

IN THE SUPREME COURT OF THE STATE OF NEVADA

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| <p>REV. LEONARD JACKSON,</p> <p>Appellant,</p> <p>vs.</p> <p>FAIR MAPS NEVADA PAC; AND<br/>BARBARA K. CEGAVSKE, IN<br/>HER OFFICIAL CAPACITY AS<br/>NEVADA SECRETARY OF<br/>STATE,</p> <p>Respondents.</p> | <p>Case No.: 80563</p> <p>District Court Case No.<br/>19OC002091B</p> |
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**ANSWERING BRIEF ON APPEAL AND**  
**OPENING BRIEF ON CROSS-APPEAL**

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## NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, 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 justices of this court may evaluate possible disqualification or recusal.

There are no parent corporations for Respondent Fair Maps Nevada PAC or publicly held companies owning 10% or more of Respondent's stock.

Respondent has been represented throughout this action by Adam Hosmer-Henner, Esq. and Lucas Foletta, Esq. of McDonald Carano LLP.

DATED: April 6, 2020.

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## **ANSWERING BRIEF**

### **STATEMENT OF THE ISSUES**

- 1.) Whether Appellant's appeal is nonjusticiable due to NRS 295.061(3)'s prohibition against successive challenges or by the filing of the Amended Petition?
- 2.) Whether Appellant is an aggrieved party with standing to challenge the District Court's Order, despite being the prevailing party below?

### **STATEMENT OF THE CASE**

Fair Maps filed Initiative Petition #C-02-2019 ("Petition") on November 4, 2019 to amend the Nevada Constitution by adding a new section, Section 5A, to the Nevada Constitution. JA 49-54. The Petition included the following description of effect:

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

The Commission will consist of seven Nevada voters, four who will be appointed by the leadership of the Nevada Legislature, and three who are unaffiliated with the two largest political parties who will be appointed by the other four commissioners. Commissioners may not be partisan

candidates, lobbyists, or certain relatives of such individuals. All meetings of the Commission shall be open to the public who shall have opportunities to participate in hearings before the Commission.

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

JA 52.

Appellant filed a Complaint and the Opening Brief on November 26, 2019 in which he argued that the Petition's description of effect fails to comply with NRS 295.009(1)(b). JA 1-6. Appellant's Complaint is limited to his challenge to the description of effect. The Complaint asserted three causes of action: 1) "Misleading Description of Effect: 'Independent'"; 2) "Misleading Description of Effect: 'Fair and competitive maps'"; and 3) "Misleading Description of Effect: 'Practical and Fiscal Impacts.'" *Id.* The relief requested in the Complaint was for the Court to "enter an order: 1. Declaring that the Petition does not comply with NRS 295.009(1)(b) and is therefore invalid; 2.) Prohibiting

the Secretary of State from placing the Petition on any ballot; and, 3. Granting any other relief the Court deems just.” *Id.*

Fair Maps filed its Answer on December 13, 2019 and its Answering Brief on December 17, 2019. JA 25-32; JA 35-60. The District Court held a hearing on December 23, 2019 and issued its Order on January 2, 2020. JA 127-132. On January 7, 2020, Fair Maps filed an Amended Initiative Petition C-023-2019 (“Amended Petition”). The Amended Petition contained a revised description of effect:

This measure will amend the Nevada Constitution to establish a redistricting commission to map electoral districts for the Nevada Senate, Assembly, and U.S. House of Representatives.

The Commission will have seven members, four who will be appointed by the leadership of the Legislature, and three who are unaffiliated with the two largest political parties who will be appointed by the other four commissioners. Commissioners may not be partisan candidates, lobbyists, or certain relatives of such individuals. Commission meetings shall be open to the public who shall have opportunities to participate in hearings.

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

This amendment requires redistricting after each federal census, beginning in 2023, which could replace maps drawn by the Legislature after the 2020 census, and will result in the expenditure of state funds to fund the Commission.

Reply in Support of Motion to Dismiss and for Sanctions, Ex. 1.

Appellant appealed from the District Court's Order on February 5, 2020. JA 141-142 and Fair Maps cross-appealed on February 18, 2020. JA 143-176.

## **STATEMENT OF THE FACTS**

Appellant did not include or attach any proffered facts, evidence, declarations, or affidavits to his Complaint. JA 1-6. Appellant did not introduce any facts or move for the admission of any evidence at the hearing at the District Court. JA 74-119. Appellant's entire position is based on the unsupported, unverified, unsubstantiated arguments of counsel.

The text of the Petition can be found at JA 49-54. The text of the Amended Petition can be found as Exhibit 1 to Fair Maps' Reply in Support of Motion to Dismiss and for Sanctions.

## STANDARD OF REVIEW

When a district court decides a ballot matter without resolving disputed facts, as occurred here, de novo appellate review applies. *Nevadans for Nev. v. Beers*, 122 Nev. 930, 942, 142 P.3d 339, 347 (2006).

## SUMMARY OF ARGUMENT

This appeal should serve as the high-water mark for gamesmanship in ballot litigation. In order to delay the political process for an initiative that Appellant opposed, Appellant filed a hyper-technical challenge to the Petition's description of effect. This challenge cloaked policy objections within arguments about linguistic ambiguity in a two-hundred word description of effect, and, at most, would have achieved imperceptible real-world consequences through the replacement of synonyms.

Fair Maps filed an anti-gerrymandering petition to amend the Nevada Constitution to transfer responsibility for redistricting from the Nevada Legislature to a newly established independent commission. This effort is part of a series of political initiatives have been launched across the country to protect voting rights. *See* League of Women Voters of the US, *Redistricting*, LWV (last visited Dec. 17, 2019),

<https://www.lwv.org/voting-rights/redistricting>, (“We promote transparent and accountable redistricting processes and to end hyper-partisan practices that don't benefit constituents. We believe responsibility for fair redistricting should be vested in an independent special commission, with membership that reflects the diversity of the unit of government. The League works in states across the country to pass ballot initiatives to institute independent redistricting commissions.”). As Justice Kagan stated in her dissent in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2525 (2019), gerrymandering was “anti-democratic in the most profound sense” and that gerrymandering practices “imperil our system of government. Part of the Court’s role in that system is to defend its foundations. None is more important than free and fair elections.” (Kagan, J., dissenting). Appellant seeks not only to defend gerrymandering by opposing the Petition, but also argues that the Petition is somehow misleading because “Democratic voters *will expect* the 2021 Legislature and the Governor to adopt a redistricting plan that will be friendly to Democrats” and so predicts, as fact, that anti-democratic maps will be adopted. Op. Br. 12 (emphasis added). A

position that neither the Legislature nor the Governor have expressed nor endorsed.

Appellant refused to respond to five alternative descriptions of effect proposed by Fair Maps and, when asked by the District Court whether an alteration would be satisfactory, Appellant's counsel responded it was not Appellant's job to "help [Fair Maps] draft their initiative" and refused to commit to whether *any* description of effect would ever be satisfactory. JA 91, 92. The District Court expeditiously resolved this case and identified a modified version of one of Fair Maps' alternative descriptions of effect as compliant with NRS 295.009(1)(b). The District Court agreed with Appellant on every issue that was raised below and found that the initial description of effect in the Petition did not satisfy the requirements of NRS 295.009(1)(b) based on its findings, among others, that the Petition did "not provide potential signatories with enough information about the cost consequences of the Petition – specifically that it will result in the expenditure of state funds" and that the Petition "does not adequately explain to voters what is meant by the term 'independent' or the phrase 'fair and competitive.'" JA 127-132.

With this context in the background, Appellant’s current appeal was filed solely for the purpose of delay as Appellant was the prevailing party below who lacks standing as he is not aggrieved by the District Court Order in any way, shape, or form. The frivolousness of the appeal is established by Appellant’s sole substantive contention: that the revised description of effect identified in the Order should say that the proposed amendment “will” replace maps drawn by the Legislature after the 2020 census rather than that it “could” replace such maps. Op. Br. 7. Simply from the standpoint of accuracy, Appellant is wrong because nothing in the proposed amendment prohibits the redistricting commission from adopting the maps that were drawn by the Legislature. Stating that the commission “will” replace the Legislature’s maps is erroneous and speculative as there is no such requirement in the proposed amendment. Appellant concedes this to be true as the adoption of the Legislature’s maps is among the “many things [that] are theoretically possible.” Op. Br. 10. But Appellant argues that it is “misleading to voters to imply that there is any realistic possibility that the Commission will simply adopt the Legislature’s redistricting plan”

because it is not politically likely, in Appellant's unevidenced opinion, that the Commission would adopt the same maps.

Procedurally, the appeal cannot provide Appellant relief as there is not a live case or controversy for this Court to resolve. The District Court has already issued injunctive relief against the Petition that was challenged by Appellant, preventing it from appearing on the ballot. Fair Maps filed an Amended Petition on January 7, 2020, which has not been challenged by Appellant nor can it as NRS 295.061(3) states that the "amended description may not be challenged." This Court is not suited "to determine, in the first instance, the effects resulting from the initiative." *Prevent Sanctuary Cities v. Haley*, 421 P.3d 281 (Nev. 2018). Appellant's new arguments concerning whether the Amended Petition's language will mislead or confuse voters have not been raised below and cannot be challenged now based on NRS 295.061(3).

Any action taken by this Court with respect to the Amended Petition would be outside the record and the procedural posture of this case. It would also unduly interfere with Nevadans' right to amend their Constitution through initiative petition. What Appellant seeks in this appeal is the ability to indefinitely stall the political process

through unending litigation. Even though the District Court ruled in Appellant's favor, Appellant still wants to reverse that decision and cause the District Court to resolve new criticisms about the Amended Petition, which would spawn further litigation relating to whether a revised description matched the District Court's new order, which could be further appealed. This cycle is not permitted by NRS 295.061(3). Appellant successfully challenged the Petition's description of effect and Fair Maps then filed an Amended Petition in compliance with the District Court's Order. This Court should dispose of this appeal in Fair Maps' favor given that Appellant is not an aggrieved party, the challenge to the initial Petition is moot, NRS 295.061(3) bars further challenges to the Amended Petition, and Appellant lacks any substantive grounds for relief.

## **ARGUMENT**

### **I. Introduction**

Article 19, Section 2 of the Nevada Constitution enshrines the people's right to amend the Nevada Constitution by initiative petition. Specifically, it states that "the people reserve to themselves the power to propose, by initiative petition, . . . amendments to this Constitution."

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

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

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

## **II. The Appeal is Moot.**

Appellant, as the prevailing party, has already obtained an injunction preventing the Petition from appearing on the ballot. JA 127-132. Fair Maps is not seeking to place the Petition on the ballot and is not collecting signatures in support of the Petition, but rather is attempting to qualify the Amended Petition for the ballot.<sup>1</sup> Fair Maps, submitted an Amended Petition to the Nevada Secretary of State in compliance with the District Court’s Order, NRS Chapter 295, and this

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<sup>1</sup> Fair Maps’s cross-appeal was filed only in the event the Court does not determine that the appeal is moot. In the event that the Court rules that the appeal is moot due to the filing of the Amended Petition, then Fair Maps stipulates that the cross-appeal is similarly moot.

Court's precedent. Because Appellant has not challenged the Amended Petition and cannot bring such a challenge pursuant to NRS 295.061(3), there is not a live case or controversy for this Court to resolve.

**A. The Filing of the Amended Petition Renders the Appeal Moot.**

This Court often resolves ballot cases on mootness grounds. *Personhood Nevada v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (holding that the appeal “was rendered moot when appellants failed to submit sufficient signatures on the initiative petition by the June 15 submission deadline, rendering the proposed initiative ineligible for vote in the 2010 general election regardless of our decision”); *Miller v. Burk*, 124 Nev. 579, 599 n. 70, 188 P.3d 1112, 1126 (2008) (“As the primary election is imminent and it appears that the ballots therefore have already been printed, we deny as moot any relief directed at the 2008 primary election.”); *Guinn v. Legislature of State of Nev.*, 119 Nev. 460, 476, 76 P.3d 22, 33 (2003) (“[W]e determine that the petition for rehearing became moot when the Legislature passed the revenue-generating bills by the requisite two-thirds vote.”). The Court's duty “is to decide actual controversies by a judgment which can be

carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it.” *NCAA v. Univ. of Nev.*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981).

Here, the injunction preventing the Petition from appearing on the ballot is in force and Appellant cannot obtain further relief by gratuitously supplementing that injunction. In *Church v. Washoe Cty.*, 409 P.3d 53 (Nev. 2018) (unpublished), this Court noted that “although the time frame for challenging ballot initiatives might be relatively short, the district court and this court can expedite and resolve those challenges before they become moot, thus providing the challengers with the means to obtain review in that time frame.” (internal citations omitted). Appellant did not seek to expedite this appeal until after Fair Maps’ Motion to Dismiss was denied, and Appellant delayed the process to the maximum extent possible. What Appellant failed to do though, was to challenge the Amended Petition, which was not 1) directly challenged by Appellant in a separate action, 2) challenged through an amended pleading at the District Court, or 3) enjoined by the District Court in any way. This Court cannot resolve factual challenges to the

Amended Petition in the first instance. *Haley*, 421 P.3d 281. Thus, the entire appeal is mooted as the initial Petition was enjoined by the District Court, the Amended Petition was not enjoined or challenged, and this appeal only relates to Appellant's successful enjoining of the initial Petition.

**B. Any Challenge to the Amended Petition is Barred by Statute.**

Nevada law explicitly prohibits successive, interminable challenges to a petition's description of effect. "If a description of the effect of an initiative or referendum . . . is challenged successfully pursuant to subsection 1 and such description is amended in compliance with the order of the court, the amended description may not be challenged." NRS 295.061(3). Here, Appellant successfully challenged the description of effect, which was then amended in strict compliance with the District Court's Order. Consequently, the amended description of effect cannot be further challenged in this appeal or in a separate proceeding so as to prevent unlimited hyper-technical nitpicking of the description. *Educ. Init.*, 129 Nev. at 49 (holding that "a hyper-technical examination of whether the description covers each and every aspect of

the initiative” is not required and that “a statutory interpretation-style construction of the description, in which the meaning and purpose of each word and phrase contained in the description of effect are examined, is not appropriate”).

This interpretation of NRS 295.061(3) is fully supported by the relevant legislative history. Committee Chair Cegavske asked: “Assembly Bill 322 will also provide that a description of the ballot question cannot be challenged. Was that an issue last session?” Fair Maps’ Motion to Dismiss, Exhibit 5, Sen. Committee on Legislative Operations and Elections, May 1, 2007, pages 5-6. Assemblywoman Gansert, the sponsor of Assembly Bill 322, replied: “If the court orders you to change the summary in some particular way, once you fix it, you cannot be rechallenged if you mandated a court order. [sic] Currently, you can continue to challenge the same issue as many times within the time frame.” *Id.* Assembly Bill 322 was enacted and added NRS 295.061(3) to the statutory scheme.

This Court “has consistently held that the right to appeal is statutory; where no statute or court rule provides for an appeal, no right to appeal exists.” *Ford v. Showboat Operating Co.*, 110 Nev. 752,

756, 877 P.2d 546, 549 (1994). Pursuant to the plain language of NRS 295.061(3), once the description of effect is amended in compliance with the order of the court, no further challenge is permitted.

### **III. Appellant is Not an Aggrieved Party with Standing to Appeal.**

Appellant prevailed in full at the district court and is therefore not an “aggrieved” party who may appeal. NRAP 3A(a) (providing that only a “party who is aggrieved by an appealable judgment or order may appeal from that judgment or order . . .”) Pursuant to this Court’s interpretation of NRAP 3A(a), a party is “aggrieved” when a “judgment adversely and substantially affects either a personal right or a property right.” *Roth v. Bayerische Motoren Werke Aktiengesellschaft*, 124 Nev. 1504, 238 P.3d 851 (2008). A party who has prevailed below cannot be said to be aggrieved. *Calloway v. City of Reno*, 116 Nev. 250, 271, 993 P.2d 1259, 1272 (2000) (dismissing cross-appeal for lack of jurisdiction, holding that because “the City prevailed in the district court, the City is not an aggrieved party”).

The relief requested by Appellant in his Complaint was that the Court “enter an order: 1. Declaring that the Petition does not comply

with NRS 295.009(1)(b) and is therefore invalid; 2.) Prohibiting the Secretary of State from placing the Petition on any ballot; and, 3. Granting any other relief the Court deems just.” The District Court entered an order declaring that the Petition “failed to satisfy the requirements of NRS 295.009(1)(b)” and invalidating “any signatures collected on the Petition containing the description of effect.” JA 127-132. Appellant obtained the full relief requested in his Complaint and therefore this appeal should be dismissed. *Comm'n on Ethics of State v. Carrigan*, 126 Nev. 701, 367 P.3d 759 (2010) (“cross-appellant prevailed below, and as a result, it appeared that cross-appellant was not an aggrieved party with standing to appeal”); *Webb, ex rel. Webb v. Clark Cty. Sch. Dist.*, 125 Nev. 611, 617–18, 218 P.3d 1239, 1244 (2009) (dismissing appeal because “the district court awarded Webb damages in the amount of \$27,270, we conclude that Webb was not denied any equitable or legal rights”).

Appellant filed a Complaint on November 26, 2019 asserting three causes of action: 1) “Misleading Description of Effect: ‘Independent’”; 2) “Misleading Description of Effect: ‘Fair and competitive maps’”; and 3) “Misleading Description of Effect: ‘Practical and Fiscal Impacts.’” JA 1-

6. The District Court agreed with Appellant and entered an order providing full relief on each of these causes of action, requiring the description of effect be amended in accordance with each of the defined challenges raised by Appellant. Furthermore, Appellant was required to include all challenges and supporting documents at one time, together with the first filing of the complaint. NRS 295.061(1) (“All affidavits and documents in support of the challenge must be filed with the complaint.”) No new arguments or evidence can be raised through motion practice or on appeal.

Finally, Appellant cannot maintain a piecemeal appeal from a specific portion of the Order whether it is a finding of fact or a conclusion of law. In *Ford*, this Court held that “no court rule or statute provides for an appeal from a finding of fact or from a conclusion of law.” 110 Nev. at 756 (“A party who prevails in the district court and who does not wish to alter any rights of the parties arising from the judgment is not aggrieved by the judgment.”) As Appellant obtained the requested declaratory relief, he cannot maintain an appeal that would have no additional effect, other than to affirm the relief already provided.

#### **IV. The District Court Had Jurisdiction to Approve of a Revised Description of Effect.**

Appellant argues that the District Court lacks jurisdiction to approve of a revised description of effect, but must only issue findings of fact and thus permit further litigation over whether the revised description of effect was consistent with those findings. Op. Br. 16-18. This position is devoid of any legal support and falters based on the plain language of the statute, which states that after a successful challenge to the description of effect, the description can be “amended in compliance with the order of the court.” NRS 295.061(3). The applicable statutes do not prohibit the District Court from rewriting a description of effect; rather, they explicitly contemplate that a description may be amended “in compliance” with the court’s order. It makes no difference whether the revised description of effect is contained within the court’s order or merely based on it. Fair Maps, not the District Court, drafted and submitted the Amended Petition with a revised description of effect to the Secretary of State. Furthermore, the District Court found in Appellant’s favor on every issue, took out every objectionable word, and added in everything that Appellant claimed was missing.

Appellant does not explain how he is aggrieved or harmed in any way by the District Court's action. His arguments appear to be entirely theoretical. The District Court's Order did not require Fair Maps to use the description of effect suggested by the Court, it just stated that the Court "finds that the above-referenced deficiencies *may* be cured through the revised description of effect provided herein" and "identifi[ed] a new description of effect that satisfies the legal standard required by NRS 295.061(3)." JA 138. This is not a jurisdictional issue at all and Appellant cites to nothing from any source that would prevent the Court from including suggested language. In fact, Appellant strangely cites to *Prevent Sanctuary Cities v. Haley* for the proposition that "the district court did not provide a recommendation for resolving the description's insufficiency." 2018 WL 2272955, at \*4; Op. Br. 17. This citation fully supports Fair Maps as the Court in *Haley* was criticizing the district court for not providing the "recommendation" that the District Court provided in this case.

Additionally, this Court's case law is entirely consistent with the District Court's action. In *Nevadans for Nevada v. Beers*, the committee supporting an initiative petition "submitted a revised description of

effect, which the district court adopted as adequate by order dated March 7, 2006. On March 8, 2006, the committee filed with the Secretary of State a new copy of its initiative petition with the revised description of effect.” 122 Nev. 930, 935, 142 P.3d 339, 342 (2006). This is precisely what happened here as Fair Maps submitted a revised description of effect to the District Court through lengthy discussions with the District Court during the hearing and the District Court adopted it “as adequate” in its January 2, 2020 Order. JA 127-132; *see also Coal. for Nevada's Future v. RIP Commerce Tax, Inc.*, 132 Nev. 956 (2016) (citing NRS 295.061(3) for the proposition that an amended description cannot be challenged).

#### **V. The District Court Made Adequate Findings of Fact.**

First, NRS 295.061(1) requires that all “affidavits and documents in support of the challenge must be filed with the complaint.” Appellant failed to include any affidavits, documents, facts, or evidence with his complaint or at any time thereafter. Accordingly, he has waived any arguments as to the District Court failing to make findings of fact. He certainly has waived any argument with respect to whether the revised

description of effect is misleading or deceptive to voters as he has not provided this Court with any factual basis to assess these claims.

Second, Appellant is plainly wrong to claim that the district court failed to make findings of fact as those findings are clearly contained within the district court's order and are entirely favorable to Appellant. JA 127-132. Appellant cannot be aggrieved because he was and remains the prevailing party such that any absent findings are presumed to support him. *Fenkell v. Fenkell*, 86 Nev. 397 (1970) ("Any fact necessary to support the order is presumed to have been proven in the absence of an affirmative showing to the contrary.") The District Court found that the Petition's description was misleading, in a decision no different than *Las Vegas Taxpayer Accountability v. City Council of Las Vegas*, 125 Nev. 165 (2009). Any omitted findings are presumed to support Appellant, who did not present any actual affidavits or evidence below.

Third, it is abundantly clear that Appellant seeks to misuse the courts for his political purposes rather than to resolve a legal controversy. The argument is that the District Court failed to make "actual findings of fact regarding the true effect of the petition, i.e., that the Commission it proposes is not 'independent,' nor is it required to

draw ‘fair and competitive’ electoral districts . . .” Op. Br. 15. These are policy questions that the courts do not need to resolve at all, let alone in Appellant’s favor. The District Court need not have weighed in on whether the proposed amendment to the Constitution will succeed in its goals, only whether the description of effect is adequate.

**VI. The Revised Description of Effect Complies With NRS 295.009(1)(b).**

A description of effect “does not necessarily need to explain every effect, or hypothetical effects, but it does need to accurately set forth the main consequences of” a petition’s passage. *No Solar Tax PAC v. Citizens for Solar & Energy Fairness*, No. 70146, 2016 WL 4182739, at \*2 (Nev. Aug. 4, 2016). It “must be a straightforward, succinct, and nonargumentative statement of what the initiative will accomplish and how it will achieve those goals,” *Educ. Init.*, 129 Nev. at 38.

These rules notwithstanding, Appellant asks this Court to reject the description of effect approved by the District Court on the grounds that it fails to describe an entirely hypothetical effect—the possibility that the Commission adopts electoral maps that are different from and therefore “undo” the maps generated by the Legislature in 2021. In

doing so, Appellant, contrary to the jurisprudence of this Court, asks the Court to insist on an argumentative description of effect. Because the description of effect sets forth the “main consequences” of the petition’s passage, Appellant’s argument must be rejected.

As Fair Maps pointed out below, Appellant’s contention that the Commission will “undo” the electoral maps generated by the Legislature is entirely speculative. There is no requirement that the Commission redraw the maps drawn by the Legislature in 2021. The Commission has the option to adopt the same maps drawn by the Legislature if the maps comply with the proposed amendment. Thus, the description of effects’ description of the action the Commission will take with respect to the maps generated by the Legislature in 2021 is accurate. The Commission’s work may but will not necessarily result in replacing those maps.

Importantly, Appellant concedes this point but dismisses its relevance by arguing that there is no “real” possibility of the Legislature’s maps being adopted. Op. Br. 10. In doing so, however, Appellant asks this Court to prioritize his own speculative view of what the likely outcome is of the Commission’s work over the factually

accurate statement included in the description. Put another way, Appellant asks this Court to insist upon an argumentative description of effect—one that reflects the world as he sees it. However, this Court’s jurisprudence precludes that requirement.

Appellant’s argument is based on his speculation that because the Commission must create a redistricting plan using a different criteria with a membership of different political composition with a different vote threshold, there is no way the Legislature’s plan will comport with the Commission’s plan. Op. Br. 10-11. While it is certainly possible that is the case, there is no reason to believe—or evidence in the record of—the likelihood of that being substantially greater than the Commission adopting the Legislature’s maps.

Even if there was a substantially greater likelihood of it, the description of effect as written allows for that possibility. The description makes obvious the purpose of the petition (to eliminate partisan gerrymandering) and how it intends to achieve it (by assigning the task of generating electoral maps to a commission of non-legislators required to use a specified criteria for developing such maps). The description further specifically and accurately notes that this process

“could” result in maps drawn by the Legislature being undone. Thus, Appellant’s assertion of the likely outcome is, in fact, described in the description of effect without engaging in speculation or argument as to what the likely outcome is.

To reject the description of effect on the basis of Appellant’s argument would result in the absurd consequence of a factually accurate description of effect being rejected in favor of an argumentative one—one that satisfies the petition opponent’s speculative view of the effect of the petition. Ironically, the description of effect that would result from Appellant’s reasoning would fail to reference an undisputed possible effect—that the Commission adopt the maps drawn by the Legislature—in favor of one that speculatively presupposes the outcome of the Commission’s work. Sanctioning this view would turn the Court’s description of effect case law on its head—endorsing argumentative descriptions of effect over factually accurate ones.

Appellant does not save his argument by reference to his view of the expectations of the electorate. Appellant bizarrely claims that Nevada’s voters expected—indeed, voted in favor of—partisan

gerrymandering. Op. Br. 10-11. His argument is premised on the claim that the Legislature will necessarily engage in partisan gerrymandering and further that the Commission will necessarily undo any such effort. *Id.* He says that because that is the case, the description of fact must not describe the possibility that the Commission may not undo the Legislature's maps but instead must refer to it as a certainty. *Id.*

This argument runs contrary to all of the other arguments Appellant made to the District Court. There he argued that the Commission will not be sufficiently independent to establish non-partisan electoral maps. Now he contends that the fact that the Commission will curtail partisan gerrymandering is an effect that needs to be explicitly described. His argument is not only inconsistent but lays naked his true purpose in this litigation—to preserve the practice of partisan gerrymandering.

That said, like his argument with respect to whether the Commission will undo the Legislature's maps, this argument is based on conjecture and speculation. Appellant cannot reasonably characterize the expectations of Nevada voters as to redistricting, nor can he speak to the nature of the maps the Legislature will draw or how

the Commission will react to those maps. Indeed, he can't speak to even whether the Legislature will draw maps at all. During the last redistricting cycle, the Legislature could not successfully draw maps. Ultimately, the electoral maps were drawn by special masters under the supervision of the courts. Thus, Appellant's assertion about the process that is likely to unfold is not even consistent procedurally with the most recent iteration of redistricting.

Appellant's citation to *Las Vegas Taxpayer Accountability Comm. v. City Council*, 125 Nev. 165, 208 P.3d 429 (2009) is also unavailing. In *Las Vegas Taxpayer*, this Court affirmed the District Court's finding that the petition at issue failed to identify the material effects of the petition—specifically, the fact that the petition at issue would impact not only new development but Las Vegas's existing redevelopment plan. *Id.* at 125 Nev. at 183-84, 208 P.3d at 441. That decision was based on the Court's analysis of the language of the petition at issue and operation of that language on redevelopment plans. *See id.* It was not based on argumentative conclusions about the practical effect of the petition.

Here, Appellant does not contend that the words of the Petition dictate the effect he contends will occur. To the contrary, he argues that while the words of the Petition do not dictate that result, the practical effect of the Petition will be that the Legislature's maps will be undone. Thus, Appellant's view is based entirely on argument, not the language of the Petition itself. Consequently, *Las Vegas Taxpayer* does not support Appellant's claim. To the contrary, it supports the District Court's decision in this case insofar as it stands for the proposition that the proponents of an initiative must accurately describe the material effects of the petition. The description of effect here does that without presupposing or speculating about its practical application. Because the description is a "straightforward, succinct, and nonargumentative statement of what the initiative will accomplish and how it will achieve those goals," the Court must reject Appellant's argument.

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## **OPENING BRIEF ON CROSS-APPEAL**

### **JURISDICTIONAL STATEMENT**

The District Court's January 2, 2020 Order was a final judgment in favor of Appellant/Cross-Respondent resolving all claims by all parties. Accordingly, jurisdiction is proper under NRAP 3A(b)(1).

### **ROUTING STATEMENT**

This appeal is presumptively retained by the Supreme Court as it involves "ballot or election questions." NRAP 17(a)(2).

### **STATEMENT OF THE ISSUES**

Whether the District Court erred in finding that the Petition's description of effect was misleading without taking a holistic approach to determine whether the description was a straightforward, succinct, and nonargumentative summary of the Petition?

### **STATEMENT OF THE CASE**

Fair Maps incorporates its Statement of the Case from the Answering Brief, *supra*.

### **STATEMENT OF FACTS**

Fair Maps incorporates its Statement of the Case from the Answering Brief, *supra*.

## SUMMARY OF THE ARGUMENT

Fair Maps submits this cross-appeal because the District Court engaged in the “hyper-technical examination of whether the description covers each and every aspect of the initiative” that was disfavored by *Educ. Init.*, 129 Nev. at 49. Permitting challenges to descriptions of effect based on “hyper-technical examination[s]” that are often based on little more than inherent ambiguities in all language, allows for undue delay in the political process. In the event that the Court finds that Appellant’s appeal is moot due to the filing of the Amended Petition or otherwise, Fair Maps submits that the cross-appeal is similarly moot and will be withdrawn or should be dismissed.

## ARGUMENT

The District Court concluded that the description of effect could be argumentative, misleading or confusing in that it does not adequately explain the meaning of the terms “independent” and “fair and competitive.” JA 130. The court further found that the description failed to properly inform signers that the petition, if passed, would result in the expenditure of state funds and would require redistricting shortly after the Legislature takes up that task in 2021. *Id.* The

district court's findings in these regards, however, are clearly erroneous and not supported by substantial evidence, and effected by errors of law.

As Fair Maps pointed out below, 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. *See id.* at 3. 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.* Thus, the description of effect states in a straightforward, succinct, and nonargumentative manner what the petition intends to achieve and how it intends to achieve it.

Contrary to the district court's finding, the characterization of the redistricting commission as independent does not change this conclusion. In fact, it is entirely consistent with the purpose of the Petition. In the context of the Petition, independence connotes the fact that the decisions of the commission will not be subject to substantive

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

The Court’s finding regarding the use of the terms “fair and competitive” is likewise not supported by substantial evidence. As stated above, the description informs the reader about the purpose of the Petition—the establishment of an independent redistricting commission to oversee the adoption of fair and competitive electoral maps. It further specifies how the commission will do that. While the district court may speculate as to whether the process contemplated will, in fact, result in fair and competitive maps, the ultimate result is not relevant to whether the description of effect accurately states the

Petition's purpose and how it intends to achieve it. Disagreement with the likelihood that the structure of the Petition will bring that purpose to fruition does not render the description defective. It is merely an assessment of the efficacy of the petition.

To the extent the District Court was persuaded by Appellant's claim that the Petition invites or allows various types of unfairness—in particular, partisan bias—the district court's conclusion was erroneous. Plaintiff's argument in this regard turned on his assertion that various types of unfairness *could* affect the commission's processes such that the electoral maps it draws do not meet his definition of fair and competitive. *Id.* at 14-15. Here, again, however, that argument fails because it is a critique of the Petition and not the description of effect.

The District Court's finding with respect to the likelihood of the expenditure of state funds the related timing of the Commission's first redistricting effort are also not supported by the record. Appellant's argument below in this regard was based solely on his unsupported assertion that the Commission's redistricting effort would increase the cost of redistricting given the fact that the Legislature will have recently taken up that task. *Id.* at 12. However, there is no certainty

that the Petition would increase the costs of redistricting and it is equally or more probable that the costs of redistricting would be reduced.

The Petition establishes a single redistricting process for each census cycle, while the Legislature can currently re-draw the lines as many times as it deems appropriate. Moreover, the cost of legislative redistricting can be very high for taxpayers, especially if the Legislature is required to work in a special session. Furthermore, there is no requirement that the Commission “undo” any maps drawn by the Legislature. The Commission has the option to adopt the same maps drawn by the Legislature if the maps comply with the proposed amendment. What the Legislature and Commission may choose to do in the future is not an effect that can be definitively conveyed to voters. Finally, Appellant’s assertion below 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 *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.” 2018 WL 2272955, at \*4 (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.

For these reasons, this Court should reverse the District Court’s ruling and deny Appellant’s petition.

## **CONCLUSION**

For all of the above reasons, Fair Maps asks the Court to reject Appellant’s attempt to prolong this litigation and permit the District Court’s Order to stand. In the alternative, Fair Maps asks the Court to

**Affirmation:** Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: April 6, 2020.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to NRAP 27(d), I hereby certify that this Answering Brief on Appeal and Opening Brief on Cross-Appeal complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font, Century Schoolbook style. I further certify that this motion complies with the page limits of NRAP 28.1(e)(1) does not exceed 40 pages, calculated in accordance with the exclusions of NRAP 32(a)(7)(C).

Pursuant to NRAP 28.2, I hereby certify that I have read this motion, 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 motion complies with all applicable Nevada Rules of Appellate Procedure.

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I understand that I may be subject to sanctions in the event that this motion is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: April 6, 2020.

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDONALD CARANO LLP and that on April 6, 2020, I served the foregoing document on the parties in said case by electronically filing via the Court's e-filing system, as follows:

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DATED: April 6, 2020.

By     /s/ Jill Nelson      
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