

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELIZABETH L. HALVERSON,
an individual'

No. 51539

Petitioner,

v.

ROSS MILLER, IN HIS OFFICIAL
CAPACITY AS SECRETARY OF STATE,
IN AND FOR THE STATE OF NEVADA,
HARVARD L. LOMAX¹, IN HIS OFFICIAL
CAPACITY AS REGISTRAR OF VOTERS,
IN AND FOR THE COUNTY OF CLARK
AND ROES I - XX.,

Respondents

REPLY TO ANSWER OF HARVARD L. LOMAX
CLARK COUNTY REGISTRAR OF VOTERS
TO ORIGINAL PETITION FOR WRIT OF MANDAMUS
PROHIBITION AND DECLARATORY RELIEF

COMES NOW Petitioner Elizabeth Halverson, in Propria Persona, and makes this reply to the answer of Harvard L. Lomax (hereinafter Lomax). This Reply is based upon the following Points and Authorities.

Points and Authorities

I. Petitioner has named and served the appropriate parties

In his Answer, Lomax, states that the Attorney General was neither served nor named in the original Petition. This assertion is both factually and legally incorrect.

¹ Incorrectly named as Harvey L. Lomax in the original Writ

The argument is factually incorrect as the Certificate of Service clearly states that the Attorney General was served by regular mail with the Petition on May 1, 2008 in the same manner as which the District Attorney was served. See Exhibit 2 which contains not only the certificate of mailing but a postal receipt showing the mailing of the original petition to two different addresses.

Lomax's argument is legally incorrect because he alleges that the Attorney General must be named in the Petition where there is a request for Declaratory Relief. Despite correctly citing NRS 31.130 which requires *servi*ng the Attorney General, the Answer goes on to state that the Attorney General must be *named* in the original Petition. However, Lomax does not cite any authority which requires the Attorney General to be named in the Petition. As Lomax is without authority for his statement and because the Attorney General was actually served, this argument is without merit.

Similarly, Lomax submits another argument without authority, to wit: That because the Secretary of State and the Registrar of Voters are ministerial officers they are not proper parties to be sued in this instance. Lomax's argument does not explain why these officers are not the proper parties nor why the Legislature is the proper party. The Secretary of State is the Chief Elections Officer pursuant to law and as Chief Officer, the Secretary of State 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. N.R.S.293.124 (1). See also Comments of Ross Miller, Secretary of State, on News One at Nine, March 23, 2008 [One on News1 segment] in which he absolutely stated that he was "the Chief Elections Officer and was responsible for enforcing the Constitution". As such, the Secretary of State is responsible for insuring compliance of election laws with the

Constitution of the State of Nevada. If the Secretary of State does not ensure such compliance, a Writ does lie to require that said officer comply with the law. As to the Registrar of Voters, N.R.S. 293.185(2), requires that the actual filing be made with the Registrar for district offices which are totally in one County. The Registrar of Voters is the executive for election law in the county once he is appointed except the duties imposed by virtue of NRS 293.393 N.R.S 244.164. As such, he should be aware of the Constitution and its requirements as to terms of service.

In this case, Respondent Lomax was personally aware of the fact that the constitutionality of this election was in question as Petitioner personally informed him of the Independent Americans Party suit regarding the unconstitutionality of this election. See Exhibit 1.

Lomax also states that the other judges who were elected in 2006 in Departments 22, 24 and Department M as well as 2008 candidates must be joined in this case. The original Writ does reference that any action on this matter will impact other persons. See footnote 1 of the original Writ. But the footnote also noted that NRS 30.140 is also applicable to the Writ. NRS 30.140 provides as follows:

“NRS 30.010 to 30.160, inclusive, are declared to be remedial; their purpose is to `settle and to afford relief from uncertainty and insecurity with respect to rights, status ```and other legal relations; ***and are to be liberally construed and administered.*** ```(emphasis added).”

Lomax seeks to put form over substance by insisting on the naming of the judges and “candidates” involved in the 2008 and 2010 elections². Petitioner did not name other judges or candidates so as not to draw attention to the fact that since they have neither filed a similar suit nor joined this one, those judges do not seek to uphold the Constitution and are willing to obtain additional salary through any means including an unconstitutional

² The Family Court Judges who will have their offices dissolved in 2010 and limited to four years so that they can be placed “on cycle”.

process despite the clear prohibitions in the Nevada Constitution, Article 6, §5 and §15. The same is true for the candidates, which does not speak well for their ability to uphold the Constitution as is required in the oath of office. However, if this Court wishes these judges and others to be joined in this Writ, the original writ names ROES 1-XX as defendants and such persons could be joined into this case. As they are not plaintiffs, these judges and candidates could only be defendants who would be intent, as are the other defendants in this case, in undermining the will of the people of the State of Nevada. Thus, if the Court finds that joinder is needed, then Petitioner will move to amend the Writ, to replace the ROES with the names of these persons. If, however, the Court were to agree that these judges and candidates would be represented by the Attorney General or the District Attorney, (both of whom are already involved in this litigation and/or in NRS 30.140's rules of construction which are to liberally construe the rules so as to resolve controversies, then extending this litigation through the amendment process could be avoided.

II. Petitioner has not delayed "too long" in bringing this Writ

Lomax next attempts to make an argument about the Petitioner taking too long to file her petition while at the same time making the argument that Petitioner's Department is the only one impacted by the law. Aside from that argument undercutting Lomax's argument above, it also fails to cite proper law and consists of several citations to foreign jurisdiction cases.

a. Respondent Lomax has not properly pled laches.

Laches, is an equitable doctrine, which may be invoked when delay by one party prejudices the other party such that granting relief to the delaying party would be inequitable. Building & Constr. Trades v. Public Works, 108 Nev. 605, 610-11, 836 P.2d 633, 636-37 (1992) However, to invoke laches, the party must show that the delay caused actual prejudice. State, Gaming Comm'n v. Rosenthal, 107 Nev. 772, 778, 819 P.2d 1296, 1301 (1991). Thus, laches is more than a mere delay in seeking to enforce one's rights; it is a delay that works to the disadvantage of another. Home Savings v. Bigelow, 105 Nev. 494, 496, 779 P.2d 85, 86 (1989). "The condition of the party asserting laches must become so changed that the party cannot be restored to its former state." Id., 779 P.2d at 86. Applicability of the laches doctrine depends upon the particular facts of each case. Id.

Furthermore, laches is an affirmative defense that is required to be specifically pled by the party asserting the claim thereof. NRC 8(c). Additionally, the burden of proof in establishing laches is also on the party pleading same.

Here, Lomax has not adequately pled laches, let alone made a case for its application in this matter. Lomax complains of "lateness". No where does he establish what grounds if any he has for his affirmative defense nor what, if any, prejudice would be suffered by him or any one else by the granting of this petition. Rather, he points to foreign jurisdiction cases stating that 18 days before a general election is too late to challenge the qualifications of a candidate for Attorney General of Maryland, Liddy v. Lamone, 398 Md. 233, 919 A.2d 1276 (2007) while never mentioning that one of the factors in the decision is that prior litigation about the same race was heard in Abrams v. Lamone, 394 Md. 304, 905 A.2d 840 (2006). In Abrams, the court upheld the Constitution from a candidate seeking to change its terms so as to not require that

candidates for Attorney General be members of the Maryland Bar for ten years but rather that they simply be barred for ten years³. Moreover, this litigation is not taking place within a few days of an election. Lomax will not be impacted by this litigation as the election candidates are not yet set nor are the initiatives which are also under litigation. Moreover, the Secretary of State is continuing to challenge candidate filings as to the term limits in the Nevada Constitution. The last day for challenges on that matter is June 2, 2008. June 2, 2008 will not have occurred by the date of this filing. Lomax's interest according to his Motion to Expedite Appeals' Schedule is in preparing for the election. The Court has accommodated his request with an earlier date for oral argument but given the amount of litigation surrounding this year's ballot, it is somewhat disingenuous to argue to this Court that this case will somehow hold up the ballot as opposed to the rest of the candidate and petition challenges.

Ironically, Lomax through County Counsel, also cites *Cole v. State ex rel Brown*, 308 Mont. 265, 42 P.3d 760 (2002), which holds that incumbents cannot challenge their removal under term limits years after passage of those term limits which is inconsistent with the argument Lomax's (and County) Counsel is taking on the Nevada controversy involving those term limits as to Bruce Woodbury, Thalia Dondero, Ruth Johnson and Mary Beth Scow. See Exhibit 3 for a copy of the *Cole* case and the position counsel is taking in the Nevada term limits case. Respondent Lomax's counsel is asserting two positions in two forums although certainly the term limits controversy will surely soon join this case before this Court. Moreover, this inconsistent position will lead to more argument before this Court which undermines Lomax's argument of some sort of

³ The same respect for the Constitution is true in Nevada where "the Nevada Constitution is the organic and fundamental law of this state" *Nevadans for Nevada v. Beers*, 122 Nev. 930, 948, 142 P.3d 339, 351 (2006).

prejudice to the ability to prepare a ballot. If it is not too late nor a harm or prejudice to litigate candidacies or for the LVCVA to challenge initiative petitions at this time, how then is there a harm or any prejudice to Lomax to hearing this Writ as well?

Other cases that Lomax cites including Kromko v. Superior Court, 168 Ariz. 51, 811 P.2d 12 (1991) in which the Court held that while it was important to assure that ballots were prepared starting with absentee ballots,

“Here, Miller filed his sufficiency challenge on August 28, 1990 -- more than a month and a half before absentee voting began in the November 1990 election. We conclude, therefore, that Miller's complaint was timely filed.”

Kromko, at p. 57.

Again, Lomax’s own citations point to the fact that the Writ is timely and that Lomax cannot show any prejudice to himself but only to Petitioner in this matter who will not have her case heard. In the other cases cited by Lomax, including in State ex rel. Fidanguo v. Paulus, 297 Or. 711, 688 P.2d 1303 (1984) and Mathieu v. Mahoney, 174 Ariz. 456, 851 P.2d 81 (1993) the issues involve the timeliness of challenges under procedural rules, such as single subject rules, regarding initiatives. The limitations did not include substantive challenges. Nevada has the same standard, see Herbst Gaming, Inc. v. Heller, 122 Nev. 877, 141 P.3d 1224 (2006).

It should also be noted that Petitioner’s claim is that a statute is inconsistent with long standing constitutional provisions. This is not a case of seeking to challenge an initiative. The current case is about legislation not meeting constitutional standards and the actual actions taken by the judiciary in conjunction with the Legislature to defeat the will of the people as manifested by the Constitutional amendments passed by the people in 1978 and 1968 respectively. None of the cases cited by Lomax address the fact that

legislative statutes must be consistent with the state and federal constitutions. Therefore, this challenge is more akin to a substantive, rather than a procedural, claim.

Respondent Lomax has not met his burden of proof in claiming “un-timeliness” as he has neither pled nor proven prejudice of any kind, nor has he proven any other factor to make a claim of laches.

b. Neither Lomax nor his Counsel can claim laches as they were aware of Petitioner’s claim.

On January 17, 2008, Petitioner, filed her candidacy for “re-election” to the Eighth Judicial District Court, Department 23, **under protest**. See attached Exhibit 4 entitled “Addendum to Filing Documents and Notice of Protest and Non-Waiver of Rights” which has been signed and dated by Kenneth M. Burns, an employee of the election department, after discussion with Respondent Lomax and with the specific proviso that it would be reviewed by County Counsel. Petitioner specifically informed Mr. Lomax of the suit filed by the Independent American Party [IAP] challenging this election on the basis of the Nevada Constitution Article 6. The IAP lawsuit against Secretary of State, Miller, was filed in January and is No. 50895. Thus, both Respondents were aware in January that the election to seats 22, 23, 24 and M were being challenged. Further, in Petitioner’s presence, a telephone call was made to someone in the County counsel’s office who asked that the handwritten line regarding review by counsel be added to the Notice of Protest. Moreover, there were no calls requesting any additional information and it is my belief that the Registrar must report to the Secretary of State with the filing and the documents filed therewith. As Lomax and therefore Respondent Ross, to whom he must submit the election paperwork. were aware in

January of both the IAP suit and of Respondent's filing under protest especially in light of that suit, there can be no prejudice or surprise by the filing of this Petition.

Not only is there no prejudice in this case, but the IAP suit would have the same effect as Petitioner's Writ. More tellingly, the Supreme Court did not see a need to rush into a hearing in the IAP suit as they set that Petition to be heard on July 1, 2008. This was the original time set in this matter as well. Only because of Lomax's motion were both cases moved forward. Thus, Lomax's concerns have been addressed and he suffers no prejudice and therefore, no laches.

c. Petitioner has not been "untimely"

Despite the fact that there is no basis for laches and that it is Respondent's burden of proof, Petitioner will reiterate why she is not untimely.

First, the statute, SB 195(3) which was passed in 2005, does not conform to even the most minimal rules for notice. SB 195 purports to amend NRS 3.018, however, not all provisions of SB 195 appear within the statute. Specifically, the two year term does not appear anywhere within NRS 3.018 nor in the heading of the statute itself, 2005 Statutes of Nevada, Page 1970, Chapter 436, §3, at least one of which would be required to place a person on notice of the change from the Constitution. Moreover, Petitioner and probably no one else, would have had standing in 2005 as no one has a vested interest in the term of office that would allow them to prosecute the matter. Therefore, 2005 is not an appropriate date for filing or calculating time.

Lomax seems to make an argument that 2006 should be the operative date for determining the time to file. Petitioner filed for office May 1, 2006 and filed her Writ on May 1, 2008. First, May 2006 is not an appropriate date for the following reasons:

i. Petitioner did not only did not have standing in May 2006 as she still did not have a “harm” that would allow her to prosecute the matter in May of 2006 but the case was also not ripe for adjudication. A case is ripe for review when "the degree to which the harm alleged by the party seeking review is sufficiently concrete, rather than remote or hypothetical, [and] yield[s] a justiciable controversy." *Herbst Gaming, Inc. v. Sec'y of State*, 122 Nev. 877, 887-88, 141 P.3d 1224, 1230-31 (2006). The Court further stated that “Preelection challenges to an initiative's substantive constitutionality are not ripe. They lack a concrete factual context in which a provision may be evaluated, and any harm is highly speculative since the measure may not even pass at election time”. The same is true for a candidate who has not been elected and may not be elected. Therefore, May through November 2006, are not appropriate times for the calculation of any “timeliness”.

ii. Even if May was an appropriate time, (which it is not) the Petition was filed within 2 years of that date. Even though laches operates independently of any statute of limitation, “`courts of equity usually act in obedience and in analogy to the statutes of [limitation], in cases where it would not be unjust and inequitable to do so.” *Plyman v. Glynn County*, 276 Ga. 426, 578 S.E.2d 124 (Ga. 03/10/2003) citing *Cooper v. Aycock*, 199 Ga. 658, 666 (1) (34 SE2d 895) (1945). Nevada has long held the same:

“Especially strong circumstances must exist to sustain the defense of laches when the statute of limitations has not run. *Miller v. Walser*, 42 Nev. 497, 181 P. 437 (1919). Each case must be examined with care. *Cooney v. Pedroli*, 49 Nev. 55, 235 P. 637 (1925). Perhaps the most important inquiry is whether the party urging laches has been prejudiced by his opponent's delay in asserting rights. We perceive no prejudice here and no good reason to prefer the equitable doctrine of laches to the applicable statute of limitation and, by doing so, deny a remedy to the co-tenants out of possession.”

Lanigir v. Arden, 82 Nev. 28, 409 P.2d 891 (1966) see also *Building Trades, supra*, 108 Nev. 605, 611 citing *Lanigir*, strong circumstances must exist, however, to sustain a defense of laches when the statute of limitations has not run.

At minimum, any statute of limitations would be at least for two years in challenging the constitutionality of a statute. Therefore, even if the May 1, 2006 date was used, the statute had not expired on May 1, 2008. Thus, any date from November of 2006 and beyond would still fall well within the statute of limitations.

January of 2007 was also not an appropriate time to file suit as it was not certain that the Secretary of State would fail to fulfill his obligation under N.R.S.293.124 (1)⁴ to challenge election laws or candidates who are inconsistent with the Constitution. So once again, it was unclear if there would be a justiciable conflict as the Secretary of State had not yet acted. Petitioner, as well as every taxpayer, has the right to expect that the elected officers of this state will do their jobs at the appropriate time. A citizen need not and could not under the ripeness doctrine file suit to mandate that an elected official perform a duty sometime in the future that is not yet due to be performed. The Secretary of State's duty arose at the time he was to certify the offices that were open for filing. Once filing opened on January 7, 2008, is when Petitioner and others became aware that Respondent Ross would not uphold the Constitution and that he would authorize Respondent Lomax to accept filings for Departments 22, 23, 24 and M in direct contravention of the Nevada Constitution. IAP filed its suit within 7 days and Petitioner

⁴ Or his constitutional duty which requires him to perform the duties ascribed by law. Article 5, Section 22. **Duties of certain state officers.** The Secretary of State, State Treasurer, State Controller, Attorney General, and Superintendent of public instruction shall perform such other duties as may be prescribed by law.

gave her notice of protest and non waiver of rights within 10 days of Miller's failure to act. Moreover, after Petitioner learned that the Supreme Court would not hear the IAP case until July 1, 2008, she decided to file her own case to further protect her rights. It cannot be said that either 10 days or a little more than three months prejudiced Respondents' rights when it was respondents who failed to act. The Secretary of State has decided to uphold the 1998 term limits provisions of the Nevada Constitution but not the 1968 and 1978 amendments to Article 6 of the Constitution. This selective enforcement is just another in a list of reasons why this Writ of Mandamus, Prohibition and Declaratory Relief should be granted.

An additional reason why this case should be adjudicated on its merits is that it is a case of because the claims fall within an exception to the mootness doctrine for cases which are "capable of repetition, yet evading review." Langston v. State, Dep't of Mtr Vehicles, 110 Nev. 342, 344, 871 P.2d 362, 363(1994). The fact that the Court tends to limit the standing of persons able to challenge the unconstitutionality of statutes and in the fact that in this case, the persons with standing may be small and consisting only of judges whose interests lie against enforcing the provisions of Article 6 which limits there pay, is an additional reason why the Court should hear the Writ on its merits. The public may never be able to have this matter heard. Additionally, the evidence within the legislative history that shows that judges worked with the Legislature to override the will of the people as to the amount of compensation that they would receive and that both parties were willing to manipulate the Constitution for their own benefit, does not reflect well on the judiciary. That this Court would now seek to compound this negative image by going yet another step in keeping itself from accountability to the public and the

Constitution would be unconscionable and not in keeping with the mission, mandate or oath of the Court.

III. **Lomax is barred from obtaining relief on the merits.**

Lomax has not filed an opposition to any of the constitutional issues in this case. Rather all of his opposition is devoted to procedural matters which have not been well founded. There is no opposition to any of the Constitutional Merits of the Case. DCR 13(3) as well as most of the local rules states that: “Failure of the opposing party to serve and file his written opposition may be construed as an admission that the motion is meritorious and consent to granting the same”. Since Lomax did not discuss any opposition to or the merits of the constitutional arguments in the Writ, this Court should deem such arguments waived. Further, Respondent fails to address that the challenge is to a statute and “An act of the legislature which is not authorized by the state constitution at the time of its passage is absolutely null and void. It is a misnomer to call such an act a law. It has no binding authority, no vitality, and no existence. It is as if it had never been enacted, and it is to be regarded as never having been possessed of any legal force or effect. *State ex rel. Stevenson v. Tufly*, 20 Nev. 427, 428 (1890) citing *Meagher v. County of Storey*, 5 Nev. 251; *State v. Rogers*, 10 Nev. 260; *Cooley*, Const. Lim. 227.”⁵ Rather Lomax’s arguments seek to find ways to prevent the adherence of statutes to the Constitution.

⁵ See also “An unconstitutional law is void, not from the time it is so declared, but from its enactment. *Great Southern Fire Proof Hotel Company v. Jones*, 24 S. Ct. 576, 193 U.S. 532 (1904) citing *Findlay v. Pendleton*, 62 Ohio St. 80, 88. See also *Norton v. Shelby County*, 118 U.S. 442, “..an unconstitutional act is, in legal contemplation, as inoperative as though it had never been passed.”

IV. Lomax has neither the law nor the facts on his side as to the lack of “severability” of the two year term.

Lomax seems to argue that somehow, although he does not say how, that the unconstitutional term of two years is clearly not severable from the creation of the four judgeships in question. Lomax cites no facts for this proposition and ignores the legislative history of SB 195. As stated in the original Writ, this legislation was passed with virtually no discussion as to the provision altering the term of office. Most of the legislative history concerns itself with the number of judges, the cost for funding and the ongoing negotiations with Clark County over the number of new judges that it would allow. [See original Writ, Attachment F] The Legislature did not even discuss the number of years in 2005 when creating these four positions. Nor is the two years so inextricably intertwined with the creation of the judgeships that the Constitution cannot fill in the proper term. How can it be intertwined when it was not discussed? Also *Finger v. State*, 117 Nev. 548, 27 P.3d 66 (2001) and *Binegar v. State*, 112 Nev. 544, 915 P.2d 889 (1996) two criminal cases that involve criminal statutes including the insanity defense and AB 151. Lomax does not make clear how these cases are related to his claim or how AB 195 is similar to AB 151. What in AB 195 points to its non-severability? Lomax speculates that the four judgeships might not have been created if the Legislature believed that it would have to follow the Nevada Constitution. Such a position is not only unsupported by the Legislative History, is not only cynical, but it is outrageous to believe that no one told Legislators that they would have to follow the Nevada Constitution. Lomax does not have either the facts nor the law on the severability issue as in addition to all of the aforementioned, there is not even a non-severability clause. Moreover, if the Court was to take this position, then none of the

four departments would appear on the ballot, as all four would be non-existent. Further, Department 25, the position created in 2007, would become Department 22 and all of the new family court departments would have to move down one letter to replace Department M.

V. **Conclusion**

Petitioner has set forth the unconstitutionality of SB 195(3) and the Respondents have not set forth any basis for its constitutionality. Laches are inapplicable because, the statute of limitations has not run, the case just recently became ripe, this case would otherwise evade review and because Respondents have not shown any prejudice to themselves let alone any great damage in which their rights have been abridged.

Taxpayers will expend a minimum of \$480,000 for these four seats and at least another \$750,000 for the six family court seats in 2010 all in defiance of the Nevada Constitution as the judiciary has sought to increase its pay without the consent of the taxpayers.

CERTIFICATE OF SERVICE

I certify that I, Elizabeth Halverson, on the 28th day of May, 2008, caused the foregoing document entitled REPLY TO ANSWER TO WRIT OF MANDAMUS, PROHIBITION AND DECLARATORY JUDGMENT to be served as follows:

- by placing a copy of the same for mailing in the United States Mail, certified return receipt requested, with first class postage prepaid thereon addressed as follows; and/or
- by placing a copy of the same for mailing in the United States mail with first class postage prepaid thereon addressed as follows; and/or
- by causing a copy to be sent via facsimile at the number(s) listed below; and/or
- by hand-delivering a copy to the party or parties as listed below:

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