In the Supreme Court of the State of Nevada

EDUCATION FREEDOM PAC, a Nevada committee for political action, Appellant, vs. RORY REID, an individual; BEVERLY ROGERS, an individual, and BARBARA CEGAVSKE, in her official capacity as NEVADA SECRETARY OF STATE, Respondents.	Case No.: 84736 First Judicial District Court Case No.: 22 OC 00028 1B

RESPONDENTS' ANSWERING BRIEF

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I. INTRODUCTION

The district court had it exactly correct in this matter. For multiple reasons, the initiative proponent's ("Education Freedom PAC," or "EFP") initiative petition (the "Petition") falls short of legal requirements, and cannot go forward. The Petition's description of effect is invalid because it is confusing, misleading, and omits discussion of many of its most significant ramifications, in violation of NRS 295.009(1)(b) and this Court's jurisprudence interpreting the same. Secondly, the Petition impermissibly commands the Nevada Legislature to enact a statute or set of statutes effecting its terms, which violates the inherent deliberative functions of the Nevada Legislature. Lastly, the Petition is invalid because it mandates legislative appropriations without providing reciprocal revenues, in violation of Article 19, Section 6 of the Nevada Constitution. For all these reasons, as described and ordered by the district court, the decision below should be affirmed.

II. PROCEDURAL ISSUES

EFP's pique at the progress of this matter below is misplaced. First, Respondents have fifteen days, not thirty, to challenge certain aspects of a filed initiative petition. Op. Br., 13. Fifteen days is not much time, and

it is not unusual—and certainly not impermissible—for challengers like Respondents to take the entirety of the period allotted by NRS 295.061 in which to learn of the filed petition, perform the necessary research, and prepare and file their lawsuit, especially given NRS 295.061(2)'s charge that "[a]ll affidavits and documents in support of the challenge must be filed with the complaint." Second, a peremptory challenge is a right of a party to a lawsuit, established by rule, and is not subject to a judgment by an opposing party as to its wisdom or necessity. *See* Nevada Supreme Court Rule ("SCR") 48.1. Third, consolidation of two or more cases does not affect the separate character of the individual actions, and each remains individually appealable after final judgment, even as they remain consolidated in the district court. Here, consolidation of the cases below is not, therefore, a cause of any prejudice or delay to EFP. *See In re Estate of Sarge*, 134 Nev. 866, 870, 432 P.3d 718, 722 (2018), *overruling Mallin v. Farmers Insurance Exchange*, 106 Nev. 606, 797 P.2d 978 (2018); *see also Hall v. Hall*, 138 S. Ct. 1118 (2018).

It is not clear why EFP includes so much information on its second-filed constitutional initiative in the Opening Brief, when (1) No judicial decision on that measure is before the Court, and (2) EFP has essentially

abandoned the second measure, and the district court has had to issue an order commanding it to participate in the lawsuit after EFP declined or refused to respond to briefing.

III. ARGUMENT

EFP's legal arguments are perfunctory and conclusory, and do little to disturb the ruling of the district court in this matter. EFP may not like the style of the district court's decision, but the substance is correct and its rulings were proper.

A. There Is No Presumption Of The Petition's Validity

EFP has the strange notion that there is some presumption at law that the Petition (and its description of effect) is valid. No such presumption exists. Standards for whether a particular initiative petition is legally sufficient—whether its description is lawful, whether it contains administrative details, whether it impermissibly treats more than one subject—do exist, surely, but no Nevada case establishes a presumption of validity of a petition prior to its challenge by opponents or evaluation by the judiciary. Does a challenger have the burden of demonstrating a petition falls shy of legal requirements in some respect? Of course, just as any plaintiff has the burden of making its case, a

burden Respondents met below. The district court agreed with Respondents that, in multiple ways, EFP's Petition did not meet the mandates of law, but the court below did not fail to apply some presumption, as none exists.

B. The Petition's Description Of Effect Is Faulty

This Court has repeatedly held that "a description of effect must be straightforward, succinct, and non-argumentative, and it must not be deceptive or misleading." *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 37, 293 P.3d 874, 876 (2013). But this is not all the description must be. The purpose of the description is to "prevent voter confusion and promote informed decisions." *Nevadans for Nev. v. Beers*, 122 Nev. 930, 939, 142 P.3d 339, 345 (2006). Any description of a proposed alteration of the state constitution should fulfill that purpose. Thus, "[t]he importance of the description of effect cannot be minimized, as it is what the voters see when deciding whether to even sign a petition." *Coalition for Nevada's Future v. RIP Commerce Tax, Inc.*, 132 Nev. 956 (2016) (unpublished disposition) (citing *Educ. Initiative PAC*, 129 Nev. at 37).

The description must also "explain the[] ramifications of the

proposed amendment" in order to allow voters to make an informed decision. *Nev. Judges Ass'n v. Lau*, 112 Nev. 51, 59 (1996). In other words, this valuable real estate on the signature pages of every single petition page does not require simple recitation of the measure's provisions, but rather a useful explanation of the likely consequences of its enactment. This is, perhaps, a tall order for 200 words of text, as this Court has also recognized, but it is incumbent upon any petition's proponents to describe effects, not goals; to be accurate, not sloppy; and to write in good faith, not political double-speak. The description is not merely the first installment in an agitprop campaign; it is a test of a proponent's seriousness in invoking the people's legislative capacity.

Although a description need not "explain hypothetical effects" or "mention every possible effect" of the initiative, *Educ. Initiative PAC*, 129 Nev. at 37, it must at very least fairly present enough information for a potential signer to make an informed decision about whether to support the initiative. *See Nev. Judges Ass'n v. Lau*, 112 Nev. at 59 (rejecting initiative's description of effect for "failure to explain [certain] ramifications of the proposed amendment," which "renders the initiative and its explanation potentially misleading").

Here, the Petition's description of effect violates each of these requirements. The description states that "[g]enerating the revenue to fund the accounts could necessitate a tax increase or a reduction in government services[.]" Joint Appendix ("JA"), at 12. Having thus admitted that revenue must be found to fund the project, the description then fails to disclose that any funding appropriated for the contemplated program would inevitably and necessarily require either higher taxes, reduction of the current funding of Nevada's public schools, or the reduction in other services. There is no other option; this is axiomatically true, and the electorate should be informed of what is clearly an inevitable ramification of this Petition.[1]

Furthermore, the description incorrectly conflates "the public support that would support the education of the child" with the statewide average base per-pupil amount, a completely different figure describing only a portion of per-pupil "public support." JA, at 12. In other words,

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[1] Public schools in Nevada—or anywhere—do not operate on individual per-student contributions by the State; that is merely a shorthand way of expressing the complex system of education funding. Schools, unsurprisingly, have hard costs—utility costs, compensation for staff and maintenance, etc. Even by expressing its scheme in this way, EFP is misleading potential petition signers.

EFP has identified one measure of school funding as its descriptor ("public support"), but used a lower figure (average base per-pupil amount) as the monetary representation in its description of effect.

The most recent K-12 funding legislation in Nevada expressly defines "total public support" as:

> "[A]ll money appropriated directly for the support of the public schools in this State, including, without limitation, the statewide base per pupil funding amount, adjusted base per pupil funding, additional weighted funding and all money appropriated for a specific program or purpose in support of the public schools, and all other money projected to be received for the support of the public schools from taxes, fees and other revenues authorized by state law, excluding any money provided by the Federal Government directly to a public school or school district or otherwise provided on a one-time basis in response to an emergency."

SB 458, § 2(2) (2021).

The Legislature calculated the average total public support per pupil at **$10,204 for FY 2020-2021** and **$10,290 for FY 2022-2023**. SB 458, §§ 1, 2. But the description of effect here provides signatories with significantly smaller per-pupil figures, **$6,980** and **$7,074**, respectively. JA, 12. EFP cites the statewide average base per-pupil funding levels despite the initiative requiring education freedom accounts ("EFA") funded in an amount comparable to "public support that would support

the education of the child for whose benefit the account has been established in a public school," which would include funding beyond the average statewide base per pupil amount. JA, at 12. The description is, therefore, by its own terms, inaccurate as a factual matter.

Likewise, the description of effect completely omits the variable per-pupil funding support that any given student might receive in determining a comparable per-pupil funding amount for the Petition's proposed accounts, which has the effect of misleading the electorate as to both the cost of the measure and the potential value to parents of Nevada schoolchildren. Nevada's recently-passed education funding formula, the Pupil-Centered Funding Plan, determines each student's per-pupil support using a variety of factors. The formula adjusts per-pupil funding based on a student's district size, geography, population, enrollment zones, and labor costs. For example, for FY 2021-2022, the Legislature allocated a student in Esmeralda County an adjusted base per-pupil of **$22,360**, due to its small, rural status. SB 458, § 5(4). Compare that to the **$7,222** allocated for a Washoe County student. *Id*. Additionally, a student may receive additional, weighted per-pupil support based on their status as a special education, low-income, language learning, or

gifted and talented student. The comparable funding levels for any given student can vary widely based on these funding formula calculations. The description of effect incorrectly describes "the public support that would support the education of *the child*" in narrow terms—reflecting a focus on individual children—that is in no way commensurate with the actual funding that an individual student might receive, and consequently, the actual financial impact to taxpayers and local district budgets. JA, at 12. It is EFP's inartful language that is the culprit here, not the district court's colorful examples of the failings of that language.

EFP attempts to obscure this factual inaccuracy in its description of effect, saying that the figures are merely "an example of per pupil funding" and "[b]y estimating a lower number, the description is intentionally non-hyperbolic." Op. Br., 26. Potential signatories do not need EFP to be non-hyperbolic; they need it to be honest and accurate. A lower price tag in the description is, in this regard, argumentative, and intentionally so; it functions to mislead voters into thinking the cost of the measure is less expensive than it really will be, for purposes of garnering support for the Petition.

Perhaps EFP does not fully understand the ways in which the

Legislature funds, or determines funding for, schools and students in the many educational contexts found around the state, or how its Petition would affect those processes. Perhaps it just cannot properly describe those effects in the space permitted. But those are not problems this Court is bound to ignore so that EFP can place a poorly-designed or poorly-described measure on the ballot. In any event, the district court intuited all this, and ruled that EFP's description, as currently drafted, does not perform the functions of encouraging informed decision-making by potential signatories. It was correct to do so, and its decision should be affirmed.

C. The Petition Violates The Legislative Prerogative

EFP points to a number of examples in the Nevada Constitution containing some or other command to the Legislature. None of these are germane. Number one, the question is not whether a state constitution—in any and all contexts—can require action by a legislature; it is, rather, whether the people, acting in their legislative capacity, can order a future legislature to enact particular legislation, in derogation of its independent wisdom. There is a significant difference. Number two, this is a challenge to EFP's use of the initiative process to achieve its

particular, specific command to the 2025 Nevada Legislature. This question regarding the use of the mechanism of direct democracy has never been resolved by this Court, and none of the examples identified by EFP have been the subject of its scrutiny and review. Many of the instances appear to be original to the 1864 Constitution, which is not only a completely different legislative and legal setting, but predate the establishment of the initiative power in Nevada and, therefore, the possibility of the present inquiry.

EFP does not deny that its Petition constitutes a direct command to the Nevada Legislature to take specific legislative action. It merely claims that such a command is perfectly acceptable. But the people's legislative capacity does not encompass the power to issue such a command. "If the people have the power to enact a measure by initiative, they should do so directly." *Am. Fed'n of Lab. v. Eu*, 36 Cal. 3d 687, 714, 686 P.2d 609, 627 (1984). In other words, do not use the initiative power to direct that a statute be enacted; instead, proponents should propose and enact the statute. That is the proper exercise of direct democracy.

Here, the Petition does not, itself, establish the education accounts it proposes, but rather commands the Legislature to enact a statute or

set of statutes effecting its terms. This violates the inherent deliberative functions of the Nevada Legislature—of *any* legislature, really—and thus cannot be a valid use of the initiative power. No agency, no executive branch leader, no petition proponent, not even a fully-constituted and elected legislature can direct or commandeer the discretion of a future legislature to act as it sees fit. This is the root and branch of democracy.

The people's initiative power "is legislative in nature." *Nevadans for the Protection of Property Rights, Inc. v. Heller*, 122 Nev. 894, 914 (2006). It is an historic legal commonplace that one legislature may not control future legislation. "Implicit in the plenary power of each legislature is the principle that one legislature cannot enact a statute that prevents a future legislature from exercising its law-making power," and there is "a general rule that one legislature cannot abridge the power of a succeeding legislature." *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wash. 2d 284, 301, 174 P.3d 1142, 1150 (2007). *See also Ex parte Collie*, 38 Cal. 2d 396, 398, 240 P.2d 275, 276 (1952) ("It is the general rule that one legislative body cannot limit or restrict its own power or that of subsequent Legislatures and that the act of one Legislature does not bind its successors."). In exactly the same vein, the

people, acting through the initiative process, can no more command the Legislature to take specific legislative action than a current Legislature can bind a future one. The people's initiative power is to enact statutes or amendments, and that power does not extend to preventing a future legislature from exercising its law-making power or deliberative function. "Legislators must be free to deliberate and vote their own considered judgment, being responsible to their own constituents through the electoral process." *In re Initiative Petition No. 364*, 930 P.2d 186, 192 (Okla. 1996).

To illustrate, the Nevada Constitution may be amended in several ways, and one of those is for the Legislature to propose and approve a particular measure at two successive sessions, prior to submission to the electorate at a general election. Nev. Const. art. 16, § 1. But the first legislature to approve a particular measure cannot also pass a law requiring the next legislature to approve it as well. That would be flatly unlawful, and would contravene basic democratic functions. Furthermore, consider if the present Petition is approved by the people and becomes part of the state constitution, but the 2025 Legislature refuses to enact the required statutes, or the Governor refuses to sign the

bill into law. *What is the remedy*? Is this Court going to order individual legislators to vote in particular ways on legislation? Is it going to issue a writ of mandamus against the Governor of Nevada to rescind the veto of a bill? Of course not, and this is why the legislative power—either of the Legislature itself, or the people in their legislative capacity—cannot be exercised in this manner, because it leads to intolerable constitutional crises.[2]

In *In re Initiative Petition No. 364*, the Oklahoma Supreme Court faced an initiative petition that contained a similar command to the state legislature. Over proponent's objections that the measure was, in fact, non-binding, the court looked to the language of the initiative and found it to be "an express mandate from the people to the Legislature to take a specific action." *Id.*, 930 P.2d at 193. As such, the measure could not stand, because "[l]egislative deliberation cannot exist where the outcome is a predetermined specific action." *Id.* "State lawmakers," the court

[2] This is very different from, for example, the command to the Legislature to enact the public school appropriations as the first budgetary priority, pursuant to Article 11, Section 6. In that instance, a remedy exists in the form of invalidation of appropriations or expenditures that are enacted before the funding of the public school system.

concluded, "cannot be compelled to cast a vote in obedience to an electorate's instructions." *Id.*, at 200.

Here, the Petition's command to the Nevada Legislature is purportedly binding, and therefore the deliberative function of the Legislature is impermissibly impaired. Nevada legislators would not be free to deliberate and vote their own considered judgment, being responsible to their own constituents, and they would no longer be part of a deliberative body acting independently in exercising their individual best judgments on the matters that come before them. The outcome of the specific action mandated by the Petition—passage of a statute or statutes effecting the terms of the initiative—would be predetermined. No initiative may compel such a result, and this measure is therefore invalid and cannot proceed.

D. The Petition Violates Article 19, Section 6

The Petition is also separately—but relatedly—invalid because the very thing it commands the Nevada Legislature to do is to enact appropriations laws, without itself providing reciprocal revenues, in violation of Article 19, Section 6 of the Nevada Constitution. That provision prohibits any initiative that "makes an appropriation or

otherwise requires the expenditure of money, unless such statute or amendment also imposes a sufficient tax, not prohibited by the Constitution, or otherwise constitutionally provides for raising the necessary revenue." Nev. Const. art. 19, § 6.

EFP focuses on the purported textual limitation of Article 19, Section 6 to statutes, or, presumably, to statutory initiatives. But this does not make actual textual sense; the limitation is not to statutory initiatives, it is on making appropriations through statutes—which is, one, the only manner in which appropriations can or should be made, and two, exactly what the Petition is attempting to force the Nevada Legislature to enact. "Section 6 applies to all proposed initiatives, without exception, and does not permit any initiative that fails to comply with the stated conditions." *Rogers v. Heller*, 117 Nev. 169, 173, 18 P.3d 1034, 1036 (2001)(emphasis supplied). "If the Initiative does not comply with section 6, then the Initiative is void" in its entirety, and the offending provision cannot be severed to render it constitutional.[3] *Id.* at

[3] Although the substantive constitutionality of a ballot initiative is often not ripe for review until the initiative is enacted, *see Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 884, 141 P.3d 1224, 1229 (2006), Nevada courts have held that compliance with Article 19, Section 6's appropriation or expenditure provision is a "threshold content

173, 177-78.

"[A]n appropriation is the setting aside of funds, and an expenditure of money is the payment of funds." *Rogers*, 117 Nev. at 173. The Nevada Constitution prohibits initiatives that require appropriations or expenditures in order to "prevent[] the electorate from creating the deficit that would result if government officials were forced to set aside or pay money without generating the funds to do so." *Herbst Gaming*, 122 Nev. at 891. An initiative need not "by its terms appropriate money" to violate the prohibition. *Id.*, at 890 n.40 (citing *State ex rel. Card v. Kaufman*, 517 S.W.2d 78, 80 (Mo. 1974)). Rather, "an initiative makes an appropriation or expenditure when it leaves budgeting officials no discretion in appropriating or expending the money mandated by the initiative—the budgeting official must approve the appropriation or expenditure, regardless of any other financial considerations." *Id.*, at 890. This is precisely what this Petition does. And where the policy underlying the constitutional provision is to prevent the electorate from creating a deficit, it makes no sense whatsoever to limit the interpretation of the

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restriction" that may be raised in a pre-election challenge, *id.* at 890 n.38 (quoting *Rogers*, 117 Nev. at 173).

text only to statutory initiatives, where a constitutional amendment seeking to command the Legislature to enact a statute, or set of statutes, threatens to accomplish the same, prohibited outcome.

Here, the Petition mandates the Nevada Legislature appropriate money to fund each EFA in an amount comparable to the amount of funding that would otherwise be used in the public school system. JA, at 12. The very first sentence of the second paragraph of the Petition's description declares that "[t]he initiative will result in the expenditure of state funds[.]" *Id*. The Petition fails to impose any taxes or otherwise raise the necessary revenue to either fund the EFAs contemplated by the Petition, or to pay for the administrative expenses that would necessarily have to be incurred in creating, maintaining, and administering the EFA program. Although the wide-ranging changes mandated by the Petition would unquestionably require enormous expenditures of money, the Petition contains no tax or other provision for funding, thereby violating Article 19, Section 6.

E. No Authority Exists To Support Dismissal Below On Procedural Grounds

There is no authority for EFP's demand that the action below be dismissed due to the time it took to hold a merits hearing in the district

court, and very clear reasons exist for rejecting this approach.

There is a significant legal difference between a "directory" deadline and a "mandatory" deadline. The statutory deadline for the filing of the lawsuit, for example, is mandatory, and there would be grounds for dismissal if Respondents had not met it.

The fifteen-day direction in the hearing portion of NRS 295.061 is, however, a directory deadline. Let us remember, opponents of filed initiative petitions have rights as well, and under EFP's reading those could be squelched merely by a lack of diligence by a particular judicial chambers, or other circumstances beyond the control of a plaintiff. As this Court has said, in the context of tax assessment deadlines,

> Finally, we consider the implications of construing the deadlines as mandatory or directory. If the statutory deadlines at issue are mandatory, then in a year when property assessments are plagued with problems, real or perceived, and multitudes of taxpayers wish to contest their assessments, the State Board might not have adequate time to hear all taxpayer appeals. Construing the statutory deadlines as mandatory would then result in denying taxpayers the opportunity to challenge assessments, whereas construing the deadlines as directory would allow the boards to hear all of the taxpayer appeals. This court may construe a statute as directory to prevent 'harsh, unfair or absurd consequences.'

Vill. League to Save Incline Assets, Inc. v. State ex rel. Bd. of Equalization, 124 Nev. 1079, 1088, 194 P.3d 1254, 1260-61 (2008). Here, the function of the hearing deadline is directory, to urge the Court to act expeditiously but not to overturn the normal presumption that cases are to be determined on their merits.

IV. CONCLUSION

For the reasons described herein, the Court should affirm the decision of the district court.

DATED this 3rd day of June, 2022.

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CERTIFICATE OF COMPLIANCE

1. I certify that this Brief complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5), and the type style requirements of N.R.A.P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface, size 14, Century Schoolbook.

2. I further certify that this Brief complies with the type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the Brief exempted by N.R.A.P. 32(a)(7)(C), it contains **4,188 words**.

3. Finally, I hereby certify that I have read this 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 N.R.A.P. 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 3rd day of June, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of June, 2022, a true and correct copy of the **RESPONDENTS' ANSWERING BRIEF** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system:

By: */s/ Dannielle Fresquez*
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