

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 BARBARA K. CEGAVSKE, IN HER OFFICIAL CAPACITY AS NEVADA SECRETARY OF STATE,</p> <p>Respondents.</p>	<p>Case No.: 80563</p> <p>District Court Case No. 19OC002091B</p>	<p>Electronically Filed Apr 29 2020 11:50 p.m. Elizabeth A. Brown Clerk of Supreme Court</p>
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REPLY 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 29, 2020.

McDONALD CARANO LLP

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TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE STATEMENT.....i

TABLE OF CONTENTSii

TABLE OF AUTHORITIES..... iii

ARGUMENT 1

I. INTRODUCTION 1

II. CHALLENGES TO THE INITIAL DESCRIPTION OF EFFECT
ARE MOOT2

III. THE INITIAL DESCRIPTION OF EFFECT COMPLIED WITH
NEVADA LAW..... 4

IV. CONCLUSION 15

CERTIFICATE OF COMPLIANCE..... 17

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

Page(s)

Authorities

Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2661, 192 L. Ed. 2d 704 (2015)..... 6, 7

Coalition for Nevada’s Future v. RIP Commerce Tax, Inc., PAC, No. 69501, 2016 WL 2842925, at *4 (Nev. May 11, 2016). 1, 13

Nevadans for Nevada v. Beers, 122 Nev. 930, 935, 142 P.3d 339, 343 (2006) 3

No Solar Tax PAC v. Citizens for Solar & Energy Fairness, No. 70146, 2016 WL 4182739 (Nev. Aug. 4, 2016) 12

Statutes

NRS 295.061(2)..... 2

ARGUMENT

I. Introduction

This Court has rejected the “hyper-technical examination of whether the description covers each and every aspect of the initiative” and held 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.” *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 293 P.3d 874 (2013). The District Court, at Appellant/Cross-Respondent Rev. Jackson’s (“Rev. Jackson”) urging, committed these exact errors by examining the meaning and purpose of the word “independent” and the phrase “fair and competitive” and by accepting speculative effects such as the “cost consequences of the petition” and the nature of the redistricting done by the Legislature. JA 130, Order.

As procedural matters, any appellate consideration of the Amended Petition is improper as Rev. Jackson failed to take any procedural action with respect to the description of effect contained within the Amended Petition. Thus, all appeals related to the initial description of effect are moot. Moreover, Rev. Jackson was obligated,

under NRS 295.061(2) to include “[a]ll affidavits and documents in support of the challenge” with his complaint. Rev. Jackson failed to include any affidavits, any declarations, any verifications, any requests for judicial notice, or any admissible evidence with his initial complaint. As argued to the District Court, this failure resulted in a limitation to the legal arguments raised in Rev. Jackson’s complaint, none of which were sufficient to reject the initial description of effect. JA 100, Hr’g Tr. 100:18-23.

II. Challenges to the Initial Description of Effect are Moot.

As stated in Fair Maps’ Opening Brief on Cross-Appeal, if Appellant’s appeal is moot due to the filing of the Amended Petition or otherwise, then this cross-appeal is similarly moot and will be withdrawn or should be dismissed. The initial description of effect was rejected by the District Court and so is no longer in play as Fair Maps has submitted an Amended Petition to the Secretary of State and has been circulating that Amended Petition for signatures. The District Court issued an injunction against the circulation of the initial petition and so Rev. Jackson cannot be aggrieved as the initial petition was

enjoined from being placed on the ballot. Rev. Jackson did not factually challenge the Amended Petition at the District Court whether in a separate proceeding or through an amended pleading.

Rev. Jackson attempts to evade this result by arguing that it is “contrary to law” to deem the “amended petition [as] . . . an entirely new and separate petition from the original Petition.” Ans. Br. 5. Thus, the appeals are “not moot because [they] involve[] the same petition at issue before the district court.” *Id.* Rev. Jackson, however, failed to analyze the applicable precedent and specifically *Nevadans for Nevada v. Beers*, 122 Nev. 930, 935, 142 P.3d 339, 343 (2006). In *Beers*, the Court held that “although the circulated version contained the same version of section 4(4) as the December legal-sized version, the two petitions were not the same. To the contrary, the circulated version contained the court-approved description of effect (contained in the March 8, 2006, version), whereas the December legal-sized version contained the inaccurate description of effect rejected by the district court.” *Id.* This is *precisely* the position here that Rev. Jackson claims is contrary to Nevada law. The initial petition contains a court-rejected description of effect whereas the Amended Petition, which is “not the same,”

contained the court-approved description of effect. *Id.* (“Accordingly, a ‘copy’ of the petition that the committee ‘intend[ed] to circulate’—namely the copy with the compliant description of effect—had to be filed in order to satisfy both constitutional and statutory filing requirements.”)

Rev. Jackson has not challenged the Amended Petition and cannot do so here as a matter of clear procedure. He is seeking to challenge the language in a description of effect for the first time and obtain, from this Court not the District Court, findings of fact as to the effect of the Amended Petition.

III. The Initial Description of Effect Complied With Nevada Law.

A. The District Court Erred By Striking the Term “Independent.”

What facts has Rev. Jackson presented to show that the Commission would not be “independent”? None. What facts has Rev. Jackson presented to show that voters would be misled by a description of effect containing the term “independent”? None. The Petition creates an “Independent Redistricting Commission” within the legislative

branch of Nevada. JA 26. “Independent,” “Redistricting,” and “Commission” are all capitalized and “Independent Redistricting Commission” is a proper noun. The District Court found that it was misleading to use the actual name of the Commission within the description of effect. This was error.

Rev. Jackson challenged the description of effect because the Commission was not “independent” as four of its seven members would be appointed by the Legislature and because it would receive funding from the Legislature. JA 26-27. These issues have been repeatedly addressed by Fair Maps. As redistricting is currently conducted by the Legislature, it is entirely sufficient to describe the Commission as performing its redistricting duties “independently” of the Legislature. There is no risk of confusion to the voters here as they would be familiar with the concept of an “independent” judiciary even though that judiciary may be appointed and funded by the executive or legislative branches. The core concept of independence here is not that there is some linkage between the Legislature and the Commission, it is that the electoral districts drawn by the Commission are not subject to

review or approval by the Legislature. Rev. Jackson cannot deny that this interpretation of the term “independent” is unassailably true.

The description of the Commission as independent is consistent with the findings of the United States Supreme Court, which should be a sufficient arbiter of whether the language in the description of effect is misleading. In *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, the United States Supreme Court considered the “Arizona Independent Redistricting Commission.” 135 S. Ct. 2652, 2661, 192 L. Ed. 2d 704 (2015). The Arizona Constitution was amended to create the Arizona Independent Redistricting Commission via a ballot initiative. *Id.* The Arizona Independent Redistricting Commission is selected by the “highest ranking officer and minority leader of each chamber of the legislature each select one member of the AIRC from a list compiled by Arizona's Commission on Appellate Court Appointments.” *Id.* (“The four appointed members of the AIRC then choose, from the same list, the fifth member, who chairs the Commission.”). The United States Supreme Court ultimately held that the “Elections Clause permits the people of Arizona to provide for redistricting by independent commission” and used “independent” in

the sense of “a commission operating independently of the state legislature to establish congressional districts...” *Id.* at 2671.

Rev. Jackson’s descriptions of redistricting commissions in other states are inaccurate and immaterial. It may be possible to have redistricting commissions that have a greater or lesser degree of “independence” than the Commission. Similarly, whether commissioners can run for office after performing redistricting does not affect whether the Commission is independent or not.

Finally, the proposed order submitted by Rev. Jackson demonstrates that his position is based solely on political opinion and not fact. In his proposed order, Rev. Jackson states that the District Court should have found that the Petition is not “‘independent’ of the Legislature, nor ‘independent’ from political influences” and that the “Commission as proposed in this Petition differs substantially from ‘independent’ commissions in other states, which use an application and selection process for commissioners that is not under legislative control and which provide for independent funding for the commission.” JA 123. The voters, not the Court, should resolve these disputes over the correct structure for a redistricting commission.

B. The District Court Erred By Striking the Phrase “Fair and Competitive.”

What facts has Rev. Jackson presented to show that the electoral maps drawn by the Commission in 2023 will not be fair? None. What facts has Rev. Jackson presented to show that the electoral maps drawn by the Commission in 2023 will not be competitive? None. What facts has Rev. Jackson presented to show that voters would be misled by a description of effect containing the phrase “fair and competitive electoral districts”? None. The Petition’s description of effect stated that the Petition would “establish an Independent Redistricting Commission to oversee the mapping of fair and competitive electoral districts . . .” JA 51. The District Court’s conclusion that the description of effect “does not adequately explain to voters what is meant by the . . . phrase ‘fair and competitive’” was an invalid policy conclusion.

Rev. Jackson challenges the description of effect based on his belief that the Petition will not result in fair or competitive electoral districts. This is a question the voters should decide because the Court cannot strike a description of effect simply because it is drafted in accordance with the policy intentions of the initiative. The Petition

clearly requires that the Commission use specified criteria to draw districts. JA 27-28. For example, the Petition states that the Commission shall “[e]nsure that districts are not drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or elect representatives of their choice.” JA 27. The Petition also states that districts shall not be drawn so as to “unduly advantage or disadvantage a political party.” *Id.*

Rev. Jackson’s position in response is so much of a stretch that it borders on the absurd: “By the use of the term ‘unduly,’ it is clear that the Petition is designed and intended to tolerate unfairness between the political parties.” Ans. Br. 40. Fair Maps proposed the Petition because of its well-reasoned and empirically-supported belief that the intent of the Petition and the goal of the Commission were to draw fair and competitive electoral districts. The District Court should not be the arbiter of whether the policy proposed by Fair Maps is “fair” or “unfair” in Rev. Jackson’s subjective view. It should not determine whether the electoral districts created by the Commission will be competitive or uncompetitive in Rev. Jackson’s subjective view. The description of

effect need only be “straightforward, succinct, and nonargumentative summary of what the initiative is designed to achieve and how it intends to reach those goals.” *Educ. Initiative*, 129 Nev. at 37-38, 293 P.3d at 876. This is contrary to Rev. Jackson’s inaccurate description of Nevada law where he claims that the intent and the purpose of the Petition is immaterial. Ans. Br. 42. If a ballot initiative sought to lower taxes and stated in the description of effect that this proposal would stimulate economic growth, the description of effect cannot be invalidated because an opponent argues that lowering taxes would not actually stimulate economic growth. The courts cannot be put in a position of making political and policy determinations in favor of one side or another. Rev. Jackson cannot challenge the description of effect by arguing that the Petition will not actually reach its intended goals.

Rev. Jackson asks the Court to reject the description of effect because it “tells voters that the Commission will create ‘fair and competitive’ maps, even though the Petition does not actually require that it do so. Ans. Br. 43-44. The arguments are unavailing that the Petition does not go far enough in some ways by requiring diversity for the members of the Commission or that other criteria are ranked higher

than political competitiveness. The description of effect accurately reflects the Petition's requirements that the Commission ensures, for example, that districts are drawn to have "an approximately equal number of inhabitants," are not drawn to deny "racial or language minorities" the right to participate in the political process, and "do not unduly advantage or disadvantage a political party." JA 27. Does Rev. Jackson believe that these criteria will not result in fairer or more competitive districts? More to the point, is the statutory scheme designed to require political scientists as expert witnesses in order to persuade the District Court about the fairness or competitiveness of electoral maps drawn by the Legislature or by the Commission? Rev. Jackson's complaints about the description of effect are non-justiciable.

Finally, the proposed order submitted by Rev. Jackson demonstrates that his position is based solely on political opinion and not fact. In his proposed order, Rev. Jackson states that the District Court should have found that the Petition "is designed to tolerate unfairness between the parties" and that the Petition "would give disproportionate power to a small and non-representative minority of the Commission to veto any redistricting plan." JA 124-125. These

arguments belong, if anywhere, on the ballot advocating against passage of the Petition, but not as proper challenges to the description of effect.

C. The District Court Erred By Requiring A Discussion of Costs in the Description of Effect.

What facts has Rev. Jackson presented concerning the cost of the Commission? None. What facts has Rev. Jackson presented concerning the current cost of the redistricting process? None. What facts has Rev. Jackson presented to show that the implementation costs of the Petition are a “main consequence” of the Petition’s passage? None. The District Court’s conclusion with respect to costs was factually unfounded and contrary to precedent as 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).

Rev. Jackson simply asserts that a “practical consequence” of the Petition is that the “State will likely spend twice the resources (or more) as it would normally on redistricting efforts” as there will be a “do-over

of redistricting.” Ans. Br. 44. Without the benefit of *any* numbers or data, Rev. Jackson relies on its position that it is logical and plausible that costs will be increased, yet even Rev. Jackson can only state that the Petition will “very likely increase the cost.” Ans. Br. 44-45.

First, the operational costs of the Commission are not a “main consequence” of the Petition. This situation is a far cry from *Coalition for Nevada’s Future v. RIP Commerce Tax, Inc., PAC*, where this Court found that the referendum would “unbalance the state budget,” No. 69501, 2016 WL 2842925, at *4 (Nev. May 11, 2016). Even if Appellant/Cross-Respondent is correct that these costs are “not hypothetical or arguable,” there is still no basis to require the inclusion of the incidental costs in the 200-word description of effect. If this result holds, then nearly every ballot initiative must spend words mentioning that there would be some administrative or incidental costs associated with passage. As a result, descriptions of effect would become less informative to voters as proponents would lose space to describe the actual main consequences of their initiatives.

Second, the common-sense argument advanced by Rev. Jackson is flawed. While it is intuitively true that if the Commission undertakes

redistricting in 2023, then there would be additional redistricting costs for the 2020 decennium. Even assuming that the Legislature completes its redistricting in 2021 and these maps are not approved by the Commission, the Petition may just as easily save money for taxpayers by reducing or shortening litigation over the 2021 maps. As the District Court noted, the previous redistricting cycle was fraught with litigation and required the use of special masters as well as state resources. JA 83-84, Hr’g Tr. 10:9-11:8. There is absolutely no basis to conclude that the Commission will increase or decrease redistricting costs for the 2020 decennium. More significantly, these one-off costs will be outweighed by the overall savings brought about the Commission by reducing partisan redistricting and the concomitant litigation. While neither party has demonstrated as a factual matter whether costs will increase or decrease with certainty, it is only Rev. Jackson’s burden and Fair Maps’ arguments show clearly that the challenged effects are purely speculative and hypothetical.

Finally, closely examining the proposed order submitted by Rev. Jackson demonstrates the ridiculousness of his position. In his proposed order, Rev. Jackson writes that the Petition “would have the effect of

increasing the costs of redistricting by requiring mid-decade redistricting in 2023” and “would increase the cost of redistricting due to litigation because of the Petition’s lack of guidelines concerning partisan gerrymandering and lack of provisions to deal with contingencies . . .” JA 125. This is the height of speculation. The District Court could not and should not have made these factual findings, which are based on Rev. Jackson’s political and policy opinions, not on fact.

IV. Conclusion

For all of the above reasons, Fair Maps asks the Court to deem all appeals related to the Petition to be moot and, in the alternative, to reverse the District Court’s Order insofar as it found that the initial description of effect was invalid.

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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 29, 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 15 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 29, 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 29, 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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