IN THE SUPREME COURT OF THE STATE OF NEVADA

EDUCATION FREEDOM PAC,

Appellant,

vs.

RORY REID, AN INDIVIDUAL; BEVERLY ROGERS, AN INDIVIDUAL; AND BARBARA K. CEGAVSKE, 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 REPLY BRIEF

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APPELLANT'S REPLY BRIEF

Appellant, EDUCATION FREEDOM PAC hereby files this Reply Brief.

I. INTRODUCTION

In construing a Description of Effect, the touchstone analysis asks whether the average voter will understand what the initiative is designed to achieve and how it intends to achieve those goals. Nothing more is required. Nothing more should be required.

Here, as is set forth in the Opening Brief, the Description satisfies these liberal requirements. First, the Description informs the voter that the Initiative, if approved, will allow Nevada parents the ability to use public funds to pay for their child's education in a private school and require the Nevada Legislature to establish accounts and criteria for parents to utilize them. Second, the Description expressly informs the voter that the Initiative may increase future per-pupil funding and may require additional revenue, including a potential tax increase or reduction in government services.

The arguments raised by Respondents in their Answer Brief are misplaced. They erroneously urge this Court to apply standards that apply to the Secretary of State: relevant only to an initiative petition description that appears in the actual ballot—not the standard for gathering signatures so the initiative petition may be

placed on the ballot to begin with. This Court should reject Respondents' conflation of these standards.

The Nevada Legislature specifically intended to limit an initiative petition's description of effect to 200 words. This limitation was intended to allow the initiative process to be efficient and accessible to Nevada voters as a mechanism for direct democracy. Requiring hyper-technical language or legal terminology at this stage of the initiative process would thwart the very purpose of the initiative process.

For the reasons further set forth below, Appellant respectfully request that this Court reverse the decision of the District Court and give force and effect to the initiative petition process so that voters may seek to place it on the ballot during the upcoming 2022 general election.

II. THE PETITION'S DESCRIPTION OF EFFECT IS SUFFICIENT AS A MATTER OF LAW

To survive this Court's review, the Description must contain a "straightforward, succinct, and nonargumentative statement of what the initiative is designed to achieve and how it intends to reach those goals." *Education Initiative PAC v. Committee to Protect Nevada Jobs*, 129 Nev. 35, 37, 293 P.3d 874, 876 (2013). Nothing more is required. Appellant's description satisfies this liberal standard. It tells the reader what the potential initiative intends to

achieve—giving parents the ability to use public funds to pay for their children's education in a private school. 1 AA 12. It also describes how it will achieve this goal—requiring the Legislature to establish accounts, fund them, and establish criteria for their usage by the parents. *Id.* If the Description included its first paragraph alone, it would satisfy judicial scrutiny.

However, Appellant chose to include information above-and-beyond what is required so that citizens would have more context. It added language describing the base level of per-pupil funding for two different years, which shows that funding may change and implies funding may ultimately be higher. It also tells the reader that the initiative may require additional revenue, which could necessitate a tax increase or reduction in government services. While these portions of the Description are not required, they certainly provide more notice and information for a potential signatory.

Appellant did all the above in under 200 words. When the Legislature adopted NRS 295.009, it did so to make direct democracy accessible and relatively expedient. Senate Bill 224 (2005) was never intended to "obstruct, rather than facilitate the people's right to the initiative process." *Education Initiative PAC,* 129 Nev. at 38, 293 P.3d at 876.

Appellant's description is not misleading. Respondents argue it is misleading for two reasons. First, that the initiative necessarily requires a tax increase or reduction in government services, so the description is misleading is merely saying that it "may." RAB 6. And second, the description incorrectly describes the per-pupil funding formula. RAB 6-10. These arguments are answered in turn.

The initiative does not require a tax increase or reduction in revenue. Respondents merely hypothesize this could be an effect of the initiative, which is precisely what this Court warned against in *Education Initiative PAC,* 129 Nev. 35, 293 P.3d 874 (2013). There, the Court made clear that an initiative "cannot constitutionally be required to explain every detail or effect that an initiative may have" in only 200 words. *Id*. at 45, 293 P.3d at 881. It is unreasonable to require the description to include argumentative consequences. Arguments about policy repercussions, including fiscal concerns, are properly left to the Secretary of State to address before an initiative is placed on the ballot. *See* NRS 293.252(5)(f)(1) (requiring argument and rebuttal to "address . . . the fiscal impact of the initiative" on the ballot); *see also* NRS 293.250(5) (requiring the Secretary of State to prepare explanations of what the initiative entails); NRS 293.252(1) (requiring the Secretary of State to prepare arguments in-favor and against the initiative).

Even if Appellant were required to ponder in its description, Respondents' hypothetical is not a required outcome, or even a likely one. The State of Nevada could increase revenue through Nevada's natural economic growth as a state, and the Legislature could decide to commit more funding to education. If this were to occur, there may be enough revenue to fund the education accounts without needing to decrease government services or institute a tax increase. This is a possible outcome. But it is also possible the Legislature would need to increase taxes or reduce government circumstances. So, Appellant's description is not misleading or hiding the ball when it tells the reader that the initiative "could necessitate a tax increase or a reduction in government services." 1 JA 12.

Respondents erroneously rely on caselaw that precedes the Legislature's 2005 adoption of NRS 295.009 (SB 224), RAB 4-5, which is inapposite because the Legislature fundamentally changed the initiative process and the requirements of an initiative petition with the legislation. This Court explained the change at length in *Education Initiative PAC,* 129 Nev. 35, 293 P.3d 874 (2013). Respondents ignored this explanation. The Answering Brief, therefore, sets forth rules that are no longer good law. For instance, Respondents rely extensively on *Nevada Judges Association v. Lau*[1] for the proposition that a

[1] Of interesting note for the Court, Judge McGhee—the presiding judge over the district court matter—was the Petitioner in *Nevada Judges Association v. Lau*, 112 Nev. 51, 910 P.2d 898 (1996).

"description must also 'explain the[ ] ramifications of the proposed amendment.'" *See* RAB 4-5 (citing *Lau,* 112 Nev. 51, 910 P.2d 898 (1996)). However, the "description" in question under *Lau* was the description on the ballot itself, not the description before the Court today.

Nevada law requires the Secretary of State to prepare an explanation and present arguments in favor and against. *See* NRS 293.250(3). That is the description at issue in *Lau.* In contrast, the description of an initiative petition has a "limited function" and is "relevant only at the early stages of the initiative process." *Education Initiative PAC*, 129 Nev. 35, 48, 293 P.3d 874, 883. "This approach makes sense because . . . if an initiative . . . moves on for presentation to the voters, the voters have the secretary of state's official explanation and required arguments for and against its enactment." *Id.* So, Respondents' scare tactics that the description will mislead voters has an Executive fail-safe, and the description "plays no further role" after it is approved for the ballot.

A. The description is not misleading; it cannot be expected to include an in-depth explanation of per-pupil funding.

Respondents request that this Court require an overly technical reading of the description. But the question isn't how a court that engaged in a hyper-technical legal analysis would interpret the description; the question is whether a reasonable person reading the description would have a general understanding

of the initiative so that their signature in support is meaningful. A reasonable person can read the Description and understand what they are voting for. That is all that is required.

Respondents' attempt to elevate form over substance directly contradicts this Court's ruling in *Education Freedom PAC*. *Id.* This Court takes a "holistic approach" to descriptions "[g]iven the[ir] limited function." *Id.* at 48, 293 P.3d at 883. Respondents did the exact opposite. They are asking this Court to read the description as it would a fully enacted law. Yet, "it is inappropriate to parse the meanings of the words and phrases used in a description of effect as closely as we would statutory text." *Id*.

It would be patently unreasonable to require Respondents proposed level of detail in Appellant's description. They quote Senate Bill 458 (2021) seeking to create a term of art in the description. RAB 7. They engage in pages of analysis to explain the funding formula. RAB 6-10. Respondents' multi-page attempt to illuminate a problem reinforces Appellant's argument that this Court should not treat the description as a finished product, nor should it apply traditional canons of construction.

Appellant chose to include the average base per-pupil funding formulas for two years as an example for individuals who are reading the description. It would

have been impossible for them to describe the per-pupil funding variations based on county, special education status, income, language learned, or any of the other variations described by Respondents. *See* RAB 7-9. It's precisely for this reason that it would be unreasonable to require Appellant to include the information in a description that is designed merely to initiate the process. As this Court put it before: "such a level of detail far exceeds what a proponent can constitutionally be required to include in a description of effect." *Education Freedom PAC,* 129 Nev. at 47, 37, 293 P.3d at 882.

III. THE INITIATIVE DOES NOT IMPAIR THE LEGISLATIVE FUNCTION

The Constitution can obligate the Legislature to act. Respondents ask this Court to create a new rule that the public cannot initiate a Constitutional Amendment that requires future legislative action. This is a novel argument with no Nevada precedent, or otherwise, to support it. It also runs counter to the Nevada Constitution's many provisions that already obligate future Legislatures to act. Respondents, however, argue that for some reason a voter led amendment to the Nevada Constitution should be treated differently and as a second-class amendment.

Respondents support this misleading argument by claiming the people's right to amend the constitution is Legislative in nature and, therefore, cannot bind the Legislature. RAB 11-12. This is incorrect. The people's right to amend the Nevada Constitution certainly comes with all the powers to create Amendments akin to those in the Constitution, which means they can obligate the Legislature to act as current provisions of the Constitution do. It is axiomatic to say the people's right to amend the Constitution authorizes them to do solely what the Constitution currently permits.

As a threshold matter, Respondents cite no cases that support the notion that the Constitution cannot require legislative action. The Nevada Constitution provides the exact opposition. *See* AOB 29-30. If this Court were to determine the Constitution cannot require the Legislature to act, it would necessarily need to invalidate the requirement that the Legislature create laws for the Board of County Commissioners or laws for public schools.

Respondents' reliance on *Nevadans for the Protection of Property Rights, Inc. v. Heller* is misguided. 122 Nev. 894, 141 P.3d 1235 (2006). There, the Nevada Supreme Court described the people's initiative power as "legislative in nature," but it used that language to strike down an initiative attempting to regulate administrative activities. In that limited context, the Nevada Supreme Court

explained that the people can enact policy measures by Constitution Amendment—exactly as Appellant is seeking to do—but they cannot "include administrative, non-policy matters." *Id*. at 914, 141 P.3d at 1248.

Here, the decision to require the creation of education accounts is soundly in the realm of policy. Like the other provisions of the Nevada Constitution that require the Legislature to provide law for various statutes, if enacted, the petition will constitute a policy choice upon which the Legislature must act.

Respondent relies on *In re Initiative Petition No. 365,* for the proposition that a Legislature cannot command future Legislatures. RAB 13 (*quoting* 930 P.2d 186, 191 (Okla. 1996)). There, the ballot initiative required state legislatures to apply to the federal Congress for a constitutional convention to seek a federal Constitutional amendment. *Id*. The Oklahoma Court struck this proposal down because it violated Article V of the Federal Constitution. It provides no precedential value, or even of passing interest, for the issue at bar, which is a purely state matter. *See e.g., Leser v. Garnett*, 258 U.S. 130, 137 (1922) ("[T]he function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a state.").

Put simply, Respondents' newly created "inherent deliberative functions" of the Nevada Legislature are not immune from the will of the people. The people's will to amend their Constitution is protected within that very document. Nev. Const. art. 19. Respondents would render the constitutional amendment process meaningless, as it is difficult to imagine a constitutional amendment that would require no subsequent action on the part of the Legislature. Enacting the Constitution via legislation is arguably the primary and most important function of the Legislature. This Court should deny Respondents' attempt to limit the people's Constitutional right.

A. Petitioner's argument fails because it is not ripe.[2]

NRS 295.061(1) permits a pre-election challenge on two bases: the single-subject rule or an insufficient description of effect. The Nevada Supreme Court has further explained that courts may review pre-election challenges, "asserting that an initiative measure does not fall within the proper subject matter for legislation." *Glover v. Concerned Citizens for Fuji Park & Fairgrounds*, 118 Nev. 488, 498, 50 P.3d 654, 552 (2002).

[2]Appellant's argument that the Constitutional challenge is not ripe for this Court's consideration applies equally to Respondents' claim the description violates Article 19, Section 6. This argument was briefed before the district court, 1 JA 75, and it responds to new issues raised in Respondent's Answering Brief pursuant to NRAP 28(c).

However, Appellant's arguments are not ripe on those bases. "[C]hallenges to an initiative's substantive validity will not be considered as part of this Court's preelection review of an initiative" and are unripe "until an initiative becomes law." *Nevadans for Protection of Prop. Rights, Inc. v. Heller*, 122 Nev. 894, 916, 141 P.3d 1235, 1250 (2006). Therefore, this Court should reject the argument.

IV. THE DESCRIPTION DOES NOT VIOLATE ARTICLE 19, SECTION 6

Article 19, Section 6 does not apply to Constitutional Amendments. On its face, it applies solely to statute and statutory amendments. Respondents argue in their Answering Brief that because the effect of the initiative is to provide for an expenditure, it necessarily triggers Article 19, Section 6. However, Respondents' only citation to Nevada case law merely states this effect in passing, in dictum. No Nevada Supreme Court opinion or order has ever applied the provision to Constitutional Amendments. And rightfully so, the plain language of Article 19, Section 6 applies to statutes and statutory amendments solely, not Constitutional Amendments.

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AFFIRMATION

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

DATED this 7th day of June 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 2,644 words; and

3. Finally, I hereby certify that I have read this reply 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 7th day of June 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 REPLY BRIEF** on the following as indicated below:

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(Via Electronic service through the Nevada Supreme Court's Eflex system)

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 7, 2022, at Reno, Nevada.

/s/ Bernadette Francis-Neimeyer
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