Case No. 84420

# In the Supreme Court of Nevada



BARBARA CEGAVSKE, in her official capacity as NEVADA SECRETARY OF STATE,

Appellant,

*vs.*

ROBERT HOLLOWOOD, et al.

Respondents.

**APPEAL**

from the First Judicial District Court, Clark County
The Honorable JAMES E. WILSON, JR. District Judge
District Court Case No. 21 OC 00182 1B

## RESPONDENTS' ANSWERING BRIEF

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## NRAP 26.1 DISCLOSURE

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.

Respondent Nevada Resort Association is a non-profit corporation. No publicly traded company owns more than 10% of its stock. Respondent Greater Las Vegas Chamber of Commerce, doing business as Vegas Chamber is also a non-profit corporation. No publicly traded company owns more than 10% of its stock.

Joel D. Henriod, Daniel F. Polsenberg, Abraham G. Smith, and Kory J. Koerperich of Lewis Roca Rothgerber Christie, LLP represented the Nevada Resort Association and the Vegas Chamber in the district court and represent respondents in this Court.

Dated this 15th day of April, 2022.

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## STATEMENT OF THE ISSUES

Whether NRS 295.026, which allows a proponent of a petition for initiative to withdraw the petition after it has been filed with the Secretary of State, is a constitutional exercise of the Legislature's authority under Nev. Const. Art. 19, Sec. 5 to enact procedures to facilitate the operation of initiative petitions.

## STATEMENT OF THE CASE

This is an appeal from the First Judicial District Court's order in which writs of mandamus and prohibition issued to prevent the Nevada Secretary of State from placing two withdrawn initiative petitions on the ballot in the 2022 general election.

The two initiative petitions at issue proposed tax increases on retail sales and gaming to increase funding for public education. During the 2021 Legislative Session, however, the Legislature reached a compromise with various stakeholders, including the proponents of these two initiative petitions, to raise funding for education through increased taxes on mining. As part of that compromise, the proponents agreed to withdraw their initiative petitions.

Under NRS 295.026, an authorized person can withdraw an initiative petition by submitting a notice of withdrawal form to the Secretary of State up to 90 days before the election in which the petition would otherwise appear on the ballot. Once a petition is withdrawn, NRS 295.026 provides that "no further action may be taken on that petition." There is no dispute in this case that the proponents complied with NRS 295.026 to timely withdraw their initiative petitions.

Despite the timely submission of notices of withdrawal for both petitions under NRS 295.026, the Secretary of State refused to acknowledge that those petitions are withdrawn and insists on placing the proposed tax increases on the ballot in the upcoming general election. When the Secretary initially refused, her first justification centered on the word "shall" in Nev. Const. Art. 19, Sec. 2(3):

> 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). The Secretary argued that because the Legislature took no action on the proposed initiative petitions in the 2021 session, she must place the petitions on the ballot under the plain wording of Nev. Const. Art. 19, Sec. 2(3). In the Secretary's opinion, NRS 295.026, a statute, could not contradict her constitutional obligation.

Although the Secretary relied on the constitution's use of "shall", both the Nevada Attorney General and the First Judicial District Court have recognized that the Secretary's argument falls apart when the word "shall" is considered in its appropriate context. Indeed, the Nevada Attorney General issued a formal opinion that there is no conflict between NRS

295.026 and Art. 19, Sec. 2. Despite that opinion, the Secretary insisted on placing the withdrawn petitions on the ballot based on her own personal legal interpretation. This forced the proponents to obtain writs of mandamus and prohibition from the First Judicial District Court to stop the Secretary.

Like the Nevada Attorney General, the First Judicial District Court also found that NRS 295.026 and Nev. Const. Art. 19, Sec. 2 can be read in harmony. And that when those provisions are read in harmony, the proponents of these initiative petitions effectively removed the petitions from the constitutional process by withdrawing them, so the Secretary's legal duty is clear: to take no further action. As a result, the court ordered that a writ of mandate issue directing the Secretary to withdraw the initiative petitions and take no further action on the petitions. The court further ordered the Secretary to halt from placing the petitions on the ballot in the 2022 general election.

The Secretary now appeals the First Judicial District Court's determinations. This appeal provides this Court an opportunity to affirm that NRS 295.026 is a constitutional exercise of the Legislature's authority under Nev. Const. Art. 19, Sec. 5; that the Secretary of State is

misinterpreting the law by unilaterally declaring that NRS 295.026 is of no effect once the requisite number of signatures have been collected in support of an initiative petition; and that the Secretary's legal duty is to take no further action on the withdrawn petitions.

## STATEMENT OF FACTS

### *Proponents File Their Respective Initiative Petitions*

Respondent Robert Hollowood filed Initiative Petition S-01-2020 on behalf of Respondent Nevadans for Fair Gaming Taxes PAC. I JA 30. Petition S-01-2020 proposed amendments to NRS 463.370 to increase taxes on gaming revenue. I JA 21-28. Before circulating the petition for signatures, as required by NRS 295.015, Hollowood filed a Notice of Intent to Circulate Statewide Initiative or Referendum Petition on January 14, 2020. I JA 30. The Notice for S-01-2020 authorized Robert Hollowood, Karl Byrd, or Dan Price to withdraw or amend the petition. I JA 30.

Respondent Kenneth Belknap filed Initiative Petition S-02-2020 on behalf of Respondent Fund Our Schools PAC. I JA 56. Petition S-02-2020 proposed amendments to NRS 374.110 and NRS 374.190 to raise sales and use taxes. I JA 32-54. Again, before circulating the petition for signatures, Belknap filed a Notice of Intent to Circulate Statewide Initiative or

Referendum Petition on or about January 15, 2020. I JA 56. The Notice for S-02-2020 authorized Kenny Belknap, James Frazee, or Marie Neisess to withdraw or amend the petition. I JA 56.

This brief will refer to respondents Robert Hollowood, Kenny Belknap, Nevadans for Fair Gaming Taxes PAC, and Fund Our Schools PAC collectively as the "Proponents" of the initiative petitions.

***The Legislature Indirectly Addresses the Proponents' Initiatives***

Both petitions sought to raise taxes to increase funding for public education. Both petitions obtained the required number of signatures and the appellant Secretary of State transmitted each petition to the Legislature as required by Nev. Const. Art. 19, Sec. 2(3). The Legislature took no action within the 40 days required by Nev. Const. Art. 19, Sec. 2(3) for the Legislature to enact or reject the amendments without change.

Later in the 2021 Legislative Session, however, the Nevada Legislature reached a compromise with the mining industry to increase taxes on gold and silver to raise funding for education. This was Assembly Bill 495. The compromise was a "historic" coming together of various stakeholders to fund education. *See, e.g.*, Nevada Legislature, 81st Regular Session 2021, Assembly Daily Journal, The One Hundred and Twentieth

Day, May 31, 2021, at p. 264 (Statement of Assemblyman Roberts in Support of Assembly Bill 495 lauding "bipartisan efforts to come together" and take an "historic step to create dedicated and sustainable funding" to education); Nevada Legislature 81st Regular Session, Joint Meeting of the Assembly Committee on Ways and Means and Senate Committee on Finance, May 30, 2021, 6:14:10 p.m. to 6:15:31 p.m, (last viewed April 10, 2022) https://sg001-harmony.sliq.net/00324/Harmony/en/PowerBrowser/PowerBrowserV2/20210530/-1/?fk=8996&viewmode=1 (Senator Chris Brooks commenting that the legislation "reflects the art of compromise" and detailing the "historic" nature of the different parties that came together to support the legislation). At least part of the compromise which led to bipartisan-supermajority support for Assembly Bill 495 was the Proponents' agreement to withdraw Petition S-01-2020 and Petition S-02-2020.

***Proponents Withdraw Their Respective Initiative Petitions but the Secretary of State Refuses to Recognize the Withdrawals***

On June 2, 2021, Robert Hollowood withdrew S-01-2020 by submitting a Petition Withdrawal Form to the Nevada Secretary of State. 1 JA 58.

On July 28, 2021 the Office of the Attorney General responded to a

request from the Governor's Office of General Counsel to address "a perceived conflict between NRS 295.026 (as amended in 2021) and Article 19, Section 2 of the Nevada Constitution." 1 JA 60. The Office of General Counsel asked: "Does Article 9, Section 2 of the Nevada Constitution prevent the proponents of an initiative petition from withdrawing the petition pursuant to NRS 295.026?" 1 JA 61. The Attorney General's Opinion 2021-04 answered that

> "Article 19, Section 2 of the Nevada Constitution does not prevent the proponents of an initiative petition from withdrawing the petition. NRS 295.026 can and should be read harmoniously with the requirements of the Constitution."

1 JA 62. In particular, "[t]he plain language of NRS 295.026 provides a straightforward mechanism for the proponents of an initiative petition to withdraw it—thus removing it from the procedural processes of Article 19, Section 2." 1 JA 65.

On September 7, 2021, the Nevada Secretary of State, Barbara Cegavske, responded to the Attorney General's letter and noted her disagreement. I JA 76-77 (Secretary's Letter). The Secretary determined that:

> "The Nevada Constitution requires the Secretary of State to follow a procedure once an initiative petition has obtained the required number of verified signatures. As such, a statute cannot interfere

> with that duty. Thus, when the Legislature rejects or fails to act on any initiative petition within the first 40 days of the session, '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.'"

I JA 76-77. The Secretary's letter noted that she "received a request to withdraw a petition" but because the petition "obtained the required number of signatures, and [she] submitted it to the Legislature in accordance with Article 19 Sec. 2, [she] anticipates following her duty to act as outlined in the Nevada Constitution and placing the initiative petition on the ballot during the 2022 general election." I JA 77.

Later, on October 6, 2021, Kenneth Belknap withdrew S-02-2020 by submitting his own Petition Withdrawal Form to the Nevada Secretary of State. I JA 74 (Petition Withdrawal Form). Despite the notices of withdrawals submitted by Hollowood and Belknap, the Secretary of State maintained that it is her duty to place the amendments proposed by S-01-2020 and S-02-2020 on the ballot in the upcoming general election for approval or disapproval of the voters. I JA 76-77.

### *Petitioners Seek Writs to Prevent the Secretary from Exceeding Her Authority*

The Proponents then petitioned for writs of mandamus and prohibition in the First Judicial District Court, claiming that the Secretary

has no discretion to refuse to allow Proponents to withdraw S-01-2020 and S-02-2020 and must be prohibited from placing those initiative petitions on the 2022 General Election Ballot. I JA 1-5 (Petition for Writs). The Nevada Resort Association ("NRA") and the Vegas Chamber then intervened and joined the Proponents' petition in the district court. II JA 202-204 (Order Granting Intervention). The NRA and Vegas Chamber provided their own memorandum and points of authority in support of the petitions as well as a reply in support of the petitions. II JA 205-224 (NRA and Vegas Chamber Memorandum of Points and Authorities); II 272-283 (NRA and Vegas Chamber Reply).

***The District Court Ordered that the Writs Issue***

The district court found that NRS 295.026 was presumed constitutional and that it was indeed a constitutional exercise of the Legislature's authority to "provide by law for procedures to facilitate the operation' of the constitution's provisions establishing Nevada's initiative and referendum process." II JA 284-291 (district court order quoting Nev. Const. Art. 19, § 5); II JA 288-289. The district court further found that nothing in Article 19 contravenes the Legislature's authority to permit withdrawal of an initiative petition under NRS 295.026. II JA 289. The

Secretary's ministerial duty to submit a petition to the voters at a general election, resulting from the constitution's use of "shall", assumes the existence of a valid initiative petition that has complied with procedural requirements enacted by the Legislature under Art. 19 Sec. 5. II JA 290. But the Legislature provided that when a petition is withdrawn, no further action may be taken upon it. II JA 290. Accordingly, the district court ordered that writs issue to direct the Secretary to withdraw the petitions and take no further action with respect to the petitions, as well as "to halt from placing Statutory Initiative Petitions S-01-2020 and S-02-2020 on the 2022 General Election ballot in Nevada." II JA 290.

## STANDARD OF REVIEW

*Nevadans for Nevada v. Beers*, 122 Nev. 930, 939, 142 P.3d 339, 345 (2006) succinctly provides the standard of review for the legal dispute in this case:

> The constitutionality of a statute is a question of law subject to de novo review. Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. In order to meet that burden, the challenger must make a clear showing of invalidity.

## SUMMARY OF THE ARGUMENT

The Nevada Constitution Article 19, Section 5 authorizes the Legislature to "provide by law for procedures to facilitate the operation" of initiative petitions. NRS 295.026, which provides a procedure for certain authorized persons to withdraw an initiative petition, facilitates the operation of initiative petitions by allowing citizens to engage with an unresponsive Legislature and to withdraw their petitions if their concerns are addressed or if it is otherwise necessary. In this case, the respondents were forced to obtain writs from the district court because the Secretary of State effectively declared NRS 295.026 unconstitutional by refusing to acknowledge Proponents' withdrawal of their initiative petitions.

The Secretary's original written justification for her refusal was that a statute like NRS 295.026 could not contradict the Secretary's ministerial obligation created by Art. 19, Sec. 2(3)'s use of "shall". Throughout this litigation, she has additionally argued that Article 19, Sec. 2(1) reserves a right on behalf of the public to vote on an initiative petition once it has been proposed. To justify her determination to place these petitions on the ballots, both of the Secretary's arguments narrowly focus on constitutional language out of that language's broader context, thereby artificially creating a conflict between NRS 295.026 and Art. 19, Sec. 2.

The fundamental flaw in the Secretary's arguments is that she glosses over the constitutional role of the Legislature to "provide by law for procedures to facilitate the operation" of initiative petitions. Nev. Const. Art. 19, § 5. As the district court found, NRS 295.026 is a valid exercise of the Legislature's authority to do just that. And the Secretary cannot otherwise establish, despite her attempt to contrive new constitutional rights and overemphasize her own role in the initiative process, that the Nevada constitution prohibits withdrawal of an initiative petition.

In particular, the Secretary's ministerial role and duties under Art. 19, Sec. 2 are only implicated when a valid initiative petition exists. A petition that is withdrawn under NRS 295.026 functionally removes the petition from the constitutional process set forth in Sec. 2(3) and the Secretary's only ministerial role is to take no further action on the withdrawn petition. Further, the Secretary's argument wrongly presumes that the constitution grants a right to the public to vote on an initiative petition once it has been proposed. No such right exists, either explicitly or implicitly; instead, the Secretary herself fabricates that purported right out of whole cloth by using select language from Art. 19, Sec. 2(1) and case law.

Ultimately, NRS 295.026 neither directly nor indirectly contravenes

Art. 19, Sec. 2. Nonetheless, under the guise of her ministerial duty, the Secretary has unilaterally determined that NRS 295.026 is unconstitutional and that she will not allow the proponent of an initiative petition to withdraw that petition once it has been proposed. This Court should therefore affirm the district court's order, which prevents the Secretary from acting on her erroneous interpretation and prohibits her from placing these withdrawn initiative petitions on the ballot in the next general election.

## ARGUMENT

Although the Nevada Constitution vests the authority to make laws in the Legislature, *see* Nev. Const. Art. 4, § 1, the people also reserved to themselves the power to propose and enact laws through initiative petition, *see* Nev. Const. Art. 19, § 2(1). The constitution itself provides some of the requirements for Nevada's initiative process. *See* Nev. Const. Art. 19, § 2. But the constitution also recognizes the ability of the Legislature to "facilitate" the process by enacting its own procedures for initiative petitions. *See* Nev. Const. Art. 19, § 5[1]. By enacting NRS 295.026, which

[1] Art. 19, Sec. 5 reads in full: "The provisions of this article are self-executing but the legislature may provide by law for procedures to facilitate the operation thereof."

provides a procedure for certain authorized persons to withdraw an initiative petition, the Legislature has done just that.

Not only does NRS 295.026 facilitate the initiative process, but withdrawal of an initiative petition is easily read in harmony with the constitutional process. Simply put, withdrawal under NRS 295.026 completely removes the petition from the constitutional process and prevents any further action from being taken on that petition. Such a withdrawal does not in any way conflict with any other constitutional provision concerning initiative petitions.

## I.

## NRS 295.026 IS A CONSTITUTIONAL EXERCISE OF THE LEGISLATURE'S AUTHORITY UNDER NEV. CONST. ART. 19, SEC. 5

NRS 295.026 allows the proponent[2] of an initiative petition to withdraw the petition by submitting a notice of withdrawal to the Secretary of State no later than 90 days before the election in which the initiative will appear on the ballot. NRS 295.026(1)(a). NRS 295.026(1)

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[2] NRS 295.015 governs who may withdraw a petition. "Before a petition for initiative or referendum may be presented to the registered voters for their signatures, the person who intends to circulate the petition must . . . submit to the Secretary of State . . . [t]he names of not more than three persons who are authorized to withdraw the petition . . . ." NRS 295.015(1)(b)(3).

itself provides the only requirement to withdraw a petition, which is to "submit[ ] a notice of withdrawal to the Secretary of State on a form prescribed by the Secretary of State." Once a proponent submits a notice of withdrawal on the form prescribed by the Secretary of State, "no further action may be taken on that petition." NRS 295.026(2).

Initiative petitions and referendums allow the people to enact law directly and ensure that the Legislature remains responsive to the people. The ability to withdraw an initiative petition, and a clear procedure for doing so, is an extremely valuable component of the people's power to engage in the initiative process.

### A. Initiative Petitions Are for Unresponsive Legislatures

The purpose of an initiative petition is to allow the people to enact law themselves when the legislature fails to represent their interests. *See* 42 Am. Jur. 2d Initiative and Referendum § 1 ("The purpose of initiative and referendum is to allow the people to enact laws directly without being thwarted by an unresponsive legislature."); *see, e.g.*, *Turley v. Bolin*, 554 P.2d 1288, 1292 (Ariz. Ct. App. 1976) (noting "the right of the people of initiat[ing] legislation when disappointed by the failure of their elected representatives to pass desired legislation"). Not only can the power of the

initiative directly enact law, but the people's ability to propose and enact law is itself a method of getting the legislature's attention.

As the Ohio Supreme Court aptly put it over 100 years ago, the great power in the initiative and referendum process is that it safeguards representative government:

> Now, the people's right to the use of the initiative and referendum is one of the most essential safeguards to representative government. The enemies of the 'I. & R.' persistently misrepresent it as destroying representative government, but it is not so. It is rather a guaranty or safeguard to preserve representative government. It is only when government ceases to be representative of the public welfare that the 'I. & R.' can be successfully invoked. If the people get real representative government, there is no occasion for the 'I. & R.' The potential virtue of the 'I. & R.' does not reside in the good statutes and good constitutional amendments initiated, nor in the bad statutes and bad proposed constitutional amendments that are killed. Rather, the greatest efficiency of the 'I. & R.' rests in the wholesome restraint imposed automatically upon the General Assembly and the Governor and the possibilities of that latent power when called into action by the voters.

*State ex rel. Nolan v. ClenDening*, 112 N.E. 1029, 1032 (Oh. 1915). The United States Supreme Court itself has recently recognized that the virtue of the initiative process "extends beyond the particular statutes and constitutional provisions installed by the people" and that "[t]he very prospect of lawmaking by the people may influence the legislature". *See Arizona State Legislature v. Arizona Independent Redistricting*

*Commission*, 576 U.S. 787, 823 (2015). The initiative process comports with "[t]he genius of republican liberty" which provides "not only that all power should be derived from the people, but that those intrusted [sic] with it should be kept in dependence on the people." *Id.* at 819 (quoting The Federalist No. 37, at 223).

When the initiative process is properly understood for what it is—the power to enact law when the Legislature is unresponsive to the people it represents—then withdrawal of an initiative becomes a natural part of that process. A procedure for withdrawal can play a vital role in the initiative process when the Legislature chooses to respond, whether directly or indirectly, to the concerns of the people provided through an initiative petition.

### B. NRS 295.026 Facilitates Initiative Petitions

"Any legislation which tends to ensure a fair, intelligent and impartial accomplishment may be said to aid or facilitate the purpose intended by the constitution." *State ex rel. McPherson v. Snell*, 121 P.2d 930, 934 (Or. 1942). The statute must not, however, "curtail[ ] the right or plac[e] any undue burdens upon [the] exercise" of the constitutional right. *Id.* A statute facilitates the operation of initiative petitions if the statute

safeguards the process of initiative petitions. *Cf. Fiannaca v. Gill*, 78 Nev. 337, 345, 372 P.2d 683, 687 (1962) ("[A]ny statutory provision intended to safeguard the operation of recall procedures aids in the operation thereof."); *Citizens for Honest & Responsible Government v. Secretary of State*, 116 Nev. 939, 950, 11 P.3d 121, 128 (2000) (holding that statute allowing for withdrawal of signatures from recall petition "aids in the operation" of the recall right because it "clearly gives the electorate greater flexibility and voice in the exercise of its recall right" and "helps avoid unnecessary special elections").

Perhaps the most prominent benefit of a withdrawal procedure, as illustrated by this case, is that it empowers the people to engage with the Legislature and provides them flexibility to interact and address the substance of the initiative in creative ways. The constitution's framework of an indirect initiative process—one in which there is an intervening legislative session between proposal of an initiative and a public vote on the initiative—further suggests that the Legislature's participation in the initiative process is valuable. If an intervening legislative session responds to the proponent's concerns, then an initiative petition may no longer be necessary and it can be withdrawn. The initiative process should be

designed to encourage the Legislature to actually respond to and address an initiative petition, because its very purpose is to engage the people's legislative power when the Legislature is not being responsive to the people.

The Secretary's assumption—that the only way in which an initiative petition can permissibly result in changes in the law is if it is approved exactly as proposed—severely limits the people's power given by the initiative process. California, for example, explicitly recognizes that proponents may withdraw an initiative petition as a result of negotiations and good faith bargaining to secure legislative approval of matters embraced in the initiative. *See* Cal. Elec. Code § 9604(a)-(b) ("[A]ny person may engage in good faith bargaining between competing interests to secure legislative approval of matters embraced in a statewide or local initiative or referendum measure, and the proponents may, as a result of these negotiations, withdraw the measure at any time . . . before the Secretary of State certifies that the measure has qualified for the ballot."). California did not always permit withdrawal after qualification of signatures; it was only in 2014, after the legislature realized that the inability to withdraw initiative petitions was leading to undesirable results, that California

instituted a mechanism for withdrawal. *See* Senate Rules Committee, Senate Floor Bill Analyses of S.B. 1253, California 2013-2014 Regular Session, on August 27, 2014, at 8-9, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140SB1253 (last visited April 10, 2022) (author of bill noting a problem in the law was that "if a proponent of an initiative pursues an alternative path to solving an issue—specifically through the legislative process—there is no mechanism for the proponent to remove their own ballot initiative after it's been qualified").

The California legislature cited to a 2004 example in which a group qualified a local government protection initiative for the ballot. *See* Assembly Committee on Elections and Redistricting, California 2013-2014 Regular Session, June 23, 2014 Hearing on S.B. 1253, at 8-9, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140SB1253 (last visited April 11, 2022). Before the election, however, the governor and the legislature came to a compromise in a separate measure on the same issue that was put on the same ballot. *Id.* The group preferred the compromise presented by the governor and the legislature over their own measure. *Id.* Because there was no procedure for the group

to withdraw their own initiative, they ended up actively opposing their own initiative and supporting the one put forward by the governor and legislature. *Id.* Withdrawal would have been a common-sense procedural solution to such a problem.

South Dakota, who was the leading state to approve the initiative process in 1898, also amended their initiative process in 2009 to allow for a legislative session before an initiative is placed on the ballot. *See* S.D. Const. Art. 3, Sec. 1; *see also* South Dakota Legislative Research Counsel 2009 Bills, Hearing on House Bill 1184, February 4, 2009, beginning at 9:13, (last visited April 7, 2022) https://www.sdlegislature.gov/Session/Bill/889. South Dakota recognized that withdrawal of an initiative is particularly appropriate when the Legislature acts in response to an initiative and there is no reason for the measure to be on the ballot. *Id.* at 40:00 to 41:45; *see* S.D. Codified Laws § 2-1-2.3 (allowing withdrawal not later than 120 days before the next general election by two-thirds of the named sponsors).

Multiple other states allow for withdrawal of an initiative petition, several of which also allow for withdrawal of a petition after collection and filing with signatures. *See* Cal. Elec. Cod. § 9604; Colo. Rev. Stat. § 1-40-

134; Mo. Ann. Stat. § 116.115; Ohio Rev. Code § 3519.08; S.D. Codified Laws § 2-1-2.3. Such provisions facilitate the initiative petition process not only by allowing for compromise or negotiation with the legislature, but also by providing the ability to abandon unconstitutional or inefficient initiatives and adapting to otherwise unforeseen circumstances between the proposal of an initiative and the next general election.

In short, withdrawal can be a valuable procedure to engage the Legislature as well as a procedure to save time and resources for Nevadans by withdrawing nonviable petitions. If the Legislature becomes responsive to the people on an issue, then the initiative process is no longer needed and withdrawal can be a valuable tool. Similarly, if it is discovered that an initiative petition may have an unintended consequence or is likely to be unconstitutional, withdrawal can save time and resources on an election. Conversely, providing the ability to withdraw an initiative petition does not hinder or make it more difficult for the people to exercise their right to propose initiative petitions when the legislature is failing to respond to their concerns. The Secretary's purported concerns about misuse of withdrawal are matters for further policy-based legislative decisions.

For her part, the Secretary does not directly address the advantages that come from an initiative process that contains a procedure for withdrawal and why the Legislature was well within its political discretion to enact such a procedure under Art. 19, Sec. 5. Instead, the Secretary argues that NRS 295.026 inhibits the initiative process, rather than facilitates it, because it infringes on "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." AOB at 30. Additionally, the Secretary argues, "it bypasses a mandatory duty of the Secretary of State designed to protect those rights." AOB at 30. These arguments are not so much substantive responses to the benefits of withdrawal that justify the Legislature's policy decision, but instead are simple reiterations of the Secretary's primary argument, which is that withdrawal conflicts with the Constitutional framework of initiative petitions. But a withdrawn petition does not conflict with the constitutional process, because withdrawal completely removes the petition from the procedure outlined in the constitution.

## II.

## A WITHDRAWN PETITION BECOMES VOID AND IS REMOVED FROM THE CONSTITUTIONAL PROCESS

Once an authorized person submits a timely notice of withdrawal form to the Secretary of State, "no further action may be taken on that petition." NRS 295.026(2). A withdrawn petition becomes functionally void and entirely removed from the process set forth in Art. 19, Sec. 2. Indeed, the entire conflict raised by the Secretary in this case can be avoided by simply acknowledging that a withdrawn petition is the equivalent of a void petition. *See* I JA 65 (Attorney General Opinion No. 2021-04 stating "The plain language of NRS 295.026 provides a straightforward mechanism for the proponents of an initiative petition to withdraw it—thus removing it from the procedural processes of Article 19, Sec. 2."); II JA 290 (district court finding that "the Secretary Cegavske's ministerial duty to submit a petition to the voters at a general election assumes the existence of a valid petition" but "a petition withdrawn by its proponent is void and cannot be acted upon").

The court has previously recognized that a void petition is effectively removed from the constitutional process. In *Rogers v. Heller*, the court considered an initiative to increase funding for public schools. 117 Nev.

169, 171, 18 P.3d 1034, 1035 (2001). The initiative had the requisite number of signatures and the Secretary of State transmitted it to the Legislature under Article 19 Sec. 2(3). Various business entities then sought injunctive relief, arguing, among other things, that the initiative was unconstitutional because it required a legislative appropriation without also raising a sufficient tax. *Id.* at 172, 18 P.3d at 1036. The court ultimately agreed that the initiative was unconstitutional. *Id.* at 178, 18 P.3d at 1040. The court held that the constitutional deficiency rendered the initiative "void" and therefore "the Secretary of State's transmittal of the Initiative to the Legislature was ineffective." *Id.*

NRS 295.026 itself provides a procedure in which a petition that is withdrawn becomes void. A withdrawn initiative petition is the legal equivalent of a petition that appropriates funds without raising money, or a petition without an enacting clause, or one that concerns an administrative act, or that contains multiple subjects; in each of those instances, the court has acknowledged that the petition may be considered void. *See Rogers*, 117 Nev. at 178, 18 P.3d at 1034; *Cain v. Robbins*, 61 Nev. 416, 131 P.2d 516, 518-20 (1942) (holding that an initiative transmitted to the Legislature and then to county clerks for publication was "wholly void"

for lack of an enacting clause); *Glover v. Concerned Citizens for Fuji Park and Fairgrounds*, 118 Nev. 488, 498, 50 P.3d 546, 552 (2002) (initiative petition that concerned administrative act was "void"); *Nevadans for the Prot. of Prop. Rights, Inc.*, 122 Nev. at 911, 131 P.3d at 1246 (acknowledging implicitly that a statutory requirement could render a petition void). A void petition is removed from the constitutional process such that it cannot go to a vote in the general election and such a transmittal or submission by the Secretary of State would be ineffective. *Cf. Rogers*, 117 Nev. at 178, 18 P.3d at 1034.

Accordingly, because "no further action may be taken" on a withdrawn petition, a withdrawn petition is not a valid petition and it cannot be submitted to the voters at a general election. NRS 295.026(2). Yet the Secretary still argues, despite NRS 295.026 being a valid use of the Legislature's authority under Art. 19, Sec. 5, and despite a withdrawn petition becoming void and removed from the constitutional process for enacting a proposed initiative, that permitting withdrawal conflicts with the constitutional process.

## III.

## NRS 295.026 IS HARMONIOUS WITH NEV. CONST. ART. 19

The Secretary of State argues that "the constitution does not tolerate withdrawal of a verified petition by a petition sponsor." AOB at 12. The Secretary's first argument is that "withdrawal is not contemplated or permitted by the constitutional process." AOB at 15. That argument wrongly assumes that the constitutional process preempts new procedures and ignores that Art. 19, Sec. 5 explicitly authorizes the legislature to enact procedures to facilitate the operation of initiative petitions that are not otherwise contemplated by the constitution. The Secretary's second argument is that allowing one individual to withdraw an initiative that was proposed by 10 percent of the voters "violates the constitutional rights of the 10 percent of the electorate required to propose the petition." AOB at 17. That argument overlooks the well-established role a proponent plays in the initiative process and becomes disingenuous when considered in light of the Secretary's other arguments regarding the constitution. Finally, the Secretary argues that the constitution "protects the rights of the people to 'enact or reject' a verified initiative petition at the polls." AOB at 18. That argument invents a constitutional right by isolating language from the

constitution and case law to fashion a right that is not supported by the actual purpose of Art. 19, Sec. 2(1).

Ultimately, because NRS 295.026 facilitates the operation of initiative petitions by providing a procedure for withdrawal of an initiative, and because it is not directly or indirectly prohibited by Article 19, this Court should affirm the district court.

### B. The Constitution is Silent Regarding Withdrawal of an Initiative Petition

Nothing in the Nevada Constitution expressly prohibits or otherwise addresses withdrawal of an initiative petition that has been filed with the Secretary of State. For contrast, *We the People Nevada ex rel. Angle v. Miller* involved a statute that set the deadline to submit an initiative petition for signature verification on a date earlier than what the constitution's language allowed. 124 Nev. 874, 878, 192 P.3d 1166, 1169 (2008). Because the statute shortened the time for collection of signatures that was provided by Art. 19, it hindered the initiative process, "directly contravene[d] Article 19", and was declared unconstitutional. *Id.* at 891, 192 P.3d at 1177.

Unlike the timing requirements addressed in *We the People Nevada*, Article 19 is silent regarding withdrawal of an initiative petition. Art. 19,

Sec. 2 neither expressly provides for nor expressly prohibits withdrawal. Because NRS 295.026 does not directly contravene Article 19, all of the Secretary's arguments amount to claims that NRS 295.026 indirectly conflicts with other provisions of Art. 19, Sec. 2.

### C. NRS 295.026 Does Not Indirectly Contravene or Inhibit the Initiative Process Set Forth in Art. 19, Sec. 2

#### *1. Self-Executing Does Not Mean Further Procedures are Preempted*

When the Secretary argues that withdrawal is not "contemplated or permitted by the constitutional process", AOB at 15, she is implying that NRS 295.026 is unconstitutional because the constitution itself does not provide for withdrawal. The Secretary's argument misunderstands what it means for a constitutional provision to be self-executing and also disregards the import of the Legislature's authority under Art. 19, Sec. 5.

The Secretary is simply wrong when she argues that self-executing means that the Legislature cannot add to the process given in the constitution. *See* AOB at 22-25. Self-executing just means that "no legislation is necessary to give effect to it." 16 Am. Jur. 2d Constitutional Law § 102. Self-executing does not mean that further legislation is preempted or prohibited. 16 Am. Jur. 2d Constitutional Law § 104 ("A self-

executing provision of a constitution does not necessarily exhaust legislative power on the subject."). As long as a legislative act is in harmony with the self-executing provision and does not curtail the right provided by the constitution, the legislature may enact laws to facilitate a self-executing constitutional provision. 16 Am. Jur. 2d Constitutional Law § 104; *see also* 16 C.J.S. Constitutional Law § 128 ("Although constitutional provisions that are self-executing require no implementing legislation, implementing legislation is permissible as long as it does not directly or indirectly impair, limit, or destroy the rights that the self-executing constitutional provision provides.").

In Nevada, the plain language of Art. 19, Sec. 5 explicitly authorizes the Legislature to enact procedures that are not in the constitution. Nonetheless, the Secretary takes language from *Wilson v. Koontz* out of context to support her argument that the Legislature cannot "read into the initiative process elements that did not already exist in the Constitution." AOB at 23. But *Wilson* simply verified that Article 19 is indeed self-executing like Section 5 says it is. *See Wilson*, 76 Nev. 33, 34, 348 P.2d 231, 231 (1960) (Secretary of State defended refusal to file a petition to amend the constitution based, in part, on an argument that Art. 19, Sec. 3

was not self-executing as to propose constitutional amendments). That is, *Wilson* confirmed that legislative aid was not necessary to give effect to the initiative process. *See Wilson*, 76 Nev. at 38, 348 P.2d at 233 (noting the constitutional "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"). That, however, does not mean that legislative aid is prohibited from enabling and even enhancing the people's initiative power reserved by Art. 19, Sec. 2(1). Just the opposite, the plain language of Art. 19, Sec. 5 explicitly authorizes the Legislature to give further effect to the power.

For example, in *Nevadans for Nevada v. Beers*, the court upheld a statutory description of effect requirement despite the constitution only requiring the full text of the measure proposed. 122 Nev. 930, 938, 142 P.3d 339, 344-45 (2006). The proponents of an initiative petition argued that the description of effect requirement placed an "'extra-constitutional' burden on the initiative process." *Id.* at 344, 142 P.3d at 938. Still, the Court held that the Legislature "may enact laws that provide procedures to facilitate the initiative and referendum process" and that "[a]dditionally,

the legislative power includes the broad power to frame and enact laws, unless there is a specific constitutional limitation to the contrary." *Id.* at 939, 142 P.3d at 345. The proper analysis must therefore return to whether NRS 295.026 facilitates the operation of the initiative process or is specifically prohibited by a constitutional limitation.

### *2. A Proponent Represents the 10 Percent of Voters Who Propose an Initiative*

The Secretary's argument that one proponent cannot withdraw what 10 percent of the voters proposed disregards how initiative petitions work and rings hollow upon an analysis of the Secretary's other positions in this case. *See* AOB 15-18.

Nevada law provides a special role for the person who intends to circulate a petition for signatures. *See* NRS 295.015. The original circulator has special rights and responsibilities that the other signers do not possess. *cf. Perry v. Brown*, 265 P.3d 1002, 1017-18 (Cal. 2011) ([T]he official proponents of an initiative measure are recognized as having a distinct role—involving both authority and responsibilities that differ from other supporters of the measure—with regard to the initiative measure the proponents have sponsored."). For example, the circulator is required to file a copy of the petition, including the description of the effect, with the

Secretary of State before presenting the petition to registered voters for signature. NRS 295.015(1)(a). Additionally, before circulating the petition for signatures, the circulator must also submit "[t]he names of not more than three persons who are authorized to withdraw the petition or submit an amended petition." NRS 295.015(1)(b)(3).

As a result, before any signer ever places their name on an initiative petition, the law has already clearly established the person(s) who are authorized to withdraw that petition. *See* NRS 295.015(1)(b)(3). The Secretary's argument that it is unfair for one proponent to withdraw what 10 percent of the voters proposed is a distraction considering that the Secretary's actual legal argument is that not even all signers could come together and withdraw their petition because the public has become interested in the petition. *See, e.g.*, AOB 17 ("Those individuals cannot even withdraw their signatures to defeat the minimum number of voters required . . ."). In reality, when 10 percent of the voters affix their signature to an initiative petition and "propose" that petition, they do so through the proponents of the initiative petition and subject to the law that has authorized withdrawal by up to three individuals.

The Secretary also appears to challenge NRS 295.015's wisdom about

who may withdraw an initiative, which could conceivably include a non-resident or non-registered voter. *See* AOB at 17 ("[T]he 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."). It is ironic that the Secretary would implicitly warn of such a consequence, because the Secretary herself sponsored the bill in 2015 that became NRS 295.015. *See* II JA 187 (Senate Committee on Legislative Operations an Elections, May 3, 2017, at 11 (Barbara K. Cegavske testifying, that "I am hopeful to earn your support [of Assembly Bill 45] here in the senate")). Regardless of the Secretary's uneasiness with her own past policy stance, such arguments are still policy arguments. The policy determinations regarding the qualifications of those permitted to withdraw a petition—the number of authorized persons, their residence, their registration status, etc.—are political concerns for the Legislature, not constitutional concerns before this Court at this time.

#### *3. The Constitution Does Not Include a Right of the People to Vote on an Initiative Petition Simply Because One Has Been Proposed*

Art. 19, Sec. 2(1) does not establish a right of the public to vote on an initiative petition simply because it has been proposed. Art. 19, Sec. 2(1)

states that:

> 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.

The Secretary claims that this provision gives the public a right to vote on an initiative petition once it has been proposed and consequently prevents the withdrawal of an initiative petition that has been filed with the Secretary of State. *See* AOB at 18-20. Under the Secretary's interpretation, an initiative petition is a juggernaut set in motion by filing—once filed with the Secretary of State, the petition must either become law or be rejected by the voters at the polls.

#### a. ART. 19 SEC. 2(1) IS BROADLY ABOUT RESERVING POWER, NOT CREATING A SPECIFIC RIGHT TO VOTE ON AN INITIATIVE

When Art. 19, Sec. 2(1) provides that "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", it is referring to broad principles of legislative power, not to a narrow public right and procedure to vote on an initiative petition. *Cf. MDC Restaurants, LLC v. Eighth Judicial Dist. Court*, 134

Nev. 315, 324, 419 P.3d 148, 155 (2018) (citing to 16 Am. Jur. 2d Constitutional Law § 3, at 325 (2009) for the proposition that "constitutions traditionally do not deal in details, but enunciate the general principles and general directions"). The Secretary's argument erroneously splits Section 2(1)'s reserved power to legislate into two distinct rights: the right to propose an initiative and the right to vote on a proposed initiative. But there is no authority to support that distinction or separation.

#### *i. A Plain Reading of the Constitution Does Not Support a Public Right to Vote on a Proposed Initiative Petition*

The phrase "and to enact or reject at the polls" cannot be read in isolation but must instead be read in the context of the rest of Section 2(1) and the entire constitution. *See Nevadans for Nevada*, 122 Nev. at 944, 142 P.3d at 348 ("The Nevada Constitution should be read as a whole, so as to give effect to and harmonize each provision"). The introductory phrase in Section 2(1) is "[n]otwithstanding the provisions of section 1 of article 4 of this constitution"; that suggests the purpose of Section 2(1) is to grant a power in contrast to Art. 4, Sec. 1, which otherwise vested all of the people's power to enact law in a representative legislative body. Once the reader puts "and to enact or reject them at the polls" in that context, it

becomes clear that the point of emphasis should actually be on "at the polls" rather than "enact or reject". That is, Section 2(1) is about reserving the people's power to create law, which can only take effect upon a vote at the polls, rather than the Legislature's power to create law, which happens during a legislative session. Simply put, the phrase "and to enact or reject at the polls" was meant to describe how an initiative petition becomes law in contrast to a legislative act. The phrase is not an implicit denial of the ability to withdraw an initiative petition once it has been proposed.

Further, when Art. 19, Sec. 2(1) refers to "the people" enacting or rejecting a proposed amendment at the polls, "the people" is in contrast to the Legislature. Because "the legislature possesses the whole legislative powers of the people," *State v. Lincoln County Power Dis. No. 1*, 60 Nev. 401, 111 P.2d 528, 530 (1941), it was necessary to reserve the power of "the people" to enact or reject a proposed statute at the polls as opposed to the Legislature enacting or rejecting a statute proposed by the people. Additionally, the use of the word "power" suggests that Art. 19, Sec. 2(1) is about reserving the authority to enact laws through the initiative process, not granting an enforceable right to the public to vote on proposed initiatives. The constitution's use of the word "reserve" also reinforces that

Art. 19, Sec. 2(1) is not about granting a specific right of the people to vote on an initiative petition once it has been proposed, but instead about ensuring that the Legislature was not the only entity with the authority to make law.

The Secretary's interpretation is flawed also because she reads Section 2(1) as if it provides a mechanical procedure for initiative petitions when its purpose is instead to broadly reserve the power of the people to create law on their own. The actual procedure for carrying out that power is otherwise set forth in the remaining subsections of Section 2, not Section 2(1).

Accordingly, Art. 19, Sec. 2(1) is no more than the constitution's mechanism for retaining a special legislative power for the people themselves when all legislative power had otherwise been vested within the people's representative body, the Legislature. The court should reject the Secretary attempt to take select language from that provision to create a procedural right—the public's right to vote on an initiative petition simply because it was proposed—that would not have been contemplated in that manner by those who approved and ratified Section 2(1).

### *ii. The Secretary's Use of* Rea *is Extremely Misleading*

The Secretary cites to *Rea v. City of Reno*, 76 Nev. 483, 357 P.2d 585 (1960) to support her assertion that an initiative petition must go to the ballot once it has been proposed.[3] Yet, *Rea* stands for the proposition that an initiative petition cannot become law without the appropriate legislative body using its discretion to enact the initiative or the initiative otherwise being approved at the polls. An initiative cannot become law simply as a consequence of obtaining a majority of the voting population's signatures. Notably, the Secretary does not use any rationale from the actual holding of *Rea* to support her position in this case. Instead, she applies select quotes with seemingly favorable language out of context to create a constitutional right.

In *Rea*, the legislature passed a statute[4] that required a city to adopt

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[3] In her Opening Brief, the Secretary repeats the exact same misleading analysis of *Rea* that she presented in the district court. *Compare* II JA 238-39 (Secretary of State's brief in district court) with AOB at 23-24 (Secretary of State's opening brief discussing *Rea*); *see also* II JA 275-276 (Nevada Resort Association and Vegas Chamber arguing in the district court that the Secretary's analysis of *Rea* is misleading).

[4] The statute, in relevant part, read:

> Upon the filing of any such petition bearing the required number of signatures, duly verified and setting out therein the amendment or amendments proposed, the governing body of

an amendment by resolution if at least 60% of the registered voters signed a petition proposing the amendment. *Id.* at 485, 357 P.2d at 586. That is, if enough voters signed an initiative petition, the statute effectively required that the city adopt the initiative as law without any further vote. *See id.* The court held that such a procedure violated the Constitution, which instead provides for a process in which laws are *proposed* by the initiative process, but can only be enacted *at the polls*. So when the *Rea* court said "the constitution does not contemplate the initiative without a ballot"—which is the language that the Secretary relies on—it was just recognizing that an initiative cannot become law unless approved by a vote. *Id.* at 486, 357 P.2d at 586.

The Secretary characterizes *Rea* as "deciding that the initiative must be submitted to the voters (and not simply decided by the municipality)" and therefore "the *Rea* court foreclosed the possibility that an initiative petition need not be submitted to the voters." AOB at 24. The Secretary goes on to claim that the petitioners want the same thing that was rejected in *Rea*: "an initiative process without a ballot." AOB at 25. This

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> such city or town shall adopt such amendment or amendments by resolution without further proceeding.

*Rea*, 76 Nev. at 485, 357 P.2d at 586 (quoting NRS 268.010).

characterization of *Rea* is blatantly misleading[5], however, because *Rea* was not a case about withdrawal, or even about a legislative body *choosing* to enact law in response to an initiative. Rather, the statute at issue *required* the city to adopt a proposed petition if the petition contained at least 60% of the voters' signatures; it did not just not "allow", as the Secretary describes it, the city to enact a similar provision addressing the same subject. *See* AOB at 24. Indeed, if the statute at issue would have been enforceable, the proposed initiative would have become law without any substantive vote at all (whether by a legislative body or at the polls). *Rea* simply recognized that there was no mechanism permitted by the constitution by which the people could enact a law without a vote at the polls or by requiring a legislative body to enact an initiative without any discretion.

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[5] The Secretary's most telling misunderstanding of what *Rea* means comes on page 24 of her brief, where she asserts that withdrawal of these 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." AOB at 24. Obviously, it was not these initiative petitions that enacted A.B. 495; A.B. 495 was enacted by the Legislature. If the Secretary were going to compare apples to apples with *Rea*, it would be as if the Proponents collected so many signatures for the gaming and sales tax increases that the legislative counsel bureau (or anyone other than a discerning vote from the Legislature) determined that the gaming and sales tax increases would go into effect without a vote at

The Secretary also emphasizes in bold two other quotes from *Rea* to imply that the court held that once an initiative is proposed it "must be enacted or rejected at the polls" and "must submit the same to a vote of the people for their approval or disapproval." AOB at 19-20. The Secretary is effectively asking this Court to ignore all context and simply read that *Rea* said a proposed initiative "thereafter must be enacted or rejected at the polls." What *Rea* really meant, however, is that a proposed initiative, *in order to become law*, must be enacted at the polls; the initiative process itself cannot enact a law unless there is a vote. *Rea* was not about the circumstances by which an initiative can fail to become law. The court acknowledged this context when it contrasted the "power" to propose an initiative with the power to enact law: "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.

### *iii.* Scott *Implies Withdrawal is a Possibility*

The Secretary additionally cites to *State v. Scott*, 52 Nev. 216, 285 P. 511 (1930) to argue that a petition cannot be withdrawn after signatures

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the general election.

are collected, because the public has become interested in it. *See* AOB at 18-19. But, the Secretary fails to address, despite the respondents addressing it in the district court, that the *Scott* court specifically contemplated that a statute might authorize post-filing withdrawal of signatures.

*Scott* involved a writ of mandamus to the Las Vegas city clerk and city commissioners to call a special recall election for the Las Vegas city mayor. *Scott*, 52 Nev. at 216, 285 P. at 512. The clerk refused to call the special election, arguing that one hundred signatures were withdrawn from the petitions, "which left the petitions without the required number of signers and thereby deprived the clerk of authority to call an election." *Id.* at 514. The court rejected the clerk's position, holding that "[n]either the recall amendment nor the statute enacted pursuant thereto make any provision" for the withdrawal of signatures. *Id.* Instead, the petitions met the legal requirements, were signed by a sufficient number of qualified electors, and were filed with the clerk. *Id.* Under those circumstances, where "nothing further ha[d] been prescribed by the Constitution or statute as a condition precedent to the calling of an election by the clerk," the clerk's "power and duty to act in conformity with the mandate of the law

attached when the petitions were filed." *Id.*

The court reasoned that "[b]efore filing with the clerk[,] the petition is in the power of the signers." *Id.* at 515. But after the petition is filed, "[t]he public has now become interested in it" and "[i]n 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." *Id.* at 515. Accordingly, because "no provision ha[d] been made for withdrawals, nor [was] there anything in the Constitution or aiding statute from which such a right [could] be implied" the court held that "[t]he withdrawals were therefore ineffectual." *Id.* In short, individual signers could not withdraw their names from a recall petition after it was filed with the clerk, because nothing in the law allowed for it.

The Secretary's use of *Scott* ignores that *Scott* itself contemplated that the Legislature might enact a statute that would permit withdrawal of signatures. Indeed, the Nevada Supreme Court specifically based its ruling on "the absence of something in the statute permitting" withdrawal of signatures. *Id.* at 515. Perhaps even more notably, *Scott* was decided in 1930. Since 1967, NRS 295.215 has allowed for withdrawal of an initiative or referendum involving a city ordinance, even after the initiative qualifies

for the ballot and has been considered and rejected by the city council. *See* NRS 295.215(3) ("An initiative or referendum petition may be withdrawn at any time before the 30th day preceding the day scheduled for a vote of the city or the deadline for placing questions on the ballot, whichever is earlier . . . ."). If *Scott* actually stood for the proposition the Secretary asserts, then NRS 295.215(3), which has been in effect since 1967, would also be unconstitutional.

As a result, *Scott* does not support the Secretary's argument that an initiative petition cannot be withdrawn after it is filed with the Secretary; it actually implicitly acknowledges the opposite possibility, which is that a statute like NRS 295.026 could permit withdrawal. Although *Scott* addressed a municipal recall petition in 1930, NRS 295.215(3) has permitted withdrawal of municipal initiative and referendum petitions since 1967. Similarly, in the case now before this Court, the Legislature has expressly allowed for withdrawal under NRS 295.026, so *Scott*'s reasoning does not apply.[6]

[6] *Scott* also addressed the withdrawal of individual signatures from a petition, not withdrawal of the entire petition by a person authorized to do so, which presents different considerations.

### b. EVEN IF A RIGHT EXISTED, IT WOULD NOT APPLY TO PROCEDURALLY INVALID PETITIONS

Even if Art. 19, Sec. 2(1) contemplated a right of the public to vote on an initiative petition once it has been proposed, that right still would be subject to any procedural requirements enacted by the Legislature under Art. 19, Sec. 5. Otherwise, assuming the public has a right to vote on an initiative petition simply because it had been proposed, then all judicial challenges to initiative petitions would have to be reserved until after the petition was voted upon. That, of course, has never been the law in Nevada. *See, e.g.*, *PEST Committee v. Miller*, 648 F.Supp.2d 1202, 1216 (D. Nev. 2009) (listing examples of pre-election challenges to initiative petitions); NRS 295.061(2) (providing procedure for challenges to the legal sufficiency of a petition after "the petition is certified as sufficient by the Secretary of State"). In Nevada, courts have routinely considered pre-election challenges to initiative petitions that amount to procedural or subject matter challenges. *See Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 885, 141 P.3d 1224, 1229 (2006).

As a result, any public right to vote on an initiative petition would only be invoked by an initiative petition that complies with all procedures enacted by the Legislature under Art. 19, Sec. 5. The threshold question,

then, is still whether NRS 295.026 is a valid act of the Legislature's authority under Art. 19, Sec. 5. If withdrawal is a procedure that facilitates the operation of the initiative power, then an initiative petition can be withdrawn and completely removed from the constitutional process in which the public would otherwise have a right to vote on the initiative. Accordingly, because NRS 295.026 functionally voids an initiative petition such that the petition is procedurally invalid and no further action may be taken on it, the Constitution does not require that it be placed on the ballot for a vote by the people.

#### *4. NRS 295.026 Does Not Conflict with the Secretary's Ministerial Duty*

Although the Secretary feigns a conservative and simple approach to this case by relying on the word "shall", her prioritization of her ministerial duty over the Proponents' rights and the Legislature's authority, as well as her unilateral declaration of NRS 295.026 as unconstitutional in the face of Attorney General Opinion No. 2021-04 saying otherwise, is actually radical.[7] The Secretary's ministerial duty undoubtedly is meant to ensure

[7] Notably, this challenge to NRS 295.026 was not brought by signers who are contesting the Proponents' ability to withdraw, or an educational group asserting the right to vote on the initiative petitions because they have been proposed, or even the Nevada Attorney General, but rather the

that a valid initiative petition is placed on the ballot regardless of the whims of the Secretary of State. Ironically, that same ministerial duty is now being weaponized to place an invalid petition on the ballot and negate the commands of the stakeholders in the initiative process who actually exercised discretion and powers under the Nevada Constitution: the proponents of an initiative petition and the Legislature.

#### a. THE SECRETARY'S DUTY IS ONLY TRIGGERED BY A VALID INITIATIVE PETITION

Art. 19, Sec. 2(3) uses the word "shall" twice in reference to action by the Secretary. In both instances, "shall" is used to require that the Secretary transmit or submit a proposed initiative petition from one stakeholder to another. In the first instance, after a circulated petition collects the requisite number of signatures, "[t]he Secretary of State shall transmit such petition to the Legislature as soon as the Legislature convenes and organizes." Nev. Const. Art. 19, § 2(3). In the second instance, "[i]f 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

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Secretary's legal counsel, seeking a determination of her constitutional obligation. Instead, ignoring the Attorney General's opinion, the Secretary informed the Proponents she would place the initiatives on the ballot and the Proponents were forced to seeks writs of mandamus and prohibition.

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).

The Secretary asks this Court to hold that the only conditions precedent to her ministerial duties in Art. 19, Sec 2(3) are the ones set forth explicitly in Art. 19, Sec 2(3). That, of course, cannot be true, because Art. 19, Sec. 5 explicitly authorizes the Legislature to enact procedures to facilitate the initiative process. Those procedures necessarily alter when an initiative petition is valid. Indeed, the Secretary's interpretation of her ministerial duty has already been rejected by the courts' recognition of the Legislature's authority under Art. 19, Sec. 5.

For example, in *Nevadans for the Prot. of Prop. Rights*, 122 Nev. at 901, 141 P.3d at 1240 and in *Nevadans for Nevada*, 122 Nev. at 938-39, 142 P.3d at 344-45 the court upheld challenges to the single subject and description of effect statutory provisions. In both cases, the Nevada Supreme Court recognized that the statutory provisions were constitutional exercises of the power given to the Legislature in Art. 19, Sec. 5. *See Nevadans for the Prot. of Prop. Rights*, 122 Nev. at 902, 141 P.3d at 1241 ("[U]nder Article 19, Section 5, the Legislature had the

authority to enact this requirement for initiative petitions."); *Nevadans for Nevada*, 122 Nev. at 938-39, 142 P.3d at 344-45 ("[T]he plain language of Nevada Constitution Article 19, Section 5 imparts in the Legislature authority to enact laws to facilitate the initiative process, such as requiring a description of effect and allowing challenges on this basis."). In light of these cases, the Secretary of State must recognize, at a minimum, that Art. 19, Sec. 2(3)'s use of "shall" is not unconditional and the Secretary's ministerial duty must be considered in a broader context. *Cf. Las Vegas Taxpayer Accountability Committee v. City Council of City of Las Vegas*, 125 Nev. 165, 173-84, 208 P.3d 429, 434-42 (2009) (repeatedly discussing city council's ministerial duty to place an initiative petition to a vote of the city in terms of whether the initiative petition was "procedurally valid" and "met procedural requirements").[8]

The Secretary has claimed that her ministerial duty to submit the petitions to the voters was triggered when the Legislature took no action on the initiative petitions in the 2021 legislative session. But because Art.

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[8] By analogy, a court clerk has a ministerial duty to file submitted documents, which arises only when a document is submitted in compliance with court procedures. *Cf. e.g.*, *Sullivan v. Eighth Judicial Dist. Court*, 111 Nev. 1367, 904 P.2d 1039, n.3 (1995) (recognizing that "[w]hen a document in proper form is submitted to the clerk, the clerk has a ministerial duty to

19, Sec. 5 authorizes the Legislature to enact procedures to facilitate initiative petitions, there are numerous other instances where the Secretary could receive a filed petition that she does not have a duty to transmit to the legislature or to submit to the voters. The Secretary's ministerial duty is only invoked by a petition that complies with the procedural requirements enacted by the Legislature. Since 2017, when the Legislature enacted NRS 295.026 at the Secretary's urging, the existence of an initiative petition that has not been withdrawn is a condition precedent to the Secretary's ministerial duties under Art. 19, Sec. 2(3).

## CONCLUSION

NRS 295.026 enhances the people's power to engage the Legislature through the initiative process and facilitates the operation of the people's initiative power. The Secretary's interpretation of the initiative power, in which withdrawal is not permitted, would unnecessarily restrict the people's ability to engage with the Legislature through initiative petition. Further, this Court should not accept the Secretary's bold invitation to declare a statute unconstitutional by reading "shall" out of context and by inventing an implied Constitutional right of the public to vote on an

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file that document").

initiative petition simply because the proponents collected enough signatures to file it. The Nevada Resort Association and Vegas Chamber urge this Court to instead take the approach that avoids the Secretary's artificially-created constitutional conflict and find that the Legislature validly enacted NRS 295.026 under Art. 19, Sec. 5, that the petitioners validly withdrew their initiative petitions under NRS 295.026, and that there is therefore no longer a valid initiative petition that would invoke the Secretary's duty to submit any measure in the upcoming election. The Secretary's only remaining duty is to take no further action on these initiative petitions. As a result, the Court should affirm the district court's order.

Dated this 15th day of April, 2022.

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## CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 10,941 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

DATED this 15th day of April, 2022.

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## CERTIFICATE OF SERVICE

I certify that on April 15, 2022, I submitted the foregoing "Respondents' Answering Brief" for e-filing and service *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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