

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELIZABETH L. HALVERSON,
an individual¹

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 ROSS MILLER
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 Ross Miller (hereinafter Miller). This Reply is based upon the following Points and Authorities.

Points and Authorities

I **Respondent Miller has not stated why he is not the proper party to be sued.**

. Respondent Miller asserts that he is not the proper party to be sued because the judicial seats in question are in Clark County. There is no authority given as to why the Secretary of

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

State is not the Elections officer of all of Nevada. 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. NRS 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. In 2008, Miller is enforcing term limits by challenging the ability of candidates to run for office, but Miller is failing to challenge the candidates or the terms in the Eighth Judicial District, Departments 22, 23, 24 and M despite the fact that the term stated in the legislation is facially invalid since Article 6, §5 mandates a six year term. There are neither points nor authorities on this issue and therefore, Miller’s argument must fail.

II. The Reference in Article 6, §5 is to 1874 through 1877

Miller’s continuing argument² that Article 6, §5, allows the Legislature to select any term it chooses for judges running in their first election is simply without merit and defies constitutional construction. The fact is that the language in Article 6, §5 is identical today to what it was in 1874 with the sole exception of the change of the term of a District Judge from four years to six years. Where the language of Article 6, §5 discusses a first election, its only reference in the year 1874 could be to the election of 1874 as 1874 was the “first” election under the Constitutional provisions of Article 6.

² The same argument has been made in IAP v. Miller, No. 50895

“At the first general election under this Constitution there shall be elected in each of the respective districts (except as in this Section hereafter otherwise provided) one district judge, who shall hold office from and including the first Monday of December A.D., eighteen hundred and sixty four and until the first Monday of January in the year eighteen hundred and sixty seven. After the said first election, there shall be elected at the general election which immediately precedes the expiration of the term of his predecessor, one district judge in each of the respective judicial districts (except in the First District as in this Section hereinafter provided.)” emphasis added.

The reference is clearly to the first general election under the new Nevada Constitution.

The Constitution was new in 1864. It was not reinvented in 1998. Furthermore, the language above refers to the first election and not to a first judgeship. The first election can only have one date, all others must be subsequent to it. A first time judgeship would occur every time that there were additional seats created. However the language of the Constitution refers to four, now six, being the mandated term and it specifically provides for only one shorter period, to wit, the period of the first election from December 1864 to January 1867.

Miller again argues without Points or Authorities. Miller does not explain why the law would allow disparate terms of office, how same would be justified under the Equal Protection guarantees of the United States and Nevada Constitutions. Nor does Miller explain, what terms could be imposed? Anywhere from one year to six years? And since this language was drafted in 1864, how many elections since 1864 have had terms of less than the term that was specified in the Constitution? The one in 1998 for two years? The one in 1999 for 3 years? The one in 2006? So do three elections since 1864 constitute a trend? As Petitioner stated in the Original Writ, the greed began some 30 years after the passage of Article 6, §15 in 1968 which prohibited the increase or decrease in judicial salaries during the “term of office”. It was in the late 1990’s that

judges believing they all deserved the same pay made the conscious decision to work around the Constitution via the Legislature rather than honestly face the voters and ask the voters if they wanted Judges to have the same pay rate and if they wanted the judges to continue with staggered terms of one third at a time or if the voters wanted to vote for all forty seven at once. Miller has simply not provided any information as to why Article 6, §5 is not mandatory and he has waived any argument as to Article 6, §15 and why the ever changing judicial terms would not result in an increase in compensation which would violate the Nevada Constitution.

III. Respondent Miller 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, Miller has not adequately pled laches, let alone made a case for its application in this matter. 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. Again, Miller's brief is bereft of points and authorities. Merely a reference to one Nevada case is made with no analysis as to why it is applicable here. Miller has not set out his burden of proof, let alone met it. Miller 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. Ironically, Respondent Lomax in his brief 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 that the Secretary of State somehow cannot enforce the Constitution in Article 6 cases but that he can in cases involving constitutionally imposed term limits. This challenge would undermine any argument by Miller of any kind of 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 Miller to hearing this Writ as well? Miller's actions do not speak of any hardships in this case that are inconsistent with his other election challenges. It is only Petitioner in this matter who will not have her case heard. 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. .

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

A. Miller cannot claim laches as he was aware of Petitioner's claims well as the IAP 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 1 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. was 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, Miller's concerns have been addressed and he suffers no prejudice and therefore, no laches.

B. Even if Miller could make a case of prejudice, laches should not apply.

Miller seems to make an argument that 2005 should be the operative date for determining the time to file suit .

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 had 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.

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)³ 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

³ 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.

contravention of the Nevada Constitution. IAP filed its suit within 7 days and Petitioner 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 where 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 their 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.

IV. Declaratory Relief is not subject to laches.

As stated above, laches attaches to claims for equitable relief. A claim for declaratory relief is not mere “equitable relief”. While it is a separate remedy, as it allows for but does not require that anticipatory breaches can be adjudicated, it is much more like legal relief than equitable. A declaratory action can be subject to a jury trial pursuant to the Uniform Declaratory Relief Act, codified in Nevada under NRS Chapter 30. NRS 30.040 specifically states that anyone whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. Since declaratory relief determines legal rights, it is not subject to laches but to the statute of limitations. As has been stated above, the statute of limitations which is minimally two years in this instance, has not yet run. As such, any claim of laches as to the Writ of Mandamus or Prohibition ought not to be granted given that the Court would still be required to hear the declaratory action. A declaratory action must be heard where a judgment or decree will terminate the controversy or remove an uncertainty. NRS 30.070 (*cf.* NRS 30.080 if it will not do so). As stated above, a declaratory judgment will terminate a controversy. Here, it could do exactly that and end these terms of change for judges throughout the state.

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.

Another issue that the Respondents have not taken into account, is that the request for declaratory relief is legal in nature, not equitable as a jury can be had under NRS 30.110. and therefore laches will not apply to the request for declaratory relief. Lastly, equal protection is defied when the Secretary of State upholds some portions of the Constitution to the exclusions of others. It is defied when the judiciary chooses to allow only some people to be heard.

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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