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11 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
12 **IN AND FOR CARSON CITY**

13 * * *

14 REV. LEONARD JACKSON,

15 Plaintiff,

16 vs.

17 FAIR MAPS NEVADA PAC, and
18 BARBARA CEGAVSKE, in her official
19 capacity as Nevada Secretary of State,

20 Defendants.

21 Case No. 19 OC 00209 1B

22 Dept. No. I

23 **DEFENDANT FAIR MAPS NEVADA PAC's ANSWERING BRIEF**
24 **IN RESPONSE TO PLAINTIFF'S OPENING BRIEF IN SUPPORT OF COMPLAINT**
25 **FOR DECLARATORY AND INJUNCTIVE RELIEF**

26 Defendant FAIR MAPS NEVADA PAC, a registered Nevada political action committee
27 (“Fair Maps”), by and through its attorneys Adam Hosmer-Henner, Esq. and Lucas Foletta, Esq.
28 of MCDONALD CARANO LLP, hereby submits its Answering Brief in Response to Plaintiff Rev.
Leonard Jackson’s (“Plaintiff”) Opening Brief in Support of Complaint for Declaratory Relief
and Injunctive Relief (“Opening Brief” or “Op. Br.”). This Answering Brief is supported by the
following Memorandum of Points and Authorities, the pleadings and papers on file with the
Court, and any oral argument entertained by the Court at a hearing in this matter.

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I. INTRODUCTION

The only consistency within Plaintiff’s lawsuit is that it is an attempt to defend one anti-democratic tactic, political and racial gerrymandering, through the use of another anti-democratic tactic, meritless pre-election litigation to keep ballot initiatives away from the voters. *See, e.g., Rucho v. Common Cause*, 139 S. Ct. 2484, 2525 (2019) (Kagan, J., dissenting) (describing gerrymandering as “anti-democratic in the most profound sense”). Plaintiff directly seeks to prevent Fair Maps’ Initiative Petition #C-02-2019 (“Petition”), Exhibit 1, from “appear[ing] on the general election ballot for 2020.” Op. Br. 1. Yet throughout the Opening Brief, Plaintiff struggles to articulate a basis for its opposition to the Petition and instead seems to argue that the Petition does not go far enough. Op. Br. 6 (arguing that the proposed amendment does not completely remove “political influence over individual commissioners and the Commission itself”); Op. Br. 9-10 (arguing that the proposed amendment “requires neither fairness nor competitiveness” but only makes it a factor to be considered “to the extent practicable”). As Plaintiff’s arguments reflect policy differences rather than legal objections, Plaintiff’s remedy is to propose an alternative initiative to the public, not to litigate against Fair Maps’ Petition.

The description of effect, limited to two-hundred words, must be considered holistically and not hyper-technically. Fair Maps’s Petition seeks to transfer responsibility for redistricting from the Nevada Legislature to a newly established commission. Ex. 1. Plaintiff introduces policy arguments about the description of effect that should be reserved for the political process or ballot arguments rather than the courtroom. The description of effect, however, accurately and succinctly describes the proposed amendment to voters and need not address Plaintiff’s policy objections. If Plaintiff disagrees with this policy, he may decline to sign the Petition or campaign against it, but policy disagreements do not render the description of effect legally invalid.

Most importantly, while Plaintiff asks the Court to prohibit the Petition from appearing on the ballot, this is relief that the Court cannot grant. As the sole challenge in this litigation is based on the Petition’s description of effect, the sole relief that the Court can grant is to amend the description of effect based on its factual findings. Fair Maps has proactively provided five

1 alternative descriptions of effect attached to this Answering Brief. Exhibit 2. Should the Court
2 accept any of Plaintiff's arguments, it can select an alternative description from Exhibit 2; Fair
3 Maps can provide additional alternatives consistent with the Court's factual findings in this
4 matter; or the Court can further amend the description of effect. Under no circumstance can the
5 Petition, which Plaintiff does not challenge, be barred from the ballot in violation of Nevadans'
6 right to propose amendments to the Nevada Constitution.

7 **II. FACTUAL AND PROCEDURAL BACKGROUND**

8 Fair Maps filed the Petition on November 4, 2019 to amend the Nevada Constitution by
9 adding a new section, Section 5A, to the Nevada Constitution. Ex. 1. The Petition includes the
10 following description of effect:

11 This measure will amend the Nevada Constitution to establish an
12 Independent Redistricting Commission to oversee the mapping of fair and
13 competitive electoral districts for the Nevada Senate, Nevada Assembly, and U.S.
14 House of Representatives.

15 The Commission will consist of seven Nevada voters, four who will be
16 appointed by the leadership of the Nevada Legislature, and three who are
17 unaffiliated with the two largest political parties who will be appointed by the
18 other four commissioners. Commissioners may not be partisan candidates,
19 lobbyists, or certain relatives of such individuals. All meetings of the Commission
20 shall be open to the public who shall have opportunities to participate in hearings
21 before the Commission.

22 The Commission will ensure, to the extent possible, that the electoral
23 districts comply with the United States Constitution, have an approximately equal
24 number of inhabitants, are geographically compact and contiguous, provide equal
25 opportunities for racial and language minorities to participate in the political
26 process, respect areas with recognized similarities of interests, including racial,
27 ethnic, economic, social, cultural, geographic, or historic identities, do not unduly
28 advantage or disadvantage a political party, and are politically competitive.

This amendment will require redistricting by the Commission beginning in
2023 and thereafter following each federal census.

Ex. 1.

Plaintiff filed a Complaint and the Opening Brief on November 26, 2019, which was the
last possible day (resulting in maximum delay) to file such a Complaint pursuant to NRS
295.065(1). The Complaint is limited to a challenge of the Petition's description of effect.

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1 **III. LEGAL STANDARD**

2 Article 19, Section 2 of the Nevada Constitution enshrines the people’s right to amend
3 the Nevada Constitution by initiative petition. Specifically, it states that “the people reserve to
4 themselves the power to propose, by initiative petition, . . . amendments to this Constitution.”
5 Nev. Const. art. 19, § 2(1). The Nevada Constitution further provides that the Legislature “may
6 provide by law for procedures to *facilitate* the operation thereof.” *Id.* art. 19, § 5 (emphasis
7 added). In interpreting such laws, the courts “must make every effort to sustain and preserve the
8 people’s constitutional right to amend their constitution through the initiative process.”
9 *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 122 Nev. 894, 912, 141 P.3d 1235, 1247
10 (2006).

11 NRS 295.009(1)(b) provides that a petition must “[s]et forth, in not more than 200
12 words, a description of the effect of the initiative . . . if the initiative . . . is approved by the
13 voters.” NRS 295.009(1)(b). The Nevada Supreme Court has noted that “[a] description of effect
14 serves a limited purpose to facilitate the initiative process,” and that a description of effect
15 should be reviewed with an eye toward that limited purpose. *Educ. Initiative PAC v. Comm. to*
16 *Protect Nev. Jobs*, 129 Nev. 35, 37, 293 P.3d 874, 876 (2013). Thus, while a description of
17 effect need not “delineate every effect that an initiative will have,” it must be “a straightforward,
18 succinct, and nonargumentative statement of what the initiative will accomplish and how it will
19 achieve those goals.” *Id.* at 38, 293 P.3d at 876. A description of effect cannot “be deceptive or
20 misleading.” *Id.* at 42, 293 P.3d at 879.

21 In reviewing a description of effect, “it is inappropriate to parse the meanings of the
22 words and phrases used in a description of effect” as closely as a reviewing court would a
23 statutory text. *Id.* at 48, 293 P.3d at 883. Such an approach “comes at too high a price in that it
24 carries the risk of depriving the people of Nevada of their constitutional right to propose laws by
25 initiative.” *Id.* Thus, a reviewing court “must take a holistic approach” to the required analysis.
26 *Id.* “The opponent of a ballot initiative bears the burden of showing that the initiative’s
27 description of effect fails to satisfy this standard.” *Id.* at 42, 293 P.3d at 879.

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1 **IV. ARGUMENT**

2 “The [gerrymandering] practices challenged in these cases imperil our system of
3 government. Part of the Court’s role in that system is to defend its foundations. None is more
4 important than free and fair elections.” *Rucho*, 139 S. Ct. at 2525 (Kagan, J., dissenting). In
5 response to the majority decision in *Rucho* where the U.S. Supreme Court held that partisan
6 gerrymandering claims were nonjusticiable political questions, political initiatives have been
7 launched across the country to protect voting rights. *See* League of Women Voters of the US,
8 *Redistricting*, LWV (last visited Dec. 17, 2019), <https://www.lwv.org/voting-rights/redistricting>,
9 (“We promote transparent and accountable redistricting processes and to end hyper-partisan
10 practices that don't benefit constituents. We believe responsibility for fair redistricting should be
11 vested in an independent special commission, with membership that reflects the diversity of the
12 unit of government. The League works in states across the country to pass ballot initiatives to
13 institute independent redistricting commissions.”). The Petition is part of this nationwide effort
14 and seeks to amend the Nevada Constitution to transfer responsibility for redistricting from the
15 Nevada Legislature to a newly established independent commission.

16 Plaintiff concedes that the current redistricting process is politicized insofar as it is
17 conducted by the Legislature. Despite this concession, Plaintiff seems to argue that Fair Maps
18 should have gone farther—created more independence and fairness in redistricting—in order to
19 support the language in the description of effect. Instead of proposing an alternative description
20 of effect to correspond more closely to his interpretation of the Petition or proposing a separate
21 initiative, Plaintiff requests that the Court preclude the Petition from reaching the ballot. This
22 clearly reveals Plaintiff’s interest is not in the accuracy of the description of effect, but rather in
23 preserving the status quo.

24 Plaintiff’s central argument is that the proposed redistricting commission is not
25 sufficiently insulated from political pressure to prevent partisan gerrymandering because four of
26 the seven members of the commission will be appointed by members of the Legislature. He
27 contends that as a result, the districts it generates will not be fair and competitive, and therefore
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the description of effect’s characterization of the commission as independent and the districts it will be asked to generate as fair and competitive is improper. Op. Br. 8-10.

A. Describing the Redistricting Commission as Independent is Neither Deceptive nor Misleading.

Plaintiff asserts that the redistricting commission described in the Petition is not independent because a majority of its members will be appointed by legislative leadership and because the Legislature will determine whether and to what extent to fund the commission. Op. Br. 4-9. Plaintiff asserts that the Petition would allow the Legislature “to exercise substantial, if not total, control over the Commission by determining whom to appoint and how or whether to fund the Commission.” *Id.* at 9. Plaintiff then contends that because the commission does not meet his definition of independent, the description of effect’s reference to the creation of an “independent redistricting commission” is misleading and deceptive because the commission will not be immune from the political influence of the Legislature. *Id.* at 8-9.

The Nevada Supreme Court has held that in reviewing a description of effect, the court “must take a holistic approach to determine whether the description is a straightforward, succinct, and nonargumentative summary of an initiative’s purpose and how that purpose is achieved.” *Educ. Initiative PAC*, 129 Nev. at 48, 293 P.3d at 883. This is the opposite of Plaintiff’s textual approach that turns on differing definitions of the word independent. Plaintiff asks the Court to do exactly what the Nevada Supreme Court has said it cannot do—parse the meanings of words or phrases in the Petition. *See id.*

The description of effect states clearly the purpose of the Petition: to amend the Nevada Constitution to establish an independent redistricting commission to oversee the mapping of fair and competitive electoral districts in Nevada. Ex. 1. It states with equal clarity how that purpose will be achieved: (1) by ensuring that the commission is composed of a bipartisan group of Nevada voters; (2) by requiring transparency in the mapping process; and (3) by providing specific criteria for the commission to employ in drawing electoral districts. *Id.*

Contrary to Plaintiff’s assertions, the characterization of the redistricting commission as independent is not only accurate but entirely consistent with the purpose of the Petition. In the

1 context of the Petition, independence connotes the fact that the decisions of the commission will
2 not be subject to substantive control, oversight, or review of the Legislature. Toward this end,
3 the Petition explicitly removes the mapping responsibility from the Legislature, stating that
4 “[t]he powers granted to the Commission are legislative functions not subject to *the control or*
5 *approval of the Legislature and are exclusively reserved to the Commission.*” Ex. 1 (emphasis
6 added). Thus, the Legislature has no authority to review, modify or amend those decisions,
7 rendering the acts of the commission independent of the Legislature’s control. That the
8 Legislature will appoint four of the seven members of the commission and have some control
9 over its funding level does not change this fact.

10 Plaintiff’s citation to *Las Vegas Taxpayer Accountability Committee v. City Council of*
11 *Las Vegas*, 125 Nev. 165, 208 P.3d 429 (2009), is unpersuasive. While Plaintiff correctly points
12 out that in that case the Nevada Supreme Court found the description of effect at issue to be
13 misleading and deceptive, it did so because “the description of effect materially fails to
14 accurately identify the consequences of the referendum’s passage.” *Id.* at 184, 208 P.3d at 441.
15 The material failure identified by the court was that the petition at issue would have affected all
16 redevelopment plans, not just new redevelopment plans as stated by the description of effect. *Id.*
17 In this case, the characterization of the commission as independent cannot reasonably be
18 construed to be a material failure to identify a consequence of the passage of the Petition.
19 Independent is merely an adjective used to describe the nature of the commission. Plaintiff may
20 disagree with the characterization, but the characterization in no way supports the conclusion
21 that an effect of the Petition is not included.

22 Even if Plaintiff could persuade the Court that the term independent was misleading, the
23 description of effect can be amended to incorporate this finding by modifying or excising the
24 term.

25 **B. The Petition Promotes Fair and Competitive Electoral Districts.**

26 Plaintiff opposes the Petition and argues that it will not result in fair and competitive
27 electoral districts. Op. Br. 9. Plaintiff’s argument is not tied to the test that this Court must
28 employ in evaluating the description of effect. As the Nevada Supreme Court has held, the

1 description of effect “need not be the best possible statement of a proposed measure’s intent,”
2 *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 889, 141 P.3d 1224, 1232 (2006), but “must be a
3 straightforward, succinct, and nonargumentative statement of what the initiative will accomplish
4 and how it will achieve those goals,” *Educ. Initiative PAC*, 129 Nev. at 38, 293 P.3d at 876. In
5 this case, the description informs the reader about the purpose of the Petition as the
6 establishment of an independent redistricting commission to oversee the adoption of fair and
7 competitive electoral maps. Ex. 1. And, it further specifies how the commission will do that. *Id.*
8 While Plaintiff is entitled to his opinion about whether the process contemplated will, in fact,
9 result in fair and competitive maps, the ultimate result is not relevant to whether the description
10 of effect accurately states the Petition’s purpose and how it intends to achieve it. Plaintiff does
11 not call into question the accuracy of the description of effect as a summary of the purpose of the
12 Petition, but instead registers disagreement with the likelihood that the structure of the Petition
13 will bring that purpose to fruition. That is not the legal test as it is a decision for the voters.

14 Plaintiff’s attempt to support his argument by claiming that the Petition invites or allows
15 various types of unfairness—in particular, partisan bias—is unavailing. Op. Br. 10. Plaintiff’s
16 argument turns on his assertion that various types of unfairness *could* affect the commission’s
17 processes such that the electoral maps it draws do not meet his definition of fair and competitive.
18 Here, again, Plaintiff’s argument fails because it is a critique of the Petition and not the
19 description of effect.

20 Even if Plaintiff could persuade the Court that the description of effect is invalid as
21 related to the definitions of fair and competitive, the description of effect can be amended to
22 incorporate the Court’s findings.

23 **C. Any Financial Impact of the Petition Is Hypothetical, Arguable, and Not a**
24 **Significant Aspect of the Petition.**

25 Plaintiff cannot do any more than guess as to whether the Petition will increase or
26 decrease the costs of redistricting in Nevada. The Nevada Constitution currently imposes a
27 “mandatory duty” upon the Nevada Legislature “at its first session after the taking of the
28 decennial census” to apportion the “number of Senators and Assemblymen . . . among legislative

1 districts which may be established by law, according to the number of inhabitants in them.” Nev.
2 Const. art. 4, § 5. Plaintiff does not provide the Court with any facts that could be determined
3 with certainty as to how the administrative costs of redistricting would be affected by the
4 Petition. Thus, these arguments should be reserved for the committees preparing the “pros and
5 cons for the ballot.” *Educ. Initiative PAC*, 129 Nev. at 45, 293 P.3d at 881.

6 A description of effect “does not necessarily need to explain every effect, or hypothetical
7 effects, but it does need to accurately set forth the main consequences of the referendum's
8 passage.” *No Solar Tax PAC v. Citizens for Solar & Energy Fairness*, No. 70146, 2016 WL
9 4182739, at *2 (Nev. Aug. 4, 2016). Plaintiff challenges the description of effect as failing to
10 inform voters of certain costs allegedly associated with the commission. Op. Br. 10. Plaintiff
11 claims redistricting is expensive but that the Petition fails to identify and describe these costs,
12 and he further claims the process contemplated by the Petition will result in additional litigation
13 costs. *Id.* at 10-11. He also claims that the Petition fails to note that the commission “will ‘undo’
14 whatever maps are drawn by the Legislature in 2021,” which will result in additional costs. *Id.*
15 Because these are all hypothetical effects based on Plaintiff’s unfounded speculation, they need
16 not be included in the description of effect.

17 Plaintiff’s argument regarding costs is based solely on his unsupported assertion that
18 certain hypothetical effects should be referenced in the description of effect. Op. Br. 12 (listing a
19 practical consequence as “potentially doubling the cost of redistricting for the 2020 census”).
20 First, there is no certainty that the proposed amendment would increase the costs of redistricting
21 and it is equally or more probable that the costs of redistricting would be reduced. The Petition
22 establishes a single redistricting process for each census cycle, while the Legislature can
23 currently re-draw the lines as many times as the Legislature deems appropriate. Moreover, the
24 cost of legislative redistricting can be very high for taxpayers, especially if the Legislature is
25 required to work in a special session. Second, there is no requirement that the Commission
26 “undo” any maps drawn by the Legislature in 2021. Op. Br. 11. The Commission has the option
27 to adopt the same maps drawn by the Legislature if the maps comply with the proposed
28 amendment. What the Legislature and Commission may choose to do in the future is not an

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effect that can be definitively conveyed to voters. Finally, Plaintiff’s assertion that there will be more litigation because of the standard imposed by the Petition is pure speculation. Legislative redistricting regularly draws legal challenges both in Nevada and nationally.

The administrative costs of redistricting are not part of the primary purpose of the Petition, nor do they represent a significant effect of the Petition. In *Coalition for Nevada’s Future v. RIP Commerce Tax, Inc., PAC*, the Nevada Supreme Court found that the referendum would “unbalance the state budget,” No. 69501, 2016 WL 2842925, at *4 (Nev. May 11, 2016), and in *Prevent Sanctuary Cities v. Haley*, the Nevada Supreme Court found that the initiative would “limit the power of local governments to address matters of local concern by impinging on their ability . . . to implement and carry out city programs and functions for the effective operation of local governments, such as policies regarding public health and safety.” No. 74966, 2018 WL 2272955, at *4 (Nev. May 16, 2018) (quotation marks omitted). The hypothetical and arguable administrative costs of the Petition are not of the same scope, import, or certainty as the above cases.

Even if Plaintiff could persuade the Court that the description of effect is invalid as related to the costs of redistricting, the description of effect can be amended to incorporate the Court’s findings.

D. The Court Can Amend the Description of Effect to Address Plaintiff’s Concerns.

The proponent of an initiative is afforded the opportunity to amend a description of effect to resolve any inadequacies identified by the Court. NRS 295.061(3). While the description of effect contained within the Petition is legally sufficient and holistically sound, in order to reach an amicable resolution and expedite the proceedings, Fair Maps has proactively drafted five alternative descriptions of effect for the Court’s consideration. Ex. 2. Should the Court determine that the Petition’s description of effect requires amendment, Fair Maps requests that the Court consider one of the alternative descriptions of effect or further revise the description of effect in accordance with the Court’s findings.

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In no event is Plaintiff entitled to the requested relief of prohibiting the Petition from appearing on the ballot. Such a result would deny the people’s right to propose amendments to their principal governing document.

V. CONCLUSION


For all of the above reasons, the Court should deny Plaintiff’s attempt to keep the Petition off the ballot.

Dated this 17th day of December, 2019.

AFFIRMATION

The undersigned does hereby affirm that pursuant to NRS 239B.030, the preceding document does not contain the social security number of any person.

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1 CERTIFICATE OF SERVICE

2 I hereby certify that I am an employee of McDONALD CARANO LLP and that on
3 December 17, 2019, I served the foregoing on the parties in said case by placing a true copy
4 thereof in the United States Post Office mail at 100 West Liberty Street, Tenth Floor, Reno, NV
5 89501 addressed as follows:

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15 202 N. Carson Street
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17 I am familiar with the firm's practice for collection and processing of correspondence for
18 mailing with the United States Postal Service. The envelope addressed to the parties were
19 sealed and placed for collection by the firm's messengers and will be deposited today with the
20 United States Postal Service in the ordinary course of business.

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

22 Executed on December 12, 2019 at Reno, Nevada.

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By 
An Employee of McDonald Carano LLP

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