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6
7 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
8 **IN AND FOR CARSON CITY**

9
10 REV. LEONARD JACKSON,
11 Plaintiff,
12 v.

13 FAIR MAPS NEVADA PAC, and
14 BARBARA CEGAVSKE, in her official
capacity as Nevada Secretary of State,
15 Defendants.

Case No.: 19 OC 00209 1B

Dept. No.: I

**REPLY BRIEF IN SUPPORT OF
COMPLAINT FOR
DECLARATORY RELIEF**

16
17 Plaintiff, Rev. Leonard Jackson, by and through counsel, Kevin Benson, Esq. of BENSON
18 LAW, LLC, hereby replies to Defendant's Answering Brief and requests that the Court order that the
19 Petition #C-02-2019 does not comply with the requirements of state law and therefore cannot appear
20 on the general election ballot for 2020.

21 **I. INTRODUCTION**

22 The core purpose of the description of effect is to accurately summarize what the petition will
23 do, in order to "prevent voter confusion and promote informed decisions." *Nevadans for Nev. v.*
24 *Beers*, 122 Nev. 930, 939, 142 P.3d 339, 345 (2006). This challenge is not a debate about the wisdom
25 of the policy that the Petition proposes. Instead, this challenge was brought to prevent Defendant
26 from misleading voters by telling them its Petition will do something that it will not do.

27 As described in the Opening Brief, other states have created independent redistricting
28 commissions. The commission that this Petition would create bears no resemblance whatsoever to

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1 those independent commissions. If Defendant wants to pursue a policy of creating a non-independent
2 additional arm of the Legislature to perform redistricting, it is free to do so. But it cannot tell voters
3 that it is creating an independent commission, and that the commission will create fair and
4 competitive maps, when it will not.

5 6 II. ARGUMENT

7 A. The Description of Effect is Misleading Because the Commission Would Not be 8 Independent.

9 Defendant argues that the Description of Effect is not misleading because the Commission
10 would be "independent" in the sense that it is not entirely controlled by the Legislature. *See*
11 Answering Brief, pp. 6-7. Defendant points to Section 5A (7) of the Petition, which states: "The
12 powers granted to the Commission are legislative functions not subject to the control or approval of
13 the Legislature and are exclusively reserved to the Commission." Answering Brief, p. 7.

14 Essentially, Defendant is arguing that the Commission is "independent" simply because the
15 Legislature does not directly approve or reject the Commission's plan. That is a very unusual and
16 constrained definition of "independent," and certainly not one that the typical voter would
17 understand. "Independent" is defined as "[f]ree from outside control; not depending on another's
18 authority." Oxford English Dictionary, <https://www.lexico.com/en/definition/independent> Voters
19 expect that an "independent" institution is one which is, in practical terms, insulated from political
20 influences and pressures.

21 On that point, Defendant concedes that the Legislature would directly appoint a majority of the
22 commissioners and that the Legislature would have "some control" over its funding.¹ Answering
23 Brief, p. 7. Nor does Defendant contest the fact that this Commission is not in any way similar to
24 independent commissions in other states. For example, Defendant does not contest that there is no
25 mechanism for ensuring actual independence of the commissioners, the Petition allows politically-

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27 ¹ Defendant does not explain how the Legislature has only "some" control, rather than total control of
28 the Commission's funding, as discussed in the Opening Brief, pp. 6-8.

1 connected and ambitious people to serve on the commission, and that it does not prevent
2 commissioners from immediately running for a district that they just drew.

3 Instead, Defendant argues that “independent” is “merely an adjective” and that characterizing
4 this Commission as “independent” is not material, and that it is improper for this Court to “parse”
5 such words in the Description of Effect. *See* Answering Brief, p. 7. This argument must be rejected.

6 It is apparent that the Defendant itself does not treat “independent” as merely an adjective.
7 Instead, the Petition states that it would create the “Independent Redistricting Commission.” It uses
8 “independent” as part of a proper noun, the very title of the Commission, in both the description of
9 effect and the proposed language.² As discussed in the Opening Brief, there is a clear and substantial
10 difference in policy between creating an actually independent commission, as other states have done,
11 versus what is proposed here, which is essentially an additional arm of the legislative branch that is
12 subject to legislative control and political influences. Thus the Defendant’s mischaracterization of the
13 nature of the Commission is material.

14 If Defendant wants to pursue the policy of creating a non-independent additional arm of the
15 Legislature to perform redistricting, it is of course free to do so. Whether that is good policy or bad
16 policy is not this issue here. The issue here is that Defendant cannot tell voters that it is creating an
17 independent commission when it is not.

18 Contrary to Defendant’s argument, this case is very similar to *Las Vegas Taxpayer*
19 *Accountability Comm. v. City Council*, 125 Nev. 165, 183-84, 208 P.3d 429 (2009). There, the
20 description of effect stated that the referendum would only apply to new redevelopment plans, when
21 it would actually apply to all redevelopment plans. The description was therefore simply wrong.
22 Here, the Description of Effect is also simply wrong because the Commission is not independent, and
23 Defendant does not seriously contend otherwise. Instead, it attempts to convince the Court to allow it
24 to redefine the concept of “independent” in an implausible and misleading way. That violates the

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26 ² Surely it would have also put “independent” in the title of the Petition, but the Secretary of State no
27 longer allows petition proponents to assign their own titles to initiatives, and instead assigns it a
28 misleading title.

1 very purpose of the description of effect, which is to “prevent voter confusion and promote informed
2 decisions.” *Nevadans for Nev. v. Beers*, 122 Nev. 930, 939, 142 P.3d 339, 345 (2006).

3 In this case, it is the Defendant who is trying to “parse” the meaning of the word, rather than
4 taking a “holistic” approach to determine whether the Description of Effect is “a straightforward,
5 succinct, and non-argumentative summary” that “is correct and does not misrepresent what the
6 initiative will accomplish.” *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 48, 293
7 P.3d 874, 883 (2013).

8 **B. The Description of Effect would mislead voters into believing that the Commission**
9 **will create fair and competitive electoral districts.**

10 1. Partisan fairness and political competitiveness.

11 With respect to partisan fairness and competitive electoral districts, Defendant again does not
12 really dispute that the Commission is *not* required to create fair and competitive districts, as discussed
13 in the Opening Brief, pp. 9-10. Instead, Defendant asserts that that doesn’t matter because Nevada
14 law requires that a description of effect only describe the *purpose* of the petition, not its effect. *See*
15 Answering Brief, p. 8. Defendant goes so far as to argue that “...the ultimate result is not relevant to
16 whether the description of effect accurately states the Petition’s purpose and how it intends to achieve
17 it.” Answering Brief, p. 8, ll. 9-10.

18 This is backwards of course. Defendant has, intentionally or not, substituted the word
19 “purpose” for “effect.” Nevada law is clear that the “ultimate result” (i.e., the effect) is exactly what
20 the description of **effect** must describe. *See e.g., Education Initiative*, 129 Nev. at 48 (the description
21 of effect must describe “what the initiative will accomplish,” not what its purpose is); *Las Vegas*
22 *Taxpayer*, 125 Nev. at 183-84, 208 P.3d at 441 (striking down description of effect that did not
23 accurately describe the petition’s “true effect”).

24 In *Coal. for Nev.’s Future v. RIP Commerce Tax, Inc.*, No. 69501, 2016 Nev. Unpub. LEXIS
25 153, at *10 (May 11, 2016) (unpublished decision – NRAP 36(c)), the purpose of the petition was to
26 repeal the commerce tax, and the description of effect stated that the effect of the petition would be a
27 repeal of the tax. Nevertheless, the Nevada Supreme Court struck down the description of effect
28

1 because it did not disclose the actual, practical effect: that the repeal would unbalance the state
2 budget. *Id.*

3 Thus, contrary to Defendant's argument, the "purpose" behind a petition is immaterial. The
4 best intentions or the noblest purpose are not an excuse for drafting an inaccurate and misleading
5 description of effect.

6 To the extent that Defendant is arguing that it is merely hypothetical that the Commission's
7 maps would not be fair or competitive, that argument again misses the mark and misapprehends the
8 Plaintiff's argument. *See* Answering Brief, p. 8, ll. 14-22. As discussed in the Opening Brief, pp. 9-
9 10, the Petition is invalid because it tells voters that it will create a Commission that will draw fair
10 and competitive maps, when the Petition actually contains no requirements that the Commission do
11 so. This is not a critique of the policy set forth in the Petition. It is a critique of the Description of
12 Effect for misrepresenting *what* policy the Petition would enact.

13 Again, if Defendant wishes pursue the policy of creating a Commission that is not required to
14 deal with partisan gerrymandering, that is its prerogative. But it cannot tell voters that the
15 Commission will adopt politically fair maps when it is not actually required to do so.

16 2. The Commission's composition does not fairly represent Nevada's demographics.

17 As discussed in the Opening Brief, p. 10, the Petition contains no requirements that the
18 Commission must be fairly representative of Nevada's demographics. This is true both in terms of
19 racial, language, and geographic demographics, and also in political or partisan demographics.

20 With respect to partisan demographics, the Petition would enshrine in the Nevada Constitution
21 power over the majority of the Commission to the two major parties. The three remaining
22 commissioners must either be members of minor parties, or nonpartisan. All minor party voters,
23 combined, comprise 6.5% of Nevada voters.³ The percentage of voters registered as Democrats is
24 38% and the percentage of Republicans is 32%. Voters registered as nonpartisan make up almost
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27 ³ Nevada Voter Registration Statistics, November 2019, available at:
28 <https://www.nvsos.gov/sos/home/showdocument?id=8166>

23% of all voters, and that percentage has been steadily rising.⁴ If this trend continues, nonpartisan voters will be a full third (or more) of all registered voters by 2021. Yet there is no requirement that nonpartisans be represented at all on the Commission, and minor parties could be greatly overrepresented.

Finally, the Petition requires five votes to approve a redistricting plan, and those votes must be distributed by party affiliation. This means that a small minority of commissioners can veto any map, and thus hold disproportionate power over the redistricting process. Petition, Section 5B(2). Clearly, this is not “fair” to the majority of Nevadans. The Petition requires at least one vote from each major party and one vote from a minor party or nonpartisan commissioner. Consequently, even if a supermajority of five commissioners (all three non-major party commissioners and both commissioners of one major party) agree to a map, if the two other major party commissioners vote no, the plan will fail. Given this composition, the practical effect of this Petition is that the Commission will never approve any plan, let alone a fair and competitive one. It is set up to fail.⁵

C. The financial impact of the Petition is concrete and substantial and therefore must be disclosed to voters in the Description of Effect.

Defendant next argues that it is entirely hypothetical and speculative whether the Petition will increase the costs of redistricting, and therefore this effect need not be described in the Description of Effect. *See* Answering Brief, pp. 8-10. The exact *amount* of the increase in cost cannot be accurately determined at this time⁶, but it cannot be reasonably disputed that the Petition will increase costs.

⁴ Compare November 2019 voter registration statistics to January 2010, when nonpartisans were only 15.7% of all registered voters. <https://www.nvsos.gov/sos/elections/voters/voter-registration-statistics/2010-statistics/voter-registration-statistics-jan-2010-total>

⁵ This unfairness will only get worse over time, because the Petition would enshrine in the Constitution a grant of disproportionate power to the major political parties, which continue to lose ground to nonpartisans. This will create the same issues that other constitutional amendments have, such as the Minimum Wage Amendment, which have made it extremely difficult to adapt to changing circumstances.

⁶ See Legislative Counsel Bureau Statement of Financial Impact, stating that it is unable, in the short time period since the Petition was filed, to determine its financial impacts. Available at: <https://www.nvsos.gov/sos/home/showdocument?id=8130>

1 Neither voters nor the Court should check their common sense at the door when considering an
2 initiative petition. Several aspects of the Petition make it certain that it will increase costs of
3 redistricting.

4 First, Defendant argues that the Petition would reduce costs by “establishing a single
5 redistricting process for each census cycle, while the Legislature can currently re-draw the lines as
6 many times as the Legislature deems appropriate.” Answering Brief, p. 9. Nevada has not been
7 plagued by the type of racial or partisan gerrymandering that has occurred in other states, including
8 some where the legislature attempts to redistrict whenever partisan control changes. Except for 1965,
9 when the Legislature was forced to redistrict to comply with the Supreme Court’s rulings establishing
10 the one-person-one-vote doctrine, counsel for Plaintiff has been unable to find another instance where
11 the Legislature has redistricted more than once in a decade. Thus Defendant’s argument is not just
12 theoretical, but is contrary to history.

13 Second, and ironically in light of Defendant’s first argument, the Petition itself requires mid-
14 decade redistricting for the 2020 Census. Petition, Section 5B(2). It provides that the Commission
15 “shall” approve a redistricting plan not later than July 1, 2023. *Id.* This will obviously increase the
16 cost of redistricting by having a “do over” only two years after the Legislature will redistrict in 2021.
17 There is nothing speculative about that. Defendant first attempts to understate this effect by claiming
18 that such “administrative” costs are either hypothetical or do not matter because costs are not a main
19 “purpose” of the initiative. *See* Answering Brief, p. 9. As discussed above, whether the increase in
20 costs is a “purpose” of the initiative is irrelevant. Defendant next argues that the increase in costs is
21 hypothetical because it is possible that the Commission could just accept the Legislature’s 2021 plan.
22 Answering Brief, p. 9. While that is indeed theoretically possible, it is not at all probable, given that
23 the Commission will be subject to different political influences. In any event, the Commission would
24 incur costs to be organized and to hold public hearings, which would be needless expenditures in the
25 unlikely event it did simply adopt the Legislature’s 2021 maps.

26 Furthermore, this effect is not just about costs, but about informing voters that the Commission
27 will immediately re-do the maps, as opposed to beginning after the next census. That is a significant
28 departure from Nevada’s history of redistricting only once per decade, and is not something that

1 voters would expect. Therefore the Description of Effect must inform voters that the Petition will
2 undo the redistricting plan that the Legislature will have just adopted in 2021.

3 Finally, the Petition will result in additional costs due to litigation. As to Defendant's argument
4 that litigation costs are hypothetical, again, reviewing the Petition itself makes it plain that these costs
5 are certain to occur. One example is the Petition's directive that neither political party should be
6 "unduly" disadvantaged, yet it lacks guidelines for determining when a map "unduly" disadvantages
7 a political party. Such vague language is sure to invite litigation by whichever party feels it was
8 slighted. That party has nothing to lose and everything to gain by going to court, so it would be
9 surprising if such lawsuits did *not* routinely occur.

10 The Petition is rife with other problems that are certain to generate litigation. For example, it
11 would have two Democrats and two Republicans choose the three other members. Given that there is
12 an even party split, it is likely that these four commissioners would be unable to agree on who to
13 appoint to the remaining seats. What happens if then? The Petition contains no provisions for this
14 contingency, nor even for dealing with vacancies generally. The Petition requires five votes to
15 approve a plan, and the votes must be distributed amongst the members by party affiliation. As
16 discussed above, this gives a small minority an absolute veto power over any map. What happens
17 when the Commission fails to adopt a map within its 180-day window? These are but a few
18 examples.

19 As the Court is well-aware, a map can be challenged for non-compliance with constitutional
20 requirements or for violation of the Voting Rights Act. But this Petition would create numerous
21 additional avenues for litigation that have nothing to do with typical redistricting lawsuits. The
22 Petition invites litigation that will be focused on procedural problems rather than voters'
23 constitutional rights. This Petition would therefore substantially increase the costs of redistricting
24 caused by repeated, expensive, and wasteful litigation.

25 **D. Legal Standard for the Description of Effect and the Role of the Court.**

26 Lastly, Defendant asserts that the Court has no authority to order that the Petition cannot
27 appear on the 2020, and instead that the Court's role is to amend the Description of Effect. This
28 argument is incorrect on both counts.

1 First, the role of the Court is not to redraft or amend the description of effect itself. The role of
2 the Court is to determine whether the description of effect as presented by the petition proponents is
3 valid or not. NRS 295.061(1), (3). If the Court finds it to be invalid, it is the obligation of the petition
4 proponent to draft an accurate and non-misleading description of effect. *See id.* Amendment of the
5 description of effect is accomplished by refiling the petition with the new description. *See Beers*, 122
6 Nev. at 940, 142 P.3d at 346 (petition proponents must refile the petition with the amended
7 description of effect with the Secretary of State before circulating).

8 Nor is it the obligation of the opponents of the petition to assist the proponents in redrafting the
9 description of effect. Furthermore, it would be a violation of the opponents' First Amendment rights
10 to require them to do so. *See Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 953
11 (9th Cir. 2009) (compelled speech violates the First Amendment).

12 Accordingly, the first step in the process is for the Court to determine the validity of the
13 description of effect. If the Court finds that it is invalid, then the next step is for the proponent to
14 amend by filing a new version with the Secretary of State.

15 Second, the Court plainly has the authority, and the obligation, to prohibit a initiative from
16 appearing on the ballot if its description of effect is invalid. The description of effect is an integral
17 and required part of the petition. NRS 295.009(1)(b); *Nevadans for Nev. v. Beers*, 122 Nev. 930, 940,
18 142 P.3d 339, 346 (2006). The description of effect is the "descriptive language is what appears
19 directly above the signature lines, as registered voters decide the threshold issue of whether they even
20 want the initiative placed on the ballot." *Id.*

21 An initiative that contains an inaccurate or misleading description of effect obviously has no
22 place on any ballot. That is why NRS 295.015(2) provides that any signatures obtained before the
23 misleading description of effect is amended are invalid and that is why such petitions have been
24 invalidated by the courts on numerous occasions. *See Beers*, 122 Nev. at 940, 142 P.3d at 346
25 (invalidating petition due to inaccurate description of effect); *Las Vegas Taxpayer Accountability*
26 *Comm. v. City Council*, 125 Nev. 165, 177, 208 P.3d 429, 437 (2009)) (same); *Educ. Initiative PAC*
27 *v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 37, 293 P.3d 874, 876 (2013) (same); *Coal. for Nev.'s*
28 *Future v. RIP Commerce Tax, Inc.*, No. 69501, 2016 Nev. Unpub. LEXIS 153, at *5 (May 11, 2016)

1 (unpublished decision – NRAP 36(c)) (same). A ruling that the description of effect is inaccurate or
2 misleading is therefore a ruling that the petition, in that form, cannot appear on the ballot. As
3 demonstrated by the case law, it is clear that the Court has such authority.

4 III. CONCLUSION

5 Defendant is attempting to sell the voters a bill of goods. It states that it will amend the Nevada
6 Constitution to create the “Independent Redistricting Commission,” which will be free from the
7 Legislature’s influence and that will create fair and politically competitive maps. The problem is that
8 none of that is true. Furthermore, the Petition’s description of effect fails to disclose material effects
9 that it will cause, including undoing the Legislature’s 2021 redistricting plan, increasing the costs of
10 redistricting, increasing litigation, and granting disproportionate power to a small minority of the
11 commission.

12 For these reasons, Plaintiff respectfully requests that the Court enter the following relief:

13 1. Declare that the Description of Effect is inaccurate and materially misleading because:

- 14 a. it misrepresents the nature of the Commission because the Commission is not
15 independent;
- 16 b. it misrepresents the effect of the Petition because the Commission is not required to
17 prevent or avoid partisan gerrymandering;
- 18 c. it fails to disclose that, if the Petition passes, it will increase the cost of redistricting
19 due to litigation over when a party is “unduly” disadvantaged;
- 20 d. it misrepresents the effect of the Petition because the Commission is not required to
21 create politically competitive districts;
- 22 e. it fails to disclose that, if the Petition passes, a small minority of commissioners will
23 hold disproportionate power over the redistricting process;
- 24 f. it fails to disclose that the Commission would re-draw maps in 2023, just two years
25 after the Legislature will have performed redistricting in 2021 and that this will
26 increase costs of redistricting;
- 27
- 28

- 1 g. it fails to disclose that, if the Petition passes, it will increase the cost of redistricting
2 because of the strong likelihood that the Commission will deadlock and fail to approve
3 any redistricting plan, leading to litigation;
4 2. Order that the Secretary of State take no further action to process the Petition in its current
5 form, including, without limitation, placing it on any ballot; and,
6 3. Order any other relief the Court deems just.
7

8 Dated this 20th day of December, 2019.
9

10 BENSON LAW, LLC
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CERTIFICATE OF SERVICE

Pursuant to NRCP Rule 5(b), I hereby certify that I am an employee of Benson Law, LLC,
and that on this date, I caused the foregoing Reply Brief to be served to all parties to this action by:

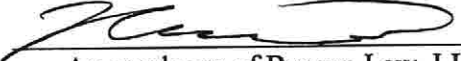
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Dated: 12/20/19


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