IN THE SUPREME COURT OF THE STATE OF NEVADA

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BARBARA CEGAVSKE, IN HER OFFICIAL CAPACITY AS NEVADA SECRETARY OF STATE, Appellant, vs. ROBERT HOLLOWOOD, et al. Respondents.	**Supreme Court Case No. 84420** District Court No.: 21 OC 00182 1B

APPELLANT'S OPENING BRIEF

Appeal from the First Judicial District Court
Judge James E. Wilson Jr., Case No. 21 OC 00182 1B.

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Docket 84420 Document 2022-10646

Rule 26.1 Disclosure

Because Appellant is the Nevada Secretary of State acting in her official capacity, NRAP 26.1 does not require further disclosure.

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Jurisdictional Statement

This Court has jurisdiction over this appeal pursuant to NRAP 3A(b)(1) which provides that an appeal may be taken from "final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered." *See also* NRS 2.090. On March 9, 2022, the First Judicial District Court entered an Order That Writs of Mandamus and Prohibition Issue, and further issued a Writ of Mandate and Writ of Prohibition ("Extraordinary Writs"). Notice of Entry of Order was filed on March 10, 2022. The Extraordinary Writs were served on March 14, 2022, and Notice of Service of the Extraordinary Writs was filed on or about March 16, 2022. The Order and Extraordinary Writs constitute final judgment in this case.

Additionally, NRS 34.310 provides that an appeal from a district court's decision on a writ of mandamus is governed by the Nevada Rules of Appellate Procedure and the Nevada Rules of Civil Procedure.

The Secretary of State filed her appeal on March 18, 2022, well within the 30-day period for filing an appeal. NRAP 4(a)(1).

Routing Statement

This appeal raises a is appropriately before the Nevada Supreme Court pursuant to NRAP 17(a)(2) because it raises questions involving the ballot for the November 2022 general election. Additionally, this appeal raises important and novel questions involving interpretation of the Nevada Constitution and the constitutionality of a statute governing elections, NRS 295.026. Therefore, this appeal is appropriately before the Nevada Supreme Court under NRAP 17(a)(11).

Statement of the Issues

1. Whether the district court erred by concluding that the Nevada Legislature can enact a statute authorizing the withdrawal of a verified initiative petition where such a statute conflicts with the constitutional "rights reserved to the people" under the Nevada Constitution to both propose initiative petitions and "to enact or reject" them at the polls.

2. Whether the district court erred by issuing a writ of mandate and writ of prohibition preventing the Secretary of State from fulfilling her constitutional mandate to place two questions raised by verified initiative petitions on the ballot in the November 2022 general election.

Statement of the Case

I. Nature of the Case

This is an appeal from an order granting a writ of mandate and a writ of prohibition. JA 284-91. The appeal will determine whether questions raised in two verified initiative petitions are placed on the ballot in the November 2022 general election. That determination involves the reservation of rights that "the people reserve to themselves the power to propose, by initiative petition, statutes and amendments to statutes . . . and to enact or reject them at the polls." Nev. Const. art. 19 § 2(1).

II. Course of Proceedings and Disposition Below

The original petitioners are sponsors of two initiative petitions seeking to fund education by raising the statewide sales tax and taxes on the gaming industry. After the Secretary of State declined to acknowledge withdrawal of the verified initiative petitions—because her mandatory obligation under the Nevada Constitution is to place the questions raised by verified petitions on the ballot at the next general election [*see* Nev. Const. art. 19, § 2(3)]—the petition sponsors filed a Petition for Writs of Mandamus and Prohibition seeking to compel the Secretary of State to recognize the withdrawal and take no further action on the petitions. The Nevada Resort Association and Vegas Chamber sought, and were granted, intervention as joint petitioners with the sponsors.

After briefing the issues, the First Judicial District Court issued an order granting the Petition for Writs of Mandamus and Prohibition and issued a Writ of Mandate and Writ of Prohibition granting the relief sought by the sponsors and the intervenors—that the Secretary of State take no further action on the initiative petitions. This appeal followed.

Statement of Facts

On January 14, 2020, Nevadans for Fair Gaming Taxes PAC filed initiative petition S-01-2020 with the Secretary of State and identified Petitioner Robert Hollowood as the authorized representative under NRS 295.015 to "withdraw the petition or submit an amended petition." JA 21-28. Initiative S-01-2020 proposed to amend statutes raising the fees on the gaming industry. *Id.* On January 15, 2020, Petitioner Fund Our Schools PAC filed an initiative petition No. S-02-2020 with the Secretary of State and identified Kenneth Belknap as its authorized representative. JA 42-47. Initiative 2020-02 proposed to amend NRS Chapter 374 to raise the retail sales tax in Nevada from 2.25% to 3.75% to provide additional funds for education. *Id.*

Nevadans for Fair Gaming Taxes and Fund our Schools together with their authorized representatives, Hollowood and Belknap (collectively "Petition Sponsors") circulated petition S-01-2020 and S-02-2020 (jointly "Initiative Petitions" and obtained the support of a number of registered voters required to

"propose" the Initiative Petitions to the Legislature and the electorate. 76-77; *see* Nev. Const. art. 19, § 2(2) (requiring an initiative petition to be "proposed by a number of registered voters . . . .").

After the signatures were verified, the Secretary of State submitted the Initiative Petitions to the Legislature on the first day of the 2021 session. Nev. Legislature, Sen. Daily Journal at 33 (Feb. 1, 2021). The Legislature failed to act on the Initiative Petitions within the first 40 days of the Legislative Session as required by the Nevada Constitution. Nev. Const. art 19, § 2(3). Instead, on the 120th day of the Legislative Session, the Legislature struck a bargain with various industries and the Petition Sponsors, to increase other taxes to support education. Assembly Bill 495 (2021); *see also* Las Vegas Review-Journal, Colton Lochhead, *'Monumental compromise:' Mining tax bill would fund schools*, May 29, 2021 *available at* https://www.reviewjournal.com/news/politics-and-government/2021-legislature/monumental-compromise-mining-tax-bill-would-fund-schools-2366919/ (last visited Apr. 5, 2022). As part of that bargain, Petitioners agreed to withdraw the Initiative Petitions, and submitted withdrawal forms to the Secretary of State. JA 58 & 74.

On or about June 2, 2021, Mr. Hollowood submitted a Petition Withdrawal Form seeking the withdrawal of Petition S-01-2020 seeking to prevent the voters from considering Petition S-01-2020 in the November 2022 general election. JA

58. On June 8, the Secretary of State responded that her office was reviewing the withdrawal "and considering Article 19, Section 2 of the Nevada Constitution and NRS 295.026." JA 260.

Thereafter, the Office of Governor Sisolak requested an opinion from the Office of the Attorney General regarding whether the language in Article 19 acted to prevent a verified initiative petition from being withdrawn. JA 60. In response, the Attorney General issued Opinion No. 2021-04 on July 28, 2021, opining that the word "shall" did not impose a mandatory duty on the Secretary of State to place verified initiative petitions on the ballot. JA 60-71. Neither the Legislature nor the Governor's Office sought input from the Office of the Secretary of State on the withdrawal of the Initiative Petitions or the development of Opinion No. 2021-04. JA 254-55. On September 7, 2021, the Secretary of State sent a letter to Attorney General Ford expressing her constitutional obligation to place verified initiative petitions on the general election ballot and disagreeing with AGO 2021-04. JA 76-77.

On October 6, 2021, Mr. Belknap submitted a withdrawal form to the Secretary of State seeking to prevent the voters from considering the petition S-02-2020 in the November 2022 general election. JA 74. The Petition Sponsors then filed their Petition for Writs of Mandamus and Prohibition in the First Judicial District Court. JA 1-5.

Subsequently, the Nevada Resort Association ("NRA") and Vegas Chamber ("Chamber" and with NRA, the "Intervenors") filed a motion to intervene or to be heard as amici curiae. *See* JA 202-04. The court granted Intervenors' motion to intervene on February 7, 2022 [JA 202-04], and Intervenors joined the Petition and filed a brief supporting the Petition on February 15, 2022 [JA 205-24].

The district court granted the Petition for Writs of Mandamus and Prohibition on March 9, 2022, by issuing the Order That Writs of Mandamus and Prohibition Issue. JA 284-91. The Writ of Mandate and Writ of Prohibition subsequently issued. JA 292, 293.

Summary of the Argument

The district court erred when it issued two writs based on the conclusion that the Secretary of State does not have a mandatory duty to place questions on the November 2022 ballot presented in the two verified Initiative Petitions. The Nevada Constitution provides that the people reserve to themselves the right to both <u>propose</u> and <u>enact or reject</u> initiative petitions to adopt or amend statutes. Nev. Const. art 19, § 2(1). The Constitution does not contemplate that initiative process would become another legislative bargaining tool. Despite this clear reservation of rights, the Nevada Legislature adopted a statute which eliminates those rights by permitting the sponsor of an initiative petition to withdraw the petition even after 10 percent of the voters have proposed the petition, the Secretary of State has verified the petition and

submitted it to the Legislature, and before the question raised by the petition is submitted to the voters to enact or reject the petition.

The mandatory duty of the Secretary of State to place the questions on the ballot in the November 2022 general election protects the rights of the signors to propose the initiative petition and the rights of the people to "enact or reject" them at the polls. NRS 295.026, which permits a petition's representative to withdraw an initiative petition after it has been proposed and verified, is facially unconstitutional because it eliminates the rights the people have reserved to themselves to propose and vote on verified initiative petitions and because it conflicts with the mandatory constitutional duty of the Secretary of State.

Because NRS 295.026 conflicts with the rights reserved to the people and the mandatory duty of the Secretary of State, this Court should reverse the Order That Writs of Mandamus and Prohibition Issue, vacate the Writ of Mandate and Writ of Prohibition, and order the district court to dismiss the Petition for Writs and Prohibition with prejudice.

Argument

The Nevada Constitution is clear and unambiguous that the people have reserved to themselves the right to both propose and enact or reject an initiative petition. No statute can alter those constitutional rights even if enacted by the Legislature under the guise of "facilitating" the initiative petition process.

In 1912, the people ratified an amendment to Article 19 of the Nevada Constitution. *Wilson v. Koontz*, 76 Nev. 33, 35, 348 P.2d 231, 231 (1960).[1] That amendment "for the first time provided for the initiative whereby the people were empowered to propose amendments to the constitution and to enact or reject the same at the polls **independent of the legislature**, and similarly were empowered to propose laws." *Id.* at 36-37, 348 P.2d at 232 (emphasis added). Since its inception, Article 19, Section 2(3) has been "self-executing, but legislation may be specially enacted to facilitate its operation." *Id.* at 36, 348 P.2d at 232.[2]

Regardless of how this case is approached, whether by a plain reading of the Constitution, cannons of constitutional and statutory interpretation, legislative history and intent, or any other legal analysis, the result is always the same—statutes cannot supersede the Nevada Constitution. And statutory law can neither: (1) inhibit the rights of the people expressly reserved to themselves to both propose and consider initiative petitions; nor (2) alter the constitutional duties of the Secretary of

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[1] Initially this amendment was ratified as Section 3 to Article 19. In an additional amendment ratified in 1962, this section was moved to its current location as Article 19, Section 2(3). *See* 1961 Nev. Stat. 813-17. The current text of article 19, sections 2 and 5 are printed in the Addendum at the end of this Opening Brief pursuant to NRAP 28(f).

[2] That phrase was amended in 1962 to read "[t]he provisions of this article are self-executing but the legislature may provide by law for procedures to facilitate the operation thereof." Nev. Const. art 19, § 5.

State to place a verified initiative petition on the ballot as required by Article 19, Section 2(3) of the Constitution.

By adopting NRS 295.026[3] and allowing for withdrawal of a verified petition, the Nevada Legislature impermissibly created a new right specific to a few individuals and fundamentally altered the constitutional process because "the constitution does not contemplate the initiative without a ballot." *Rea v. City of Reno*, 76 Nev. 483, 486, 357 P.2d 585, 586 (1960). And Legislature's the creation of a right for the sponsor of an initiative petition ignores the rights of both the signors to propose a petition and the public to "enact or reject" a petition—those rights are constitutionally reserved to the people. For those reasons, this Court should reverse the order of the district court and order the dismissal of the Petition for Writs of Mandamus and Prohibition.

I. Standard of Review

When a writ petition involves questions of statutory construction, the Court reviews the district court's decision *de novo*. *Veil v. Bennet*, 131 Nev. Adv. Op. 22, 348 P.3d 684, 686 (2015). All the issues in this case involve interpretation of the Nevada Constitution and Nevada law. Therefore, this Court should review the district court's decision *de novo*.

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[3] The complete text of NRS 295.026 (2021) is included in the Addendum attached hereto.

II. This Court Should Reverse the Lower Court Because the Plain Language of the Constitution Reserves the People's Right to Propose and Enact or Reject Questions Raised by Initiative Petition—The Constitution Does Not Tolerate Withdrawal of a Verified Petition by a Petition Sponsor.

The initiative petition process as enumerated in the Nevada Constitution requires a vote on petitions once proposed. This process protects the rights the people have constitutionally reserved to themselves including both: (1) the right of 10 percent of the voters to propose an initiative petition; and (2) the rights of the people to "enact or reject" initiative petitions once verification is complete. Nev. Const. art 19, § 2(1). The initiative petition process contemplates a vote, not bargaining by the Legislature resulting in withdrawal of a verified initiative petition by the petition sponsors.

When interpreting the Nevada Constitution, the court's primary task is to ascertain the intent of those who enacted the constitutional provision and to adopt an interpretation that best captures their objective. *Nev. Mining Ass'n v. Erdoes*, 117 Nev. 531, 538, 26 P.3d 753, 757 (2001). Constitutional interpretations "are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *Strickland v. Waymire*, 126 Nev. 230, 234, 235 P.3d 605, 608 (2010), *quoting Dist. of Columbia v. Heller*, 544 U.S. 570, 576 (2008). First, a court turns to the constitutional language and gives that language its plain effect to determine a constitutional meaning. *Miller v. Burk*, 124 Nev. 579,

590-91, 188 P.3d 1112, 1119-20 (2008). Where a constitutional provision is clear on its face, courts need not go beyond the face of the constitution to determine the voters' intent. *Strickland*, 126 Nev. at 234, 235 P.3d at 608. A court must give words their plain meaning unless doing so would violate the spirit of the provision. *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986).

Only if the language is ambiguous will the court then look to the provision's history, public policy, and rationale to determine what voters intended. *Miller*, 124 Nev. at 590-91, 188 P.3d at 1119-20. Nor will the court create an ambiguity when none exists. *Id.* A provision is ambiguous if "it is susceptible to two or more reasonable but inconsistent interpretations . . . ." *Id.* (internal citation omitted). The court's interpretation of a constitutional provision may not violate the spirit of the provision. *Id.*

Because the plain language of the initiative process in the Nevada Constitution requires the Secretary of State to put a verified petition on the ballot, and because that mandatory duty protects the rights of the people to propose and enact or reject petitions, this Court should reverse the district court's order and extraordinary writs currently preventing the Secretary from placing the Initiative Petitions on the ballot.

A. The Plain Language of the Constitutional Initiative Petition Process Requires a Vote on Verified Initiative Petitions.

When simple cannons of constitutional interpretation are applied to the provisions governing the initiative petition process, no doubt remains—the

questions proposed by 10 percent of voters in the verified Initiative Petitions must appear on the ballot so that the people can "enact or reject them at the polls." Nev. Const. art 19 § 2(1).

The initiative petition process is as follows:

First, a petition must be filed with the Secretary of State by "the person who intends to circulate it . . . ." Nev. Const. art 19, § 2(3). While an individual can "circulate" an initiative petition, only "a number of registered voters equal to 10 percent or more of the number of voters who voted in the last preceding general election" can propose an initiative. Nev. Const. art. 19, § 2(2). This means that no action is taken on an initiative by the Legislature or electorate until after the requisite number of registered voters have signed the petition.

Second, following circulation of the initiative petition and collection of the requisite number of signatures, it must be submitted for verification to the County Clerks and ultimately to the Secretary of State. Nev. Const. art. 19, § 2(3); NRS 295.056. Once the signature verification process is complete, the Secretary of State "shall transmit such petition to the Legislature as soon as the Legislature convenes and organizes." Nev. Const. art. 19, § 2(3).

Next, the constitutional process can take two different paths, and that process depends on the actions taken by the Legislature. If the Legislature fails to act on or rejects the petition, "**the Secretary of State shall submit the question of approval**

or disapproval of such statute or amendment to a statute to a vote of the voters at the next succeeding general election." *Id.* (emphasis added). But if the Legislature enacts the petition, and the Governor approves it "in the same manner as other statutes are enacted, such statute or amendment to a statute shall become law . . . ." *Id.* Only if the Legislature and Governor approve a verified initiative petition does the Constitution permit the petition not to go on the ballot for "approval or disapproval."

The initiative petition process is clear—once verified the question in the petition must go to the voters unless the Legislature adopts the statute or amendment to the statute. This should end the inquiry—withdrawal is not contemplated or permitted by the constitutional process. This conclusion is further supported by: (1) the constitutional rights of the 10 percent of voters required to propose an initiative petition; (2) the constitutional rights reserved to the people to "enact or reject," or "approve or disapprove" of the initiative petition; and (3) the mandatory duty of the Secretary of State to place the question on the ballot. Each is discussed in turn.

B. The Right of 10 Percent of the Voters to Propose an Initiative Petition Is Clear on the Face of the Constitution and Cannot Be Altered by the Petition's Sponsor or Limited by the Legislature.

A circulator of an initiative petition does not have the power to propose the petition either to the Legislature or to the electorate. Because the circulator cannot propose the petition, she should not be granted the power to withdraw the petition

once 10 percent of the voters have proposed it. As explained below, not even those who propose an initiative petition can force its withdrawal by removing their signatures. In Nevada, the number of voters required to propose an initiative petition is "10 percent or more of the number of voters who voted in the entire State in the last preceding general election." Nev. Const. art. 19, § 2(2). And the Constitution provides that "the people reserve to themselves the power to propose, by initiative petition, statutes and amendments to statutes . . . ." Nev. Const. art 19, § 2(1).

Before a petition is signed and filed for verification of signatures, "the petition is in the power of the signers." *State v. Scott*, 52 Nev. 216, 230, 285 P. 511 (1930), quoting *Bordwell v. Dills*, 66 S.W. 646, 647 (Ark. 1902); *Educ. Initiative PAC v. Comm. to Protect Jobs*, 129 Nev. 35, 37-38, 293 P.3d 874, 877-78 (2013) (signatures collected by voters "who likewise support the initiative's ideas").[4] "This power consists of the power to *propose* laws which thereafter must be enacted or rejected at the polls as distinguished from a power which would effect a legislative act without an election." *Rea*, 76 Nev. at 486, 357 P.2d at 586. Thus, before the petition is proposed, the petition is in the power of the signors who can only propose passage of an initiative petition to the electorate by accumulation of sufficient signatures.

[4] *Education Initiative PAC* also summarizes the initiative process and notes that if the Legislature "fails to take action on it during the first 40 days of the session, the Secretary must then place the initiative on the next general election ballot . . . ." 129 Nev. at 38, 293 P.3d at 877.

"Each signor may control his signature. It is not yet a petition in which the public is interested." *Scott*, 52 Nev. at 230 (internal citation omitted).

But once the initiative petition is proposed by the signors, they may not even withdraw their own signatures to defeat the number of signatories required to propose the petition. *Scott*, 52 Nev. at 230; *see also* Attorney General's Opinion No. 379 (July 14, 1930) (petitioners who sign their names cannot withdraw their names from a petition to which jurisdiction has attached by filing).

Because the right to propose an initiative petition is collectively held by 10 percent of the voters, the Legislature cannot authorize one individual to negate that right by withdrawing the proposed petition—an individual who need not even be a resident of Nevada or registered to vote in the State. *See* NRS 295.015 (authorized person(s) must be identified by filing with Secretary of State). Yet NRS 295.026, does exactly that. It provides that a "petition for initiative or referendum may be withdrawn if a person authorized . . . to withdraw the petition submits a notice of withdrawal to the Secretary of State . . . not later than 90 days before the election at which the question of approval or disapproval of the initiative will appear on the ballot . . . ." NRS 295.026(1)(a).

To the extent NRS 295.026 permits withdrawal of a proposed initiative petition, it violates the constitutional rights of the 10 percent of the electorate required to propose the petition. Those individuals cannot even withdraw their

signatures to defeat the minimum number of voters required to propose a petition as stated in *Scott*. The Initiative Petitions could not have been proposed but for at least 10 percent of the voters—a right specifically reserved by the people. Nev. Const. art 19, § 2(1). The fate of the Initiative Petitions cannot be decided by one individual—who does not have the right to propose a petition and who is not required to be a Nevadan—in violation of the rights of the voters proposing the petitions. For this reason, NRS 295.026 violates the rights of those proposing a petition. The order of the district court must be reversed and the writs vacated.

C. The Power of the Electorate to Enact or Reject a Verified Initiative Petition Cannot Be Modified or Eliminated by the Legislature—Questions Raised by Verified Petition Shall Appear on the Ballot.

Not only does the Constitution provide for the rights of the signors to propose a petition, it protects the rights of the people to "enact or reject" a verified initiative petition at the polls—and the provisions of the Nevada Constitution reserving and governing rights of the electorate are clear and unambiguous. In enacting the initiative process, "the people reserve to themselves the power to propose, by initiative petition, statutes and amendments to [the] Constitution, **and to enact or reject them at the polls.**" Nev. Const. art. 19, § 2(1) (emphasis added).

After signors propose a petition by filing for signature verification, the "public has become interested in it." *Scott*, 52 Nev. at 230. Once a signature has been verified, signatures cannot be withdrawn—the power to act on the petition cannot

be impaired by those who proposed it in the first place. *Id.*; *see also* Attorney General's Opinion No. 379 (July 14, 1930) (petitioners who sign their names cannot withdraw their names from a petition to which jurisdiction has attached by filing).

Before the petition is filed for verification, the petition is in the power of the signors. "Each signor may control his signature. It is not yet a petition in which the public is interested." *Scott*, 52 Nev. at 230 (internal citation omitted). But once the petition has been filed with the Secretary of State:

> The public has now become interested in it. The jurisdiction of the subject matter has now attached. In the absence of something in the statute permitting it, no individual signer, nor indeed, all the signers, could thereafter withdraw or erase their names from the petition. * * * He who voluntarily sets on foot a proceeding for the enforcement of a salutary police regulation in any community should not be permitted to capriciously undo his work. He should not be allowed to play fast and loose with the interests of society. The law makes no provision for protests and remonstrances, for signing and countersigning. It only provides for the petition.

Scott, 52 Nev. at 230-31 (internal citation omitted).

In *Scott*, the Court considered whether a signor could withdraw his signature after the signed petition had been filed with the Secretary of State so as to defeat the petition by reducing the number of signors below the constitutional requirement. *Id.* at 224. The court concluded that no signor could withdraw a signature because the rights had passed to the electorate to enact or reject the petition. *See id.* at 231. The rights of the signors was to "*propose* laws **which must thereafter be enacted**

or rejected at the polls as distinguished from a power which would effect a legislative act without an election." *Rea*, 76 Nev. at 486, 357 P.2d at 586 (bold emphasis added).

Thus, the "right of a specified number of the electorate to unite in proposing laws to the legislative body, which, after due consideration **must submit the same to a vote of the people for their approval or disapproval.**" *Id.* (emphasis added). The Constitution does not provide for withdrawal of a verified initiative petition by the circulating entity nor by those proposing the petition. Doing so would interfere with the rights of the electorate who reserve the ability to "enact or reject" the petition at the polls.

The rights reserved to the people are unequivocal and clear—the people have a right to enact or reject the questions raised in a proposed and verified initiative petition. Because the initiative petition process protects this right reserved to the people, this should the end the inquiry. The Constitution does not equivocate whether a verified petition should go on the ballot—it mandates that the question be placed on the ballot for the electorate to "enact or reject."

D. The Mandatory Duty of the Secretary of State to Place the Initiative Petition on the Ballot is Consistent with the Rights Reserved to the People to both Propose and Enact or Reject the Petition.

The rights of the signors and the rights of the electorate are protected by the express language of Article 19, Section 2(3) which details the duties of the Secretary

of State. The Secretary of State is acting within her constitutional duties by placing the Initiative Petitions on the ballot in the November 2022 general election. Because the Secretary of State's actions are consistent with the rights reserved to the people, the district court erred by issuing the Writ of Mandate and Writ of Prohibition to compel the Secretary of State to violate her constitutional duties.

1. The Secretary of State's mandatory duty to place verified initiative petitions on the ballot confirms the rights reserved to the people to propose and enact or reject petitions.

The Secretary of State has a mandatory duty to place the Initiative Petitions on the ballot. A straightforward reading of the applicable constitutional requirements as it would be understood by the voters is instructive:

> If the statute or amendment to a statute is rejected by the Legislature, or if no action is taken thereon within 40 days, the Secretary of State **shall submit the question of approval or disapproval** of such statute or amendment to a statute to a vote of the voters at the next succeeding general election.

Nev. Const. art. 19, § 2(3)[5] (emphasis added).

The duty of the Secretary of State is unambiguous—she "shall submit the question of approval or disapproval" to the voters. The word "shall" means "has a duty to, more broadly is required to" and is meant in "the mandatory sense that

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[5] Additional history of Article 19 is further set forth in *Wilson v. Koontz*, 76 Nev. 33, 348 P.2d 231 (1960).

drafters typically intend and that courts typically uphold." Black's Law Dictionary 1653 (11th Ed. 2019). The Nevada Legislature even agrees with that definition stating in law: "'Shall' imposes a duty to act." NRS 0.025(1)(d). Therefore, the duty of the Secretary of State to submit a verified initiative petition to the voters on the ballot is mandatory, not permissive and not subject to legislative interference or alternative interpretation.

Moreover, this interpretation is consistent with the whole of Article 19. The provisions of the Nevada Constitution governing the initiative petition process are self-executing. Nev. Const. art. 19, § 5. Self-executing provisions of the Constitution "need no legislative aid to put them into effect." *State v. District Court*, 52 Nev. 379, 381, 287 P. 957 (1930). Provisions which are not self-executing require "the legislature to enact legislation carrying the provisions of the constitution into effect." *Goldfield Con. M. Co. v. State*, 60 Nev. 241, 245, 106 P.2d 613 (1940). Because the initiative process is "self executing," the Legislature is prohibited from enacting statutes that interfere with the self-executing nature of the initiative process which needs no legislative aid to put it into effect.

The Nevada Supreme Court has already recognized that the procedures in Article 19, Section 2 are complete, self-executing, and relate "to *all* initiative petitions." *Wilson*, 76 Nev. at 38, 348 P.2d at 233. In *Wilson*, the petitioners asked the court to compel the Secretary of State to file an initiative petition to amend the

Constitution. *Id.* at 34, 348 P.2d at 231. In compelling the Secretary of State to file the initiative petition, the Supreme Court specifically interpreted Article 19, Section 2, finding that provision:

> is specific in the requirements necessary to effectuate the change or changes desired. The section provides the number of signatures required on any petition, who may sign the petition, what the petition shall contain, where and when the petition must be filed, and the detailed disposition of the same after its filing. **If any election must follow because of the legislature's rejection or nonaction thereon, or because of the referendum, the procedure therefor is fully covered by general law**.

Id. at 38, 348 P.2d at 233 (emphasis added). Critically, that court recognized that the "wisdom of making it part of the organic law is no concern for the courts." *Id.* In other words, the court could not read into the initiative process elements that did not already exist in the Constitution.

Moreover, Article 19 of the Constitution "does not contemplate the initiative without a ballot." *Rea*, 76 Nev. at 486, 357 P.2d at 586. Although the court in *Rea* was considering municipal legislation, "the initiative power given to the electors of a municipality with respect to municipal legislation is no different from the initiative power given to the people as a whole with respect to state matters." *Id.* The Supreme Court concluded that the initiative process "consists of the power to *propose* laws which thereafter **must be enacted or rejected at the polls as distinguished from a power which would effect a legislative act without an election**." *Id.* (emphasis

added). Yet that is exactly what withdrawal of the Initiative Petitions would allow—a power which would effect a legislative act (Assembly Bill 495 raising the mining tax to fund education) without an election to consider the Initiative Petitions. In effect, the withdrawal of the Initiative Petitions frustrates the entire point of the initiative process—a legislative act without the Legislature. *See Wilson*, 76 Nev. at 36-37, 348 P.2d at 232 (the initiative process provided for the first time the power of the people to propose laws "and to enact or reject the same at the polls independent of the legislature . . . .").

In *Rea*, the court considered a statute which did not provide for the submission of an initiative to the voters. 78 Nev. at 485, 357 P.2d at 586. Instead, the statute allowed the city or town to "adopt such amendment or amendments by resolution without further proceeding." *Id.* In declaring that the statute violated Article 19, Section 2, the Nevada Supreme Court concluded that "the legislature . . . went beyond the said powers granted to it by the constitution, because it failed to provide therein for the submission of proposed charter amendments to the decision of the voters at the polls." *Id.* at 486, 357 P.2d at 586. In deciding that the initiative must be submitted to the voters (and not simply decided by the municipality), the *Rea* court foreclosed the possibility that an initiative petition need not be submitted to the voters.

But that is exactly what the district court ordered—an initiative process without a ballot. The plain language of the Nevada Constitution does not permit this. This Court cannot ignore the Legislature's failure to enact the Initiative Petitions—the circumstance which expressly triggers a mandatory, constitutional duty to place the Initiative Petitions on the ballot. By issuing the writs of mandamus and prohibition, the district court affirmed a process which allows for bargaining outside of the constitutional process and which ignores the rights of the electorate to both propose and consider by ballot a verified initiative petition.

Respondents would have the Court read the Nevada Constitution to include an exception to submitting a verified petition to the voters and employ a different meaning to the word "shall" other than a mandatory obligation. But the Constitution addresses this—it provides that the initiative petition does not go to the ballot only if the Legislature enacts it "without change." Nev. Const. art. 19, § 2(3). The Constitution does not provide any other circumstance to avoid placing the question raised in the petition on the ballot. And it certainly does not provide a right for the entity responsible for circulating a petition to withdraw the petition once the voters propose the petition, it has been verified, submitted to the Legislature, and either acted upon or not acted upon by the Legislature. The Constitution could have provided for this process or used language other than "shall" to describe how a verified initiative petition proceeds or does not proceed to the ballot. Neither the

Legislature nor the voters who enacted Article 19 saw fit to include a provision for withdrawal once the signatures are verified and Secretary submits the petition to the Legislature. Instead, all the language is mandatory—the issue shall be on the ballot.

2. The district court erred by issuing the writs of mandate and prohibition because the law does not recognize any duty placed upon the Secretary of State to withdraw the Initiative Petitions.

A writ of mandamus will only issue "when the respondent has a clear, present legal duty to act." *Round Hill Gen. Imp. Dist. v Newman*, 97 Nev. 601, 603, 637 P.2d 534, 536 (1981). And a writ of prohibition "arrests the proceedings of any tribunal, corporation, board or person **exercising judicial functions**, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." NRS 34.320 (emphasis added). A writ of prohibition is available only to restrain courts, tribunals, or others "who are exercising or attempting to exercise judicial or quasi-judicial functions beyond their powers." *Mineral Cnty. v. State Dep't of Conservancy*, 117 Nev. 235, 243-44, 20 P.3d 800, 805-06 (2001).

The district court concluded that the Secretary of State's "ministerial duty to submit a petition to the voters at a general election assumes the existence of a valid petition that has complied with the procedural requirements enacted by the Legislature." JA 290. But the court failed to analyze the constitutional duty of the Secretary of State to place a verified petition on the ballot or how that duty protected both the rights of those proposing the petition and the rights of the electorate to vote

on the petition as explained above. No writ of mandamus is available to compel the Secretary of State to withdraw the Initiative Petitions when her explicit constitutional duty is clear—once 10 percent of the voters propose the Initiative Petitions petition, the Secretary's duty is to place the questions raised in the Petitions on the ballot in the 2022 general election so that the electorate can "enact or reject" the Initiative Petitions. Therefore, the district court erred in its conclusion to issue the Writ of Mandate.

And a writ of prohibition is only available to arrest judicial or quasi-judicial functions in excess of that public officer's jurisdiction. The Order That Writs of Mandamus and Prohibition Issue fails to identify any judicial or quasi-judicial actions that the Secretary of State is performing and which a writ of prohibition can prohibit. *See* JA 284-91. Therefore, the lower court erred by issuing the Writ of Prohibition.

Because writ relief is not available either in the form of a writ of mandamus or writ of prohibition, the district court should not have issued the Order That Writs of Mandamus and Prohibition Issue, and it should not have issued the Writ of Mandate and Writ of Prohibition. This Court should reverse the Order and vacate the Writs issued by the district court.

III. This Court Should Reverse Because the Legislature Cannot Interfere with the Initiative Petition Process or the Rights of the People.

Provisions of the Nevada Constitution "constitute the supreme law of the state and control over any conflicting statutory provisions . . . ." *Goldman v. Bryan*, 106 Nev. 30, 37, 787 P.2d 372, 377 (1990). "The constitution may not be construed according to a statute enacted pursuant thereto; rather, statutes must be construed consistent with the constitution and, where necessary, in a manner supportive of their constitutionality." *Foley v. Kennedy*, 110 Nev. 1295, 1300, 885 P.2d 583, 586 (1995).

Not only is the Nevada Constitution the supreme law, the self-executing nature of constitutional law further dictates that where a statute conflicts with the constitutional provisions, the constitutional article should be followed and not the provisions of the statute. *E.g.*, *Foley*, 110 Nev. at 1301 & n.5, 885 P.2d 586. Here, the "withdrawal" of a verified initiative petition violates the rights of the people specifically reserved to themselves to both propose and "enact or reject" laws as well as the duties of the Secretary of State to facilitate those rights by placing petitions on the ballot.

The Legislature can only adopt laws governing the initiative petition process "so long as those laws facilitate the provisions of Article 19." *Nevadans for the Protection of Property Rights, Inc. v. Heller*, 122 Nev. 894, 902, 141 P.3d 1235, 1240 (2006). In *Heller*, this Court found that the single-subject requirement for

initiative petitions facilitate the initiative process by preventing voter confusion and promoting informed decisions by voters. *Id.* The single-subject requirement also does not "impermissibly limit the people's ability to legislate or amend the constitution" because any second subject can be addressed by creating a second initiative petition. *Id.* Similarly, the court upheld statutes requiring a description of the petition because those rules "facilitate the people's right to meaningfully engage in the initiative process." *Nevadans for Nevada v. Beers*, 122 Nev. 930, 940, 141 P.3d 339, 345 (2006).

But where a statute curtails the power of initiative or places an undue burden on an exercise of the right, the statute will be struck down. "[T]he procedural laws enacted by the Legislature may not unreasonably inhibit the powers reserved to the people in Article 19." *We The People ex rel. Angle v. Miller*, 124 Nev. 874, 887, 192 P.3d 1166, 1174 (2008). "[A] statutory provision will not be enforced when to do so would infringe upon rights guaranteed by our state constitution." *Id.* at 891, 192 P.3d at 1177 (striking down a statutory provision shortening the time for circulation of a petition because the Legislature "may not directly inhibit the powers reserved to the people under Article 19.").

Inhibiting the rights the people have reserved to themselves is exactly what the Legislature has done by enacting NRS 295.026. The statute authorizing one individual to withdraw a verified initiative petition after the Legislature has failed

to act on the petition within 40 days violates the powers reserved both to the signors of an initiative petition to propose laws as well as the rights reserved to the people to "enact or reject" those proposed laws. And it bypasses a mandatory duty of the Secretary of State designed to protect those rights. The withdrawal statute does not facilitate the constitutional process—it impairs the constitutional rights of the people.

Because the Constitution is clear on its face and expressly spells out the process for legislative consideration of the initiative and subsequent placement of the initiative on the ballot, the Legislature cannot engage in law-making that contravenes the provisions of the Constitution. The district court erred by not considering that NRS 295.026 permitting withdrawal of a verified initiative petition that has been submitted to the Legislature contradicts the Nevada Constitution. Therefore, the writs compelling the Secretary of State to recognize the withdrawal of the Initiative Petitions are clearly in error and should be vacated.

Conclusion

By allowing the sponsor to withdraw a verified initiative petition, NRS 295.026 violates the constitutional rights of the people which they have reserved to themselves to both propose initiative petitions and enact or reject those petitions. Therefore, this Court should:

(1) reverse the Order That Writs of Mandamus and Prohibition Issue,

(2) vacate the Writ of Mandate and Writ of Prohibition, and

(3) order the district court to dismiss the Petition for Writs of Mandamus and Prohibition with prejudice.

Dated this 5th day of April, 2022.

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Addendum

Nevada Constitution, article 19, section 2

Sec. 2. **Initiative petition for enactment or amendment of statute or amendment of Constitution; concurrent and consecutive amendments.**

1. Notwithstanding the provisions of Section 1 of Article 4 of this Constitution, but subject to the limitations of Section 6 of this Article, the people reserve to themselves the power to propose, by initiative petition, statutes and amendments to statutes and amendments to this Constitution, and to enact or reject them at the polls.

2. An initiative petition shall be in the form required by Section 3 of this Article and shall be proposed by a number of registered voters equal to 10 percent or more of the number of voters who voted at the last preceding general election in not less than 75 percent of the counties in the State, but the total number of registered voters signing the initiative petition shall be equal to 10 percent or more of the voters who voted in the entire State at the last preceding general election.

3. If the initiative petition proposes a statute or an amendment to a statute, the person who intends to circulate it shall file a copy with the Secretary of State before beginning circulation and not earlier than January 1 of the year preceding the year in which a regular session of the Legislature is held. After its circulation, it shall be filed with the Secretary of State not less than 30 days prior to any regular session of the Legislature. The circulation of the petition shall cease on the day the petition is filed with the Secretary of State or such other date as may be prescribed for the verification of the number of signatures affixed to the petition, whichever is earliest. The Secretary of State shall transmit such petition to the Legislature as soon as the Legislature convenes and organizes. The petition shall take precedence over all other measures except appropriation bills, and the statute or amendment to a statute proposed thereby shall be enacted or rejected by the Legislature without change or amendment within 40 days. If the proposed statute or amendment to a statute is enacted by the Legislature and approved by the Governor in the same manner as other statutes are enacted, such statute or amendment to a statute shall become law, but shall be subject to referendum petition as provided in Section 1 of this Article. If the statute or amendment to a statute is rejected by the Legislature, or if no action is taken thereon within 40 days, the Secretary of State shall submit the question of approval or disapproval of such statute or amendment to a statute to a vote of the voters at the next succeeding general election. If a majority of the

voters voting on such question at such election votes approval of such statute or amendment to a statute, it shall become law and take effect upon completion of the canvass of votes by the Supreme Court. An initiative measure so approved by the voters shall not be amended, annulled, repealed, set aside or suspended by the Legislature within 3 years from the date it takes effect. If a majority of such voters votes disapproval of such statute or amendment to a statute, no further action shall be taken on such petition. If the Legislature rejects such proposed statute or amendment, the Governor may recommend to the Legislature and the Legislature may propose a different measure on the same subject, in which event, after such different measure has been approved by the Governor, the question of approval or disapproval of each measure shall be submitted by the Secretary of State to a vote of the voters at the next succeeding general election. If the conflicting provisions submitted to the voters are both approved by a majority of the voters voting on such measures, the measure which receives the largest number of affirmative votes shall thereupon become law. If at the session of the Legislature to which an initiative petition proposing an amendment to a statute is presented which the Legislature rejects or upon which it takes no action, the Legislature amends the statute which the petition proposes to amend in a respect which does not conflict in substance with the proposed amendment, the Secretary of State in submitting the statute to the voters for approval or disapproval of the proposed amendment shall include the amendment made by the Legislature.

4. If the initiative petition proposes an amendment to the Constitution, the person who intends to circulate it shall file a copy with the Secretary of State before beginning circulation and not earlier than September 1 of the year before the year in which the election is to be held. After its circulation it shall be filed with the Secretary of State not less than 90 days before any regular general election at which the question of approval or disapproval of such amendment may be voted upon by the voters of the entire State. The circulation of the petition shall cease on the day the petition is filed with the Secretary of State or such other date as may be prescribed for the verification of the number of signatures affixed to the petition, whichever is earliest. The Secretary of State shall cause to be published in a newspaper of general circulation, on three separate occasions, in each county in the State, together with any explanatory matter which shall be placed upon the ballot, the entire text of the proposed amendment. If a majority of the voters voting on such question at such election votes disapproval of such amendment, no further action shall be taken on the petition. If a majority of such voters votes approval of such amendment, the Secretary of State shall publish and resubmit the question of approval or disapproval to a vote of the voters at the next succeeding general election in the same manner as such question was originally submitted. If a

majority of such voters votes disapproval of such amendment, no further action shall be taken on such petition. If a majority of such voters votes approval of such amendment, it shall, unless precluded by subsection 5 or 6, become a part of this Constitution upon completion of the canvass of votes by the Supreme Court.

5. If two or more measures which affect the same section of a statute or of the Constitution are finally approved pursuant to this Section, or an amendment to the Constitution is finally so approved and an amendment proposed by the Legislature is ratified which affect the same section, by the voters at the same election:

(a) If all can be given effect without contradiction in substance, each shall be given effect.

(b) If one or more contradict in substance the other or others, the measure which received the largest favorable vote, and any other approved measure compatible with it, shall be given effect. If the one or more measures that contradict in substance the other or others receive the same number of favorable votes, none of the measures that contradict another shall be given effect.

6. If, at the same election as the first approval of a constitutional amendment pursuant to this Section, another amendment is finally approved pursuant to this Section, or an amendment proposed by the Legislature is ratified, which affects the same section of the Constitution but is compatible with the amendment given first approval, the Secretary of State shall publish and resubmit at the next general election the amendment given first approval as a further amendment to the section as amended by the amendment given final approval or ratified. If the amendment finally approved or ratified contradicts in substance the amendment given first approval, the Secretary of State shall not submit the amendment given first approval to the voters again.

Nevada Constitution, article 19, section 5

Sec. 5. **Provisions of article self-executing; legislative procedures.**

The provisions of this article are self-executing but the legislature may provide by law for procedures to facilitate the operation thereof.

NRS 295.026 **Withdrawal of petition.**

1. A petition for initiative or referendum may be withdrawn if a person authorized pursuant to NRS 295.015 to withdraw the petition submits a notice of withdrawal to the Secretary of State on a form prescribed by the Secretary of State. Any such notice of withdrawal of:

(a) A petition for initiative that proposes a statute or an amendment to a statute must be submitted to the Secretary of State not later than 90 days before the election at which the question of approval or disapproval of the initiative will appear on the ballot;
(b) A petition for initiative that proposes an amendment to the Constitution must be submitted to the Secretary of State not later than 90 days before the first election at which the question of approval or disapproval of the initiative will appear on the ballot; or
(c) A petition for referendum must be submitted to the Secretary of State not later than 90 days before the election at which the question of approval or disapproval of the referendum will appear on the ballot.

2. Once a petition for initiative or referendum is withdrawn pursuant to subsection 1, no further action may be taken on that petition.

Attorney's Certificate

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2021 and a font of Times New Roman.

I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points, and contains 8,831 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of April, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, the foregoing **APPELLANT'S OPENING BRIEF** was served on the individuals registered to receive service pursuant to the Court's electronic filing system. Service was also completed via electronic mail pursuant to a stipulation of the parties, and completed on the following individuals as shown:

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