state and the counties. The overall scheme indicates, to the contrary, a comprehensive system (Constitutional pronouncements, NINE entire chapters of the NRS, and NINE entire chapters of the Nevada Administrative Code) that is either entirely exclusive in favor of the state, or almost entirely exclusive in favor of the state. See also NRS 244.146(3)(e) (except as specifically authorized by statute, counties shall not "order or conduct an election").

Third, regardless of the first or second parts of the test, it is least likely of all that elections pass the third part of the test: does not concern either a state interest that requires uniformity of regulation or a state or federal interest that is committed by the Constitution, statutes, or regulations to the state. For many of the same reasons already discussed, the scheme in Nevada is organized around and consistent with uniformity, including the centralization of election authority and rule-making power in a single Constitutional officer (SOS). The Nevada Constitution even goes so far as to PROHIBIT the legislature from enacting special or local laws on elections. Article 4, section 20 prohibits the legislature from enacting special or laws "[p]roviding for opening and conducting elections of state, county, or township officers, and designating the places of voting …" This means that only general—aka uniform—laws can be enacted in this field. In other words, elections appear to invoke a state interest that requires uniformity of regulation. And it appears that the state has followed that course in the comprehensiveness of its laws on elections.

Additionally on the third part of the test, it also seems reasonably clear that election law is a state interest that is committed by the Nevada Constitution, statutes, and regulations to the state. The reasoning on this point is the same as indicated in the previous paragraphs. As such, it would not be a matter left to the control of the local governments.

The analysis so far leads to the conclusion that election law is not a "matter of local concern" as defined in NRS 244.143. This alone does not mean that the resolution is invalid. But it does tilt the rest of the analysis under Nevada's "modified" Dillon's Rule. Any doubt over the existence of any of the powers proposed to be exercised by the county in the form of the resolution mean it is presumed those powers do not exist.

PART 2: APPLICATION OF DILLON'S RULE FRAMEWORK TO PROPOSED RESOLUTION

Having laid out the cornerstones of the analytical framework in Part 1, we turn now to an application of that framework to each of the resolution's provisions individually. As this portion of the analysis unfolds, ***it is critical to note that this is not a commentary on the wisdom, quality, or soundness of any proposed items versus what may already be provided for, or not provided for, in Nevada law. Those are policy and/or political decisions that belong to appropriate law makers. The analysis that follows is merely an assessment of the law as it exists in Nevada and as it appears to apply to the 20 numbered items in the proposed resolution.***

With each item, we have indicated our conclusion about its potential validity or invalidity. Items deemed invalid or likely invalid are probably not within the purview of the county commission to consider adopting. Conversely, items deemed valid or likely valid are probably within the purview of the county commission (BCC) to consider adopting. To abbreviate these conclusions, we have placed a bolded designation at the end of the analysis of each of the items of either "**WITHIN THE BCC'S PURVIEW**" or "**NOT WITHIN THE BCC'S PURVIEW**," as the case may be.

It is of paramount importance to keep in mind that just because an item is "within the purview" of the BCC does not mean that the county commission "should" adopt it or "must" adopt it. It simply means there is a legal likelihood that the commission can adopt it if it chooses to do so based on the ordinary types of policy factors that enter into similar decisions, such as cost, feasibility, fairness, benefit to the community, risks, detriments, and the like.

Item 1. This item will be analyzed along with Item 17 below.

Items 2 and 3. There does not appear to be anything in state law that would call into doubt the existence of the power of the county to use its own residents as poll workers. It seems consistent with legitimate goals of proximity for purposes of working shifts, as well as knowledge of and connection to the community in the administration of its election processes.

- **WITHIN THE BCC'S PURVIEW (WASHOE COUNTY RESIDENTS AS POLL WORKERS)**

Item 4. Nor does there appear to be anything in state law that would call into doubt the existence of the power of the county to limit private contributions to the

registrar's office. In fact, the opposite may well be the case. NRS 244.270 specifically empowers the county commission to make decisions about accepting donations.

- **WITHIN THE BCC'S PURVIEW (LIMIT PRIVATE CONTRIBUTIONS)**

Item 5. As formulated, this provision—which calls for "other" measures "to ensure accuracy, reporting, and purity of elections"—does not pose any legal conflicts with state law. It is vague, however, which could lead to conflicts depending on whatever specific measures ended up being implemented under it.

- **WITHIN THE BCC'S PURVIEW (OTHER LEGAL MEASURES)**

Item 6. Likewise, this item—which calls for "quarterly" reporting by the registrar on measures and improvements to the election system's quality and reliability—does not pose any conflicts with state law as formulated.

- **WITHIN THE BCC'S PURVIEW (QUARTERLY REPORTS FROM REGISTRAR)**

Item 7. Stealth paper ballots. It is not clear exactly what is meant by "stealth paper ballots." There has been discussion in correspondence with the county and during public comment that indicate this may refer to a form of carbon paper where the top sheet counts as the official ballot and the sheet underneath is simultaneously impressed with the same information that appears on the top sheet. There has also been discussion of this concept referring to different coloring on ballots or to the use of stealth identifiers such as watermarks similar in style to what is used for currency.

If carbon paper is the intent, there is likely doubt about the existence of the county's power to order it. This is because of NRS 293.274 in conjunction with NRS 293.730. NRS 293.274(1) requires the registrar to allow members of the public to observe voting. But subsection 2 prohibits any member of the public from photographing "the conduct of voting …" While not entirely clear, carbon copying could easily be viewed as a form of photographing in that it, like photography, entails the imprint of an image on a surface that is captured simultaneously with the event depicted in the image. It is arguable either way and so occupies a "gray area" of sorts. In the abstract, grayness may indicate a reasonable basis to move forward, or at least a good faith one. But the framework of Dillon's Rule is the guide here. If there is ANY "fair or reasonable doubt" about the existence of the power, it is presumed not to exist.

Further doubt is raised with the carbon paper concept because of NRS 293.730(1)(c) and (e), which prohibit anyone but an election board member from removing a ballot from a polling place before the closing of the polls, or from showing a voted ballot to another person in order to demonstrate who they voted for. This is intended to prevent "payoffs" and similar conduct where voters are promised compensation of some kind in exchange for proof that they voted a certain way. Allowing carbon copies to leave with a voter arguably would constitute removing a ballot from a polling place and would enable the voter to show proof of how they voted to others, which the statute is designed to forbid (certain special ballot categories are exempted). As such, our opinion is that this provision is most likely invalid.

- **NOT WITHIN THE BCC'S PURVIEW (CARBON COPY BALLOTS)**

If coloring or watermarks are the intent, the analysis probably changes somewhat. This is because NRS 293.250(7) empowers the county clerks, or in Washoe County's case the registrar (NRS 244.164), to "prescribe the color or colors of the ballots and voting receipts used in any election" they are required to conduct. So there is some level of delegation on this point. This makes it at least arguable on a good faith basis that there is no fair or reasonable doubt about the existence of the power. Also, if chosen, the SOS likely would need to approve the ballot form used (NRS 293.250), and additionally the county would need to make decisions about cost, availability, and other policy matters.

- **WITHIN THE BCC'S PURVIEW (COLORING OR WATERMARKS ON BALLOTS)**

Item 7 also includes a provision for "one electronic voting kiosk for ADA qualified voters …" It is unclear if this would be sufficient. Obviously the county must comply with any ADA requirements for the operations of its polling places and other components of the elections. The item is written so it is open to multiple interpretations. One would be that there is only a single electronic voting kiosk in the whole county available for ADA qualified voters. This almost certainly would be invalid. Another interpretation is that an electronic voting kiosk would be required at every polling location for ADA qualified voters. This would be more likely to withstand scrutiny, and the registrar's office would need to ensure that this would be consistent with its experience in implementing ADA requirements for voting.

- **WITHIN THE BCC'S PURVIEW (ELECTRONIC VOTING KIOSKS AT EACH POLLING PLACE FOR ADA QUALIFIED VOTERS)**

Item 8. This item contemplates mail-in ballots being sent "certified receipt", ostensibly to supplement chain of custody and indicia of security in the process. AB 321 (2021) requires, in most cases, mail-in ballots be sent to all active and registered voters before every election, even if they did not specifically request them. This change was added to Nevada law on a permanent basis in 2021 after being added provisionally as a response to the COVID pandemic during special session in the summer of 2020. It requires that ballots be mailed by "first-class mail, or by any class of mail if the Official Election Mail logo or an equivalent logo or mark created by the United States Postal Service is properly placed …" AB 321 (2021), sec. 4(1).

Similar to item 17, which seeks to add to registration requirements already set forth in NRS chapter 293 and the SOS's corresponding regulations, this item seeks to add to the mailing requirements in AB 321 (2021). Moreover, the additions would appear to reduce access to ballots by mail recipients, because they would be required to be home when the mail arrived and to sign for them as well. The intent of AB 321 (2021) was clearly to expand access. So this requirement not only adds to the structure of the statute without any apparent express authorization to do so, but it also appears to conflict with the intent of the statute itself. For these reasons, there is at least a "fair or reasonable doubt" as to the existence of the county's power to alter the mail scheme contemplated by the statute, raising a presumption that this power does not exist.

- **NOT WITHIN THE BCC'S PURVIEW (MAIL BALLOTS "RETURN RECEIPT REQUESTED")**

Item 9. This would require mail-in ballots be scanned as received before being placed in ballot boxes. It is not entirely clear if this means before being counted but after being placed in a ballot drop box, or before even being placed in the drop-box.

AB 321 (2021) sec. 8(1) contemplates mail-in ballots being hand-delivered to the registrar or any ballot drop box by close of polls on election day, or by being post-marked on or before the day of the election and received by 5pm on the fourth day following the election. Scanning before deposit would probably be feasible for hand deliveries to the registrar's office and possibly to drop boxes at polling places if there were someone there to do the scan before the voter deposited the ballot into the box. But it is far from clear how this would even work with ballots that are mailed. Conceivably the registrar's staff could scan them before depositing them for later counting after dropped off by the postal worker delivering them. Either way, these details would need to be ironed out before this possibly being put into

place. There is at least adequate room for it to be considered due to section 10 of the same statute, which empowers the registrar to "establish procedures for the processing and counting mail ballots." Therefore, it is likely that this provision is not in doubt, and therefore presumably invalid, under the Dillon's Rule analysis. Furthermore, it appears to be consistent with AB 321 (2021), sec. 14, which requires the central mail ballot counting board and/or the voting board to conduct a review of each ballot and marking it "received" before casting it in order to determine if the person is entitled to vote.

- **WITHIN THE BCC'S PURVIEW (SCANNING MAIL-IN BALLOT BEFORE ACCEPTANCE BY REGISTRAR)**

Item 10. This item seeks "bipartisan teams" of unmarried individuals be involved throughout various aspects of the election process concerning things like registration, ballot retrieval from drop boxes, counting of ballots, and so forth. This does not appear to conflict with any state laws insofar as the registrar is able to implement it within the operations of the county's election system. In fact, it appears consistent with the format already contemplated in NRS 293.217 which requires the registrar to appoint an election board of officers "for the various polling places" in the county. Such officers "must not all be of the same political party", and they cannot be candidates in the election or related to candidates within the second degree of consanguinity (familial connections) or affinity (marital connections). NRS 293.217(1); see also AB 321 (2021), sec. 13 (same requirements for mail ballot counting board). This item is likely valid.

- **WITHIN THE BCC'S PURVIEW (BIPARTISAN TEAMS INVOLVED IN ASPECTS OF ELECTION PROCESS)**

Item 11. Ensuring that the "bipartisan teams" are approved by the central committees of political parties is more problematic. Possibly the parties could submit recommendations. But giving them authority over the conduct of the election itself, including registration and vote counting, would appear to conflict with the powers given to the registrar to create an election board and counting boards and otherwise utilize staff to carry out the duties of the office. Moreover, it could build a potential "stalemate" into the process where one of the parties' central

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committees refuses to approve a proposed arrangement. Then what? The election grinds to a halt? Or they insist that the another party submit someone else for their slot on a team? And what if they refuse? It is a tic-tac-toe scenario of endless deadlocks. In any event, because it appears to conflict with the delegation of election powers to the registrar, it likely is in doubt and therefore presumably invalid.

- **NOT WITHIN THE BCC'S PURVIEW (ENSURING BIPARTISAN TEAMS ARE APPROVED BY THE CENTRAL COMMITTEES)**

Item 12. Ensuring these bipartisan teams are scheduled in two shifts, one morning and one afternoon. This would appear to be the prerogative of the registrar, as they would be operating under that office's umbrella. There does not appear to be any direct conflict with state law, and therefore no doubt as to the existence of this level of power being exercised by the registrar.

- **WITHIN THE BCC'S PURVIEW (SCHEDULING OF BIPARTISAN TEAMS)**

Item 13. Ensuring the National Guard is present at polling places. This is illegal. First, the Guard is under the control of the Governor and, in cases of federalization, the President. The county has no control over this. Second, and even more significant, it is a federal felony to have federal troops present at the polls. 18 U.S.C. 592.

- **NOT WITHIN THE BCC'S PURVIEW (NATIONAL GUARD AT THE POLLS)**

However, after bringing attention to these legal limitations, a request was made that we assess this provision with the use of the Washoe County Sheriff's Office and its deputies instead of the Guard. This proposal is significantly different. NRS 293.217 provides that once the election board of officers is appointed by the registrar, IF requested by the registrar, the sheriff shall "(a) [a]ppoint a deputy sheriff for each polling place in the county and for the central election board or the absent ballot central counting board; or (b) [d]eputize as a deputy sheriff for the election an election board officer of each polling place in the county and for the central election board or the absent ballot central counting board."

The registrar is free to make this request. Whether the Washoe County Sheriff's Office (WCSO) responded by assigning a deputy to each polling place, or by deputizing an election board officer would appear to be subject to the Sheriff's discretion. But the request could be made. And the statute does provide for one or the other alternative. It is unclear if this concept has been discussed with the WCSO for any clarification or input they may have as to its implementation or operability.

One last consideration is worth mentioning on this point. State law prohibits voter intimidation in NRS 293.710. Federal law includes similar prohibitions. The presence of deputy sheriffs at polls, if requested and carried out, would need to be done in a way that avoided the appearance of any form of intimidation in order to avoid any claims under these legal provisions.

- **WITHIN THE BCC'S PURVIEW (REQUEST WCSO DEPUTIES AT THE POLLS)**

Item 14. Ensure counting ballots is public and continues until completed. This appears to already be codified in NRS 293.363(1) (second sentence), which governs counts carried out by the counting board. "When the polls are closed, the counting board shall prepare to count the ballots voted. The counting procedure must be public and continue without adjournment until completed." Accordingly, this provision appears to be valid.

- **WITHIN THE BCC'S PURVIEW (COUNTING BALLOTS IN VIEW OF PUBLIC)**

Item 15. Ensure ballots are counted by hand in order to ensure that any recounts also occur by hand. This is an apparent reference to NRS 293.404(3) which says that a recount board shall conduct a recount by the same method as the original count. As to the hand-count concept, it appears to be allowed. Although machines are commonly used, it does not appear to be mandatory. See AB 321 (2021), sec. 10(2)(a) (mail ballot counting system "may" be by computer or electronic means); see also NRS 293.363 et. seq. (counting board); NRS 293B.105 (BCC "may" acquire and use mechanical system); and NRS 293B.110 (mechanical system "may" be used for parts of precinct or district in a county, while the other parts "may" use "paper ballots" or other mechanical systems).

There is a caveat worth mentioning here. NRS 293.2546(b)(10) guarantees voters in Nevada the right to "a uniform, statewide standard for counting and recounting all votes accurately …" See also Nevada Const. Article 2, sec. 1A(10). It is not clear if having different counting "methods" in different counties, precincts, or other districts—i.e., by hand in one county versus by machine in another—would amount to having a different "standard" for counting, or if "standard" refers more to the system for determining whether votes are to be included in the count (e.g., ballot correctly filled out, valid registration, residency, age, signature verification, etc.). But if this did amount to a different "standard," it would conflict with these provisions and probably be invalid. However, while it does create an ambiguity which perhaps dilutes the strength of the conclusion on this point somewhat, it is

not enough by itself to counter the straight-forward language in the other statutes referenced above.

- **WITHIN THE BCC'S PURVIEW (COUNTING BALLOTS BY HAND)**

Item 16. Ensure same day registrations are given a paper provisional ballot of a different color. See above for analysis of use of different colors for ballots. As for giving same day registrants only "provisional" ballots, this appears to be consistent with NRS 293.5842(4)(b)(3) (provisional ballots for same day registrations and voting at early voting locations) and NRS 293.5847(4)(b)(3) (provisional ballots for same day registrations and voting on election day). This appears to be consistent with state law.

- **WITHIN THE BCC'S PURVIEW (SAME DAY REGISTRANTS ARE GIVEN PROVISIONAL BALLOT)**

Item 17 (and Item 1). Item 17 calls for verification of "all voter registration forms" through the "USCIS SAVE program, National Change of Address (NCOA), and Washoe County Assessor and Vital records BEFORE they are entered into the voter registration system …" The problem with this provision is that the legislature and SOS have already addressed registration requirements, including the documentation that is required to be provided. NRS 293.507 directs the SOS to develop forms for the registration of voters. Those forms must include documentation of certain forms of identification provided at time of registration that include a current Nevada Driver's License number, the last four digits of a social security number, or a number generated for the applicant who signs a sworn statement that they lack either type of document. Further requirements for registrations are set forth in the SOS's regulations, including NAC 293.395 and regulations following it. We are aware of nothing in those provisions that call for or authorize use of the USCIS SAVE database or any of the other databases as a pre-qualification for registration to be completed. Consequently, it is our opinion that the existence of this power is in doubt and is therefore presumed not to exist.

There is an additional concern specific to the citizenship verification components for the registration process. To the extent it implicates federal elections, which are in fact intertwined with the rest of the balloting and voting in the county's system, adding any additional citizenship verification requirements beyond what is set forth in the forms approved via the National Voting Rights Act is barred by federal law. Arizona v. Inter Tribal Council of Arizona, 570 U.S. 1 (2013) (opinion by Justice Scalia). Any changes on that front would need to come from Congress, just as any

changes as to state level elections would most likely need to come from the legislature.

- **NOT WITHIN THE BCC'S PURVIEW (ITEM 17 – PRE-VERIFICATION OF REGISTRATION BY SPECIFIED DATABASES)**

Item 1 contemplates use of the same databases but is slightly different in scope. It calls for the registrar to "correct" the current statewide voter registration list "in verification with" the specified databases. NRS 293.530(1)(a) empowers the registrar to "use any reliable and reasonable means available to correct the portions of the statewide voter registration list which are relevant to the county … and to determine whether a registered voter's current residence is other than that indicated on the voter's application to register to vote." The question is thus whether the databases identified in the item are "reliable and reasonable means" for making corrections to the relevant portions of the statewide voter registration list. This appears to be a judgment call for the registrar and/or the county commission. If so, it would appear to be in compliance with statutory authority specifically granted to the registrar.

- **WITHIN THE BCC'S PURVIEW SUBJECT TO ADDITIONAL INFO (ITEM 1 - CORRECTION OF STATEWIDE VOTER REGISTRATION LIST)**

Items 18 and 19. These both deal with a proposal to purge voter registrations from the system periodically every 5 years after original registration. Item 18 adds the requirement and item 19 posits notice to voters whose names are about to be removed from the system so they can renew their registrations if they want. Both items conflict with registration rules in state law, which do not provide for automatic expiration. Certain inactive voters' registrations are removed from the system but that is only after they fail to vote in a certain number of general elections and fail to respond to notification that they are being removed. Generally these are covered in NRS 293.530, 540, and 541. Nowhere in these provisions is there allowance for an automatic purge every 5 years. This raises a fair or reasonable doubt over the existence of this power. It is therefore presumed invalid.

- **NOT WITHIN THE BCC'S PURVIEW (ITEM 18 - PURGE OF VOTER ROLLS EVERY 5 YEARS; ITEM 19 – NOTICE TO VOTERS WHO ARE TO BE PURGED)**

Item 20. Ensure that "forensic material of elections" is maintained for 10 years. This term is undefined in the law, so it is unclear what exactly it means. Regarding election records in general, their retention is governed by a combination of legal authorities. Federal election materials are generally required to be retained

for 22 months. 52 U.S.C. 20701. Under state law, some election records are specifically dealt with in NRS chapter 293, and some are dealt with more generally in the Nevada public records law codified in NRS chapter 239.

NRS 293.391 provides that "voted ballots, rejected ballots, challenge lists, records printed on paper of voted ballots collected pursuant to NRS 293B.400, and stubs of the ballots used, enclosed and sealed must, after canvass of the votes by the board of county commissioners, be deposited in the vaults of the county clerk. The records of voted ballots that are maintained in electronic form must, after canvass of the votes by the board of county commissioners, be deposited in the vaults of the county clerk without being sealed. **All materials described by this subsection must be preserved for at least 22 months, and all such sealed materials must be destroyed immediately after the preservation period** …" (emphasis added). A blanket 10 year retention period would conflict with this mandatory destruction provision as to the sealed records in question.

There are also applicable rules under Nevada's general public records law, codified in NRS chapter 239. That chapter provides that records of a local government must be handled in accordance with the retention periods set forth in that chapter and under regulations adopted by the State Library, Archives, and Public Records Administrator. NRS 239.124-125; NAC 239.155. The Administrator has adopted rules for retention of local government records. NAC 239.155-161. Records must be handled under either a schedule approved by the Administrator, or a default schedule adopted by the Administrator. NAC 239.155(1). Washoe County is not free to simply adopt its own schedule, but rather must get approval of a specific proposed schedule by the Administrator. Alternatively, the county can use the Administrator's default schedule. NAC 239.155(5). Washoe County uses the default schedule, updated by the state in 2020, which is viewable at the following link: https://nsla.nv.gov/ld.php?content_id=60238524 (election records: pp. 128-135).

The default schedule includes a number of provisions on election records and frequently uses the same 22 month period set forth in NRS chapter 293 and federal law. However, there are other categories within the schedule that are significantly shorter or longer—such as lists of candidates and official returns: permanent retention (p. 130)—or that appear to require destruction at 22 months—such as specified records of "Voting systems – Computer Programs" (p. 135). Additionally, for any election records that contain or constitute information declared by law to be confidential—for example, NRS 293.3086(3) (certain personal information within a ballot is confidential), NRS 293.4855(8) (certain preregistration information), NRS 293.5002 (confidential or other specified addresses), NRS 293.503(6) (certain

records of where a person registers to vote), NRS 293.558(2) (SSN, DL number, and email addresses of voters), and NRS 293.870 (records regarding security of an election system)—there is a requirement of destruction in accordance with the retention schedule. NAC 239.165.

Simply using a blanket approach of 10 years would conflict with these state law rules. It would also amount to an unapproved retention schedule which would also violate the requirement that the county use the default schedule or first get approval of a specific schedule from the state. For these reasons, the county's power to adopt its own blanket retention schedule for election records is doubtful and therefore presumed not to exist.

- **NOT WITHIN THE BCC'S PURVIEW (BLANKET 10 YEAR ELECTION RECORD RETENTION PERIOD)**

PART 3: CONCLUSION AND SUMMARY

In conclusion, the analytical framework for analyzing whether a county has the power to act within any field is known as Dillon's Rule. Under statutory modifications to that rule in Nevada, counties have broader discretion to act on "matters of local concern." On such matters, if there is any doubt of the existence of a particular power, it is presumed to exist. But on other matters, if there is any doubt, the power is presumed not to exist.

The proposed election integrity resolution deals with election law. Election law is almost certainly not a matter of local concern. Therefore, under Nevada's version of Dillon's Rule, if there is any doubt about the existence of a power the county contemplates exercising, it is presumed not to have that power. If presumed invalid, an item is likely not in the BCC's purview to act. If presumed valid or if based on or consistent with express provisions of law, however, an item is likely in the BCC's purview to act.

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As to the 20 items listed in the resolution, the following legal conclusions have been reached:

- Items 1 (subject to additional info), 2, 3, 4, 5, 6, 7 (coloring or watermarks on ballots, ADA compliant kiosks), 9, 10, 12, 13 (request for WCSO deputies at the polls), 14, 15, and 16 are believed to be within the BCC's purview to act if it chooses to do so;

- Items 7 (carbon copy ballots), 8, 11, 13 (National Guard at the polls), 17, 18, 19, and 20 are believed not to be within the BCC's purview to act; and

Lastly, it is worth repeating ***that this is not a commentary on the wisdom, quality, or soundness of any proposed items versus what may already be provided for, or not provided for, in Nevada law. Those are policy and/or political decisions that belong to appropriate law makers. This analysis is merely an assessment of the law as it exists in Nevada and as it appears to apply to the 20 numbered items in the proposed resolution.***

Thank You.

By /s/ Nathan J. Edwards
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