IN THE SUPREME COURT OF THE STATE OF NEVADA

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EDUCATION FREEDOM PAC,

Appellant,

vs.

RORY REID, AN INDIVIDUAL; BEVERLY ROGERS, AN INDIVIDUAL; AND BARBARA K. CEVASKE, IN HER OFFICIAL CAPACTY AS NEVADA SECRETARY OF STATE,

Respondents.

Supreme Court Case No. 84736
District Court Case No. 22OC000281B

APPEAL FROM ORDER OF THE FIRST JUDICIAL DISTRICT COURT CARSON CITY, NV

APPELLANT'S OPENING BRIEF

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Docket 84736 Document 2022-16698

DISCLOSURE STATEMENT IN COMPLIANCE WITH NRAP 26.1

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Education Freedom PAC
2. Lucas Foletta, Esq. from McDonald Carano LLP was the prior attorney of record during the district court Proceedings.
3. Jason D. Guinasso, Esq., Alex R. Velto, Esq., and Astrid A. Perez, Esq. of Hutchison & Steffen, PLLC, are now and will be the current appeal the attorneys of record for Education Freedom PAC. No other attorneys from Hutchison & Steffen, PLLC are expected to appear before this Court with respect to the appeal now pending.

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APPELLANT'S OPENING BRIEF

Appellant, EDUCATION FREEDOM PAC hereby files this Opening Brief.

I. JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to NRAP 3A(b)(1) because it is an appeal from a final order resolving all claims presented to the district court, and pursuant to NRAP 3A(b)(3) because it is an appeal from an order granting an injunction.

The final order was entered on April 12, 2022. The Second order was entered on April 26, 2022. Notice of entry of the order was served on May 4, 2022. The notice of appeal was filed on May 19, 2022. This appeal is timely because it was filed within 30 days after the entry of the final judgment as N.R.A.P. 4(a)(1) requires.[1]

[1] The district court consolidated two separate cases involving Initiative Petitions. The district court has not issued a final order in the second Initiative Petition case, only the one presently before this Court. Given the time-sensitive nature of this appeal, this brief references the other district court case and underlying Initiative Petition in-part.

II. ROUTING STATEMENT

This case is presumptively retained by the Supreme Court: (1) pursuant to NRAP 17(a)(3) because it is a case involving a ballot or election issue; and (2) pursuant to NRAP 17(a)(12) because there is an issue of first impression. The district court concluded that Article 19, Section 6 of the Nevada Constitution applies to constitutional amendments, as well as statutes and statutory amendments. There is no opinion of this Court with a holding that supports this conclusion.

III. ISSUES PRESENTED

1. Whether Education Freedom PAC's Description of Effect is a straightforward, succinct, and nonargumentative summary of what the initiative is designed to achieve and how it intends to reach those goals?

2. Whether the district court erred in requiring Education Freedom PAC's Description of Effect to contain subjective, argumentative language?

3. Whether the Nevada Constitution prohibits unfunded Constitutional Amendments, when the plain language only applies to statutes and statutory amendments?

4. Whether, as is the case with many other provisions of the Nevada Constitution, a Constitutional Amendment can force the Legislature to act?

5. Whether NRS 295.061 obligates a district court to dismiss a complaint if the district court cannot comply with the statutorily required timeline?

IV. INTRODUCTION

This case is about a district court's outcome driven rejection of a lawfully compliant Initiative Petition for a Constitutional Amendment. The district court erred for five reasons. First, the district court erred when it evaluated its own subjective policy conclusion over Nevada's liberal standard for Initiative Petitions. Second, the district court erred when it determined the description was vague and incomplete, even though the description was straightforward, succinct, and non-argumentative. Third, the district court erred when it concluded that Nevada's Constitution precludes unfunded Constitutional Amendments, even though the plain language of Article 19, Section 6 applies to statutes and statutory amendments solely. Fourth, the district court erred when it concluded the Petition interferes with the Legislature's function, even though there are many other examples of Nevada Constitutional provisions that equally require the Legislature to act. And fifth, the district court erred when it failed to dismiss the complaint after the timeline prescribed in NRS 295.061(1) expired.

V. STATEMENT OF THE CASE

Initiative Petitions follow a simple path. A Petition with its Description of Effect (hereinafter "Description") is filed with the Secretary of the State's office. The Description must contain a simple description of the proposed change and the Petition can only cover one subject. The description is not supposed to be argumentative. It is not supposed to be subjective. After the Petition receives enough signatures, it is placed on the ballot for debate, dialogue, and votes. The State requires that the ballot include arguments in favor or against a petition which ensures both sides are heard, and policy ramifications of the Petition can be evaluated.

But here, the district court put the cart before the horse. Rather than applying existing Nevada law governing an Initiative Petition's Description of Effect, it placed its own subjective opinion above "one of the basic powers enumerated in this State's Constitution." *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller,* 122 Nev. 894, 912, 141 P.3d 1235, 1247 (2006); Nev. Const. art. 19 § 2. Rather than evaluating the Description to assess if it was "straightforward, succinct, and nonargumentative," the district court evaluated the policy and enjoined Appellant because the district court pontificated that the Petition would "ha[ve] a most solemn and powerful effect on the public

education system." 1 JA 187; *Education Initiative PAC v. Community to Protect Nevada Jobs*, 129 Nev 35, 37, 293 P.3d 874, 876 (2013).

The Nevada Constitution requires better than allowing one district court judge's personal opinion to remove the citizens' right to evaluate the proposal and choose to vote yes or no. When placing limits on initiative petitions, Nevada courts should never "judge the wisdom of a proposed initiative; such policy choices are solely for the voters." *Nevada Judges Assn. v. Lau*, 112 Nev. 51, 57, 910 P.2d 898, 902 (1996). The people alone own "the power to propose, by initiative petition . . . amendments to [the] Constitution, and to enact or reject them at the polls." Nev. Const. art. 19, § 2(1). Because the right to change our Constitution is fundamental to our democratic system, Nevada courts must "make every effort to sustain and preserve the people's constitutional rights to amend their constitution through the initiative process." *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller,* 122 Nev. 894, 912, 141 P.3d 1235, 1247 (2006).

The district court disregarded settled Nevada law. Because it speculated that the Petition would result in a bad outcome, it struck down the Petition since the Description did not tell the voters the Petition might be a bad idea to

some people. The district court erred by substituting its judgment for that of the voters by applying this arbitrary and erroneous standard.

VI. BACKGROUND

This appeal involves an Initiative Petition seeking a Constitutional Amendment. The underlying district court case consolidated the complaint against this Petition with a complaint against another Petition. A final decision for the other Petition is pending. Both Petitions have similar goals but have distinction. This section explains the Initiative Petition before the Court, and briefly addressed the other matter that does not yet have a final decision.

A. Statement of the Facts and Statement of the Case

1. Education Freedom PAC lawfully filed its Initiative Petitions

Education Freedom PAC is an organization committed to improving education in Nevada by providing access to educational opportunities Nevada students and parents otherwise would not have. It properly filed an Initiative Petition with the Nevada Secretary of State's Office on January 31, 2022, seeking an amendment to the Nevada Constitution that requires the Legislature to establish an education freedom account program. 1 JA 53.

The Petition (Case No. 28 1B) proposes amending Article 11 of the Nevada Constitution to add the following section:

> 1. No later than the school year commencing in 2025, and on an ongoing basis thereafter, the Legislature shall provide by law for the establishment of education freedom accounts by parents of children being educated in Nevada. Parents shall be authorized to use the funds in the accounts to pay for the education of their children in full or in part in a school or educational environment that is not part of the uniform system of common schools established by the Legislature. The Legislature shall appropriate money to fund each account in an amount comparable to the amount of funding that would otherwise be used to support the education of that child in the uniform system of common schools. The Legislature shall provide by law for an eligibility criteria for parents to establish an education freedom account.
>
> 2. **Severability.** Should any part of this Act be declared invalid, or the application thereof to any person, thing or circumstance is held invalid, such invalidity shall not affect the remaining provisions or application of this Act which can be given effect without the invalid provisions or application, and to this end the provisions of this Act are declared severable. This subsection shall be construed broadly to preserve and effectuate the declared purpose of this Act.

Id. at 83.

The Petition includes the following Description of Effect:

> The initiative will provide parents with the ability to use funds appropriated by the Legislature to pay for the education of their children in a school or educational environment that is not part of the public school system. The initiative requires the Legislature to establish an education freedom account program under which parents may spend money appropriated by the Legislature into

> those accounts to pay for some or all of their child's education outside the public school system. The Legislature must establish an eligibility criteria for parents to establish an account.
>
> The initiative will result in the expenditure of state funds to fund the accounts in an amount comparable to the public support that would be used to support the education of the child for whose benefit the account has been established in a public school. For Fiscal Year 2021-2022, the Legislature determined the statewide base per pupil amount to be $6,980 per pupil. For Fiscal Year 2022-2023, the amount is $7,074 per pupil. Generating the revenue to fund the accounts could necessitate a tax increase or reduction in government services. The Legislature must establish the program by the start of the school year that commences in 2025.

Id. at 84.

For the Court's knowledge. There is a second Petition (Case No. 44 1B) that proposes Amending Article 11 of the Nevada Constitution to add the following:

> 1. No later than the school year commencing in 2025, and on an ongoing basis thereafter, the Legislature shall provide by law for the establishment of education freedom accounts by parents of children being educated in Nevada. Parents shall be authorized to use the funds in the accounts to pay for the education of their children in full or in part in a school or educational environment that is not part of the uniform system of common schools established by the Legislature, except that the Legislature may limit the eligibility to participate in the program to parents of children eligible to enroll in kindergarten and parents of

children who enroll in the uniform system f common schools for a specified period of time prior to establishing an education freedom account not to exceed the entirety of the preceding school year. The Legislature shall appropriate money to fund each account in an amount comparable to the amount of funding that would otherwise be used to support the education of that child in the uniform system of common schools.

2. **Severability.** Should any part of this Act be declared invalid, or the application thereof to any person, thing or circumstance is held invalid, such invalidity shall not affect the remaining provisions or application of this Act which can be given effect without the invalid provisions or application, and to this end the provisions of this Act are declared severable. This subsection shall be construed broadly to preserve and effectuate the declared purpose of this Act.

Id. at 100.

The second Petition includes the following Description of effect:

> The initiative requires the Legislature to establish an education freedom account program under which parents may spend money appropriated by the Legislature to pay for part of all of their child's education outside the public school system. The Legislature may limit eligibility in the program to parents of children eligible to enroll in kindergarten and parents of children who enroll in the public school system for a specified period of time preceding establishment of a education freedom account not to exceed the entirety of the previous school year.
>
> The initiative will result in the expenditure of state funds to fund the accounts in an amount comparable to the public support that would be used to support the education of the

> child for whose benefit the account has been established in a public school. For Fiscal Year 2021-2022, the Legislature determined the statewide base per pupil amount to be $6,980 per pupil. For Fiscal Year 2022-2023, the amount is $7,074 per pupil. Generating the revenue to fund the accounts could necessitate a tax increase or reduction in government services. The Legislature must establish the program by the start of the school year that commences in 2025.

Id. at 109

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The differences between the Petitions are subtle:

Initiative Petition: Proposed Language		
What is the Same	Unique to 28 1B	Unique to 41B

• "No later than the school year commencing in 2025, and on an ongoing basis thereafter, the Legislature shall provide by law for the establishment of education freedom accounts by parents of children being educated in Nevada" • "Parents shall be authorized to use the funds in the accounts to pay for the education of their child in full or in part in a school or educational environment that is not a part of the uniform system of common schools established by the Legislature." • "The Legislature shall appropriate money to fund each account in an amount comparable to the amount of funding that would otherwise be used to support the education of that child in the uniform system of common schools."	• "The Legislature shall provide by law for an eligibility criteria for parents to establish an education freedom account."	• "the Legislature may limit eligibility to participate in the program to parents of children eligible to enroll in kindergarten and parents of children who enroll in the uniform system of common schools for a specified period of time prior to establishing an education freedom account not to exceed the entirety of the preceding school year."

The differences between the Descriptions are subtle:

Initiative Petition: Description Effect		
What is the Same	Unique to 281B	Unique to 41B

• "The initiative will result in the expenditure of state funds to fund the accounts in an amount comparable to the public support that would […] the education of the child for whose benefit the account has been established in a public school." • "For Fiscal Year 2021-2022, the Legislature determined the statewide base per pupil amount to be $6,980 per pupil." • "For Fiscal Year 2022-2023, that amount is $7,074 per pupil. • "Generating the revenue to fund the accounts could necessitate a tax increase or a reduction in government services." • "The Legislature must establish the program by the start of the school year that commences in 2025."	• "The initiative will provide parents with the ability to use funds appropriated by the Legislature to pay for the education of their child in a school or educational environment that is not a part of the public school system" • "The initiative requires the Legislature to establish an education freedom account program under which parents may spend money appropriated by the Legislature into those accounts to pay for some or all of their child's education outside the public school system." • "The Legislature must establish an eligibility criteria for parents to establish an account."	• "The initiative requires the Legislature to establish an education freedom account program under which parents may spend money appropriated by the Legislature to pay for part or all of their child's education outside the public school system." • "The Legislature may limit eligibility in the program to parents of children eligible to enroll in kindergarten and parents of children who enroll in the public school system for a specified period of time preceding establishment of

		an education freedom account not to exceed the entirety of the previous school year.”

2. Reid/Rodgers Challenge the Initiative

a. Respondents intentionally delayed the district court’s ability to consider the Initiative Petitions—denying Education Freedom PAC its due process and using strategy to deny voters the right to vote.

Under statute, a party challenging an Initiative Petition has 30 days to file the challenge. *See* NRS 295.061(2). Respondents took multiple actions before the district court to intentionally delay a court ruling. First, they waited until the last possible day to challenge the Petition. And on that last day—February 22, 2022—Respondents, Rory Reid and Beverly Rogers, filed a complaint for declaratory and injunctive relief against the Nevada Secretary of State that challenged the initiative petition under NRS 295.061(1). 1 JA 1-14. But Respondents failed to properly name Education Freedom PAC as a defendant, which caused unnecessary delay, forcing Education Freedom PAC to seek court approved intervention. 1 JA 58-59.

Third, Respondents filed an unnecessary peremptory challenge. *Id.* at 203. The case was assigned to Judge Wilson due to a conflict for Judge

Russell, *id.* at 32, however, Respondents recused Judge Wilson, *id.* at 59. The case was eventually assigned to Senior Judge McGee, *id.* at 41. Because of Respondents delays in district court, the lower court could not hold a hearing within 15 days as required under NRS 295.061(1).

b. The Parties briefed the issue before the district court before a hearing.

Accompanying Respondents filing was a memorandum and points of authorities in support of its complaint. *Id.* at 15-31. Respondents made three arguments. First, they argued that the Petition's Description of Effect is misleading and does not give voters an opportunity for an informed decision. *Id.* at 18-19. Second, they argued that the Petition forces the Nevada Legislature to act, which violates the Nevada Constitution. *Id.* at 19-21. And third, they argued that the Petition is an unfunded mandate, claiming that it violates the Nevada Constitution. *Id.* at 21-23.

Education Freedom PAC filed its answering brief March 15, 2022. *Id.* AA 64-86. It argued, first that Respondents' failure to join Education Freedom PAC before the statute of limitations required dismissal of the Complaint. *Id.* at 67-68. Second, the district court's failure to hold a hearing in the time required under NRS 295.061—at the fault of Respondents—prejudiced Education Freedom PAC and required the district court to dismiss

the Complaint. Id. 67-70. Third, the description was not misleading or confusing. Education Freedom PAC argued extensively that Nevada law does not require the absurd level of subjective arguments that Respondents seek, especially considering they have merely 200 words available to write the Description. *Id.* at 70-72. Fourth, it argued that the Petition is consistent with Nevada law and its constitution. *Id*. at 72-75. Finally, it argued the Petition does not violate Article 19, Section 6 because Nevada's unfunded mandates rule applies to statutes and statutory amendments only, not Constitutional Amendments. *Id*. at 76-79.

The Secretary of State filed a limited response on March 24, 2022. *Id*. at 114-16. It effectively stated a position of neutrality. *Id*. at 115.

Respondents filed a reply on March 25, 2022. *Id*. at 132-44. They argued that their complaint complied with the requirements of NRS 295.061 and that the 15-day timeline is directory, not mandatory, therefore does not warrant dismissal. *Id*. at 133-34. Further, they argued the description was inaccurate as it relates to per-pupil figures and that the description omitted the variable nature of pupil funding. *Id*. at 135. Finally, it argued the Legislative power of the purse precludes the initiative. *Id*. at 135-136.

The district court heard the matter on March 29, 2022.[2] *Id.* at 112.

c. The district court consolidated the Constitutional Initiative Petition filings.

Education freedom PAC filed two separate ballot measure petitions that seek to amend Article 11 of the Nevada Constitution. Plaintiff moved to consolidate these two cases: Case No. 22 OC 00044 1B and Case No. 22 00028 1B. *Id.* at 168-69.

Education Freedom PAC urged the district court not to consolidate so that it could timely appeal. *Id.* at 209-211. The district court had already decided *Reid 1* at this point, so it would cause undue delay to consolidate. *Id*. at 210. The district court consolidated the cases anyway on April 20, 2022. *Id*. at 275-76. The parties are still waiting for a decision on the second Initiative Petition for a Constitutional Amendment.

3. The district court incorrectly invalidated the petition.

Before ruling on consolidation, the district court ruled on the Petition before this Court on April 12, 2022, titled: "Part A: Discussion of Decision

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[2] At the time of this filing, the transcripts have not yet been produced. Appellant is working swiftly to acquire the transcripts and will supplement the record when they are available.

Invalidating Petition to Amend the Nevada Constitution to Offer Sequestered Funding Alternatives Going Outside School Districts to Parents of School Age Children," and "Part B: Order Enjoining Petition". *Id*. 177-202. The district court denied the motion to dismiss the complaint because it concluded the "spirit if not letter of the rule was observed and . . . there is insufficient cause or proof of proper gamesmanship to grant dismissal." *Id*. at 180. The Court cited no law in support of its conclusion that the complaint should not be dismissed. The complaint should have been dismissed.

As to the Petition itself, the district court relied on a "pea" and "walnut" analogy in concluding that Education Freedom PAC failed to "describe the enormous fiscal impact of this initiative on the budget of most, if not all, of the school districts in the State of Nevada." *Id*. at 181-82. He opined further that the funding for the Petition could come from other budgets not disclosed in the description, relying on *Herbst Gaming Inc. v. Heller,* 122 Nev. 877, 141 P.3d 1224 (2006) and *Rogers v. Heller,* 117 Nev. 169, 18 P.3d 1034 (2001) *Id*. at 181. And he concluded that the description contains a "material omission" by failing to outline the financial implications of the proposal. *Id*. at 183. The district court presumed that the Petition would result in less funding for children in public schools, and determined the Petition

Description is legally misleading because it concluded this was a material omission that would leave voters confused. *Id.* at 186-88. The district court also concluded the Petition is an unfunded mandate, relying on *Rogers v. Heller*. *Id.* at 189.

a. After reaching its own conclusion, the district court added Respondents' proposed order to assist them in defending an appeal.

In addition to its own opinion, the district court incorporated Respondents' proposed order because "this judge has historically encouraged attorneys who prevail in a given matter to suggest language for the Order they will have to defend on appeal." *Id*. at 193. There is no explanation that pages 16 through 26 which are part of the district court's decision inform or relate to the district court's ruling, other than mentioning in passing that the court prefers to include language from the prevailing party. That portion of the order added a claim the petition mislead voters because the per-pupil funding varies by year. *Id*. at 198. And that the petition violates the deliberative function of Nevada's legislature by obligating the Legislature to act. *Id*. at 200.

On May 15, 2022, Respondents submitted a request for adjudication to the district court. *Id.* 281-82.

VII. STANDARD OF REVIEW

Efforts to impede the voters' initiative power is contrary "to the democratic process." *Farley v. Healey*, 431 P.2d 650, 652 (1967). This Court reviews de novo a district court's order granting injunctive and declaratory relief. *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs,* 129 Nev. 35, 41, 293 P.3d 874, 878 (2013).

VIII. ARGUMENT

A. Nevada voters are entitled to determine whether the Ballot measure is a good idea, not a district court.

A party seeking to invalidate a petition must make a "compelling showing" that the measure is "clearly invalid." *Las Vegas Taxpayer Accountability Comm. v. City Council of City of Las Vegas*, 125 Nev. 165, 176, 208 P.3d 429, 436 (2009) (hereinafter "*LVTAC*"). This is for good reason— "[p]lacing the burden on the challenger ensures that the 'power of initiative [is] liberally construed to promote the democratic process."' *Prevent Sanctuary Cities*, 2018 WL 2272955, at *2 (quoting *Farley v. Healey*, 431 P.2d 650, 652 (Cal. 1967)).

The district court failed to apply this high standard. It also failed to apply Nevada law when evaluating the petition. Nevada law requires that the district court have presumed the petition valid and for Respondents to have

showed compellingly that it was invalid. Respondents failed their burden in district court.

B. The district court incorrectly determined the description was vague and incomplete.

Education Freedom PAC provided a straightforward and non-argumentative description of the Petition and its intended effect. The district court erred by treating this description as the argument required for the ballot. Because it concluded the Petition was a bad idea, it demanded the Petition include a description that explained the district court judge's policy preference. This was error under Nevada law.

The seminal case on the adequacy of a Description of Effect is *Education Initiative PAC v. Community to Protect Nevada Jobs,* 129 Nev 35, 293 P.3d 874 (2013). There, the Court outlined the following standard:

> A description of effect serves a limited purpose to facilitate the initiative process, and to that end, it must be a straightforward, succinct, and nonargumentative summary of what the initiative is designed to achieve and how it intends to reach those goals. Given that limited purpose and the 200-word restriction, the description of effect cannot constitutionally be required to delineate every effect that an initiative will have; to conclude otherwise could obstruct, rather than facilitate, the people's right to the initiative process. In reviewing an initiative's description of effect, a district court should assess whether the description contains a straightforward,

> succinct, and nonargumentative statement of what the initiative will accomplish and how it will achieve those goals.

129 Nev. at 37, 293 P.3d at 876. Further, Respondents have the burden of showing the Petition "fails to satisfy this standard." *Id*. at 42, 293 P.3d at 879.

1. The Description for the Initiative Petition (Case No. 28 1B) was sufficient as a matter of law.

The Petition's Description is "a straightforward, succinct, and nonargumentative statement of what the initiative will accomplish and how it will achieve those goals." *Id*. at 37, 293 P.3d at 876. It states the goal of the petition and how it will do it, describing the establishment of an Education Freedom Account with legislative appropriation of funds that would otherwise be allocated to the public school system. 1 AA 12. It also explains that the Legislature will have the authority to create the criteria it shall use to establish the education freedom accounts. *Id*. Further, it describes how parents may use the funds and explains, by example, what a typical amount of funding would be in a given year. *Id.* This is all explained in a simple and coherent way in less than the 200 words. As such, Respondents failed to overcome their burden to invalidate the petition. *Las Vegas Taxpayer Accountability Comm. v. City*

Council, 125 Nev. 165 176, 208 P.3d 429, 436 (2009) (The party seeking to invalidate the initiative must show that the initiative is "clearly invalid.").

2. The district court erred when it determined the Petition was unclear, erroneously concluding the Description failed to discuss potential policy ramifications.

The district court incorrectly required Appellant to describe "comprehensively" the "ramifications of passage," 1 JA 183, something that is inherently value-laden, subjective, and irrelevant to the description of the proposed Amendment. A description does not need to outline every repercussion, rather, it is a "straightforward, succinct, and nonargumentative summary of what the initiative is designed to achieve and how it intends to reach those goals." *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129. Nev. at 37, 293 P.3d at 876. Nothing more is required under Nevada law. Rather than applying established law, the district court judge applied his opinion: that the Petition will ruin public education in Nevada. This conclusion about the policy underlying the Petition—that it would have huge financial ramifications—was the basis of his decision. As a result of the district court weighing policy outcomes, the district court incorrectly conferred a requirement that the Petition's Description include argumentative claims.

The arguments that the district court and respondents seek to have placed in the Description are better suited for the ballot and public debate. Under NRS 293.252(1), the Secretary of State must appoint two committees to draft arguments for and against passage of the Petition. This is the proper forum for the argument the district court incorrectly required to be included in the Initiative Petition Description. The arguments for and against passage are published prior to the election "in conspicuous display" in newspapers and included in sample ballots. This is to ensure there is debate about the merits of the Petition, however, it is improper to require this at the Description stage of the process.

3. The Description does not contain a "material omission."

The district court erred by assuming the Petition's outcome was bad policy and requiring Appellant to echo the district court's subjective opinion. *See* 1 JA 180-81 (concluding the Description "fail[ed] to describe the enormous fiscal impact of this initiative on the budget of most, if not all, of the school districts in the State of Nevada.")[3] But, a "description of effect

[3]It's hard to overstate how policy focused the district court's decision was. The Court concluded: "it is absolutely essential for the people to know if a

cannot constitutionally be required to delineate every effect that an initiative will have." *See Educ. Initi. PAC,* 129 Nev. at 37, 293 P.3d at 876. Here, there was no material omission because the Description sufficiently explains that there will be an expenditure of state funds. Nothing in the Petition requires a reduction in public school funding. Quite to the opposite, the second paragraph in the Description explains that the Legislature will need to expend funds in an amount comparable to the amount provided per pupil to a public school. 1 JA 12. There is no requirement in the Petition that this funding be zero-sum. *Id.* The Legislature could choose to fund public schools more, and to contribute to the Education Freedom Account. *Id.*

There is also no required effect of a diversion in public school funding. The Petition calls for Legislative appropriation "comparable" to what would be used to fund the education of a specific child in the public school system. 1 JA 12. It is clear that the Petition does not require the re-direction of funding

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sufficient number of voters have chosen to appropriate monies otherwise going to the School District, then once becoming the law, the amendment to the Constitution has a most solemn and powerful effect on the public education system." 1 JA 187.

from public schools, so the district court's requirement that the Description include a description of a potential unintended consequence—one that Appellant strongly disputes—goes far beyond what is required under Nevada law. *See Educ. Initi.PAC*, 129 Nev. at 42, 293 P.3d at 879.

4. Even if the Description needed to discuss financial concerns, the Description contemplate them and provides notice to the public.

Beyond the district court's erroneous policy driven conclusion, the Description even contemplates that funding the Petition may require tax increases or a reduction in government services. It does not require a reduction in public school funding. *Id.* This is a point the district court acknowledged, but never fully comprehended. *Id.* While criticizing Appellant for apparently taking funds from public schools, the district court also opined that funding "could theoretically be taken from other budgets for road, prisons, law enforcement, etc., because it is not designated funding." 1 JA 181. Alternatively, the Description specifically states that "[g]enerating the revenue to fund the accounts could necessitate a tax increase or a reduction in government services." 1 JA 12. Either of these portions of the description address the concerns the district court had—which are invalid concerns for a court to assess anyway.

a. The Description's example of per-pupil funding levels is not misleading.

The Description provides examples of the per pupil funding that a student may be eligible. In 2021-2022 that number was $6,980 and for 2022-2023 that number is $7,074. Initially, this description is accurate under Nevada's funding formula and the data Appellant relied on in crafting the description. But even if the numbers are not accurate, this Court can clarify the numbers and require a different description. *See* NRS 295.061(3) (permitting an amended description by court order).

But, even if it weren't, the description is an example of per pupil funding. The Description intends to inform the voters of an amount of money that may become eligible for participants of an Education Savings Account. By estimating a lower number, the Description is intentionally non-hyperbolic.

C. The district court incorrectly determined the Petition is an unfunded mandate.

The district incorrectly concluded that Article 19, Section 6 applies to Constitutional Amendments. That's not the case. Article 19, Section 6, provides:

> This article does not permit the proposal of any ***statute or statutory amendment*** which makes an appropriation or otherwise requires the expenditure of money, unless such statute or amendment also imposes a sufficient tax, not

> prohibited by the Constitution, or otherwise constitutionally provides for raising the necessary revenue.

(emphasis added)

On its face, Article 19, Section 6 requires statutes and statutory amendments to specify their funding mechanism. It does not require Constitutional Amendments to do the same. The Nevada Supreme Court recognized this distinction in *Nevadans for Nevada v. Beers*, where the Court stated that the funding requirement applies to statutory proposals only. 122 Nev. 930, 947 142 P.3d 339, 350 (2006) (noting that Article 19, Section 6 "prohibits the proposal of any *statute* making an appropriation without also providing a means for raising revenue").

Simply, the Nevada Supreme Court has never ruled on Article 19, Section 6's applicability to constitutional amendments. It's ruling in *Rogers* limited statutes and statutory amendments by requiring that there be an accompanying "appropriation" or other funding mechanism. The district court erred by applying language that is expressly limited to statutes and statutory amendments to Constitutional Amendments.

1. Any prior Supreme Court rulings on Education Savings Account statutes are irrelevant to this Court's consideration of the Initiative Petition.

Further, any prior cases that addressed a statute that sought to achieve this goal is irrelevant. In *Schwartz v. Lopez,* the Court considered the constitutionality of SB 302 (2015). 132 Nev. 732, 739, 382 P.3d 886, 891 (2016). The Bill was different than the Initiative Petition. It required "the amount of money deposited by the Treasurer into an account for a child within a particular school district is deducted from the" school district's budget. *Id*. at 741, 382 P.3d at 893. Because the Bill did not provide an independent basis to appropriate money from the general fund, "the education savings account program is without an appropriation to support its operation." *Id*. at 756, 382 P.3d at 902.

The Bill was a statute, so Article 19, Section 6 clearly applied. SB 302 is in stark contrast to the Petition before this Court because the Petition does not require the diversion of any state funds to support Education Freedom Accounts. Unlike SB 302, the Petition does not contain language amending the provisions of the law that apportion DSA funding, nor does it require the Legislature to do that. The Petition merely provides for a level of funding, giving the Legislature discretion to achieve that funding.

But even more, it is inaccurate to claim the Nevada Supreme Court struck down the Education Savings Account program because SB 302 had no appropriation. In fact, it was unconstitutional because SB 515 (2015) did not contemplate using DSA funds *and* SB 302 did not contain a funding source. *Id*. at 902. Accordingly, the failure of SB 302 was not that did not include an appropriation under Article 19, Section 6, rather, it failed to apportion money to be drawn from the treasury, a violation of Article 4, Section 19.

Again, the Petition does not require money be taken from the treasury; it requires that the Legislature make an appropriation. For these reasons, the Court should reject the argument and analogies to SB 302.

D. The district Court incorrectly determined the Petition impaired the Legislature's function.

In the portion of the district court's order where it allowed Respondents to defend their own perspective on appeal, Respondents claimed the Petition impermissibly commands the Legislature to enact a law. 1 JA 200. However, the Constitution certainly can obligate the Legislature to act. The Nevada Constitution contains numerous provisions that require the Legislature to provide by law for a specific outcome. For example, Article 4, Section 26 requires the Legislature to "provide by law, for the election of a Board of County Commissioners." Article 9, Section 2 requires the Legislature to

"provide by law for an annual tax." Article 11, Section 2 required the Legislature to "provide for a uniform system of common schools." The examples don't cease there. *See, e.g.,* Article 4, Section 38(1)(d)("the Legislature shall provide by law for . . . [a] registry of patients."; Article 12, Section 1 ("the Legislature shall provide by law for organizing and disciplining the Militia of this State.").

Beyond the litany of examples in the Nevada Constitution where the Legislature is required to legislate in a certain way, there is a recent Initiative Petition Amendment that obligates the Nevada Legislature to act in a specific manner. Article 10, Section 3B requires the Legislature to "provide by law for the exemption of durable medical equipment . . . storage, use, or consumption of tangible persona property." This provision was proposed by initiative petition and ratified by the voters at the 2016 and 2018 general election.

It's clear from the Nevada Constitution's structure and recent initiative petition amendments that the Petition is entirely consistent with the Nevada Constitution. Respondents rely on one instance of conflict with the Nevada Constitution for the proposition that the Petition cannot require legislative action.

E. The district court should have dismissed the complaint on procedural grounds.

The district court erred when it failed to dismiss the case even though more than 15 days had lapsed since the Complaint was filed. NRS 295.061(1) required the district court to "set the matter for hearing not later than 15 days after the complaint [was] filed." However, the district court failed to set the hearing. Given that Respondents filed their complaint on February 22, 2022, the district court had until only March 9, 2022, to hold a hearing. It never had a hearing. As such, the district court should have dismissed the complaint because it was statutorily precluded from hearing the complaint.

This court should uniquely consider that Respondents took unnecessary steps to delay the district court's consideration of its complaint. First, they waited until the last possible day to challenge the Petition. And on that last day—February 22, 2022—Respondents, Rory Reid and Beverly Rogers, filed a complaint for declaratory and injunctive relief against the Nevada Secretary of State that challenged the initiative petition under NRS 295.061(1). 1 JA 1-14. But Respondents failed to properly name Education Freedom PAC as a defendant, which caused unnecessary delay, forcing Education Freedom PAC to seek court approved intervention. 1 JA 58-59. Third, Respondents filed an unnecessary pre-emptory challenge. *Id.* at 203. The case was assigned to

Judge Wilson due to a conflict for Judge Russell, *id.* at 32, however, Respondents recused Judge Wilson, *id.* at 59. The case was eventually assigned to Senior Judge McGee, *id.* at 41. Because of Respondents delays in district court, the lower court could not hold a hearing within 15 days as required under NRS 295.061(1). Each of these actions delayed the hearing and resulted in significant detriment to Appellant. This Court should reverse and remand with instructions to dismiss the complaint.

IX. CONCLUSION

The district court never should have enjoined Appellant from distributing its petition and never should have infused its own beliefs into a case that was better decided objectively. This Court should find legal error and permit the Petition to go forward for any one of the following five reasons: First, the district court erred when it evaluated its own subjective policy conclusion over Nevada's liberal standard for Initiative Petitions. Second, the district court erred when it determined the description was vague and incomplete, even though the description was straightforward, succinct, and non-argumentative. Third, the district court erred when it concluded that Nevada's Constitution precludes unfunded Constitutional Amendments, even though the plain language of Article 19, Section 6 applies to statutes and statutory amendments

solely. Fourth, the district court erred when it concluded the Petition interferes with the Legislature's function, even though there are many other examples of Nevada Constitutional provisions that equally require the Legislature to act. And fifth, the district court erred when it failed to dismiss the complaint after the timeline prescribed in NRS 295.061(1) expired.

AFFIRMATION

The undersigned does hereby affirm that **APPELLANT'S OPENING BRIEF** filed under Supreme Court Case No. 84736 does not contain the social security number of any person.

DATED this 25th day of May 2022.

By: */s/ Jason D. Guinasso*

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. 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 2020 in 14 Point Times New Roman Font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

a. Proportionately spaced, has a typeface of 14 points or more and contains 6,871 words and

3. 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 25th day of May 2022.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I certify that I am an employee of Hutchison & Steffen, PLLC and that on this date I caused to be served a true and correct copy of **APPELLANT'S OPENING BRIEF** on the following as indicated below:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 25, 2022, at Reno, Nevada.

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