IN THE SUPREME COURT OF THE STATE OF NEVADA

FAIR MAPS NEVADA,

Appellant,

v.

ERIC JENG, AN INDIVIDUAL; AND FRANCISCO V. AGUILAR, IN HIS OFFICIAL CAPACITY AS NEVADA SECRETARY OF STATE,

Respondents.

Supreme Court Case No. 88263

District Court Case Nos. 23OC 000137 1B and 23OC000138 1B

APPELLANT'S OPENING BRIEF

McDONALD CARANO LLP

LUCAS FOLETTA (NSBN 12154)
JOSHUA HICKS (NSBN 6679)
ADAM HOSMER-HENNER (NSBN 12779)
KATRINA WEIL (NSBN 16152)

100 West Liberty Street, 10th Floor
Reno, Nevada 89501
Telephone: (775) 788-2000
lfoletta@mcdonaldcarano.com
jhicks@mcdonaldcarano.com
ahosmerhenner@mcdonaldcarano.com
kweil@mcdonaldcarano.com

Attorneys for Appellant Fair Maps

NRAP 26.1 DISCLOSURE

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 judges of this court may evaluate possible disqualification or recusal.

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

Fair Maps has been represented throughout this action by Lucas Foletta, Esq., Joshua Hicks, Esq., Adam Hosmer-Henner, Esq., and Katrina Weil, Esq. of McDonald Carano LLP.

Dated this 20th day of March 2024.

McDONALD CARANO LLP

By: */s/ Adam Hosmer-Henner*

Lucas Foletta (NSBN 12154)
Joshua Hicks (NSBN 6679)
Adam Hosmer-Henner (NSBN 12779)
Katrina Weil (NSBN 16152)
100 West Liberty St., 10th Floor
Reno, Nevada 89501
lfoletta@mcdonaldcarano.com
jhicks@mcdonaldcarano.com
ahosmerhenner@mcdonaldcarano.com
kweil@mcdonaldcarano.com

Attorneys for Appellant Fair Maps

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

JURISDICTIONAL STATEMENT

This Court has jurisdiction over Appellant Fair Maps Nevada's ("Fair Maps") appeal pursuant to NRAP 3A(b)(1) because the district court's March 6, 2024 order is a final order resolving all claims between all the parties. This Court has further jurisdiction over this appeal pursuant to NRAP 3A(b)(3) because it is an appeal from an order granting an injunction. Fair Maps filed timely Notices of Appeal pursuant to NRAP 4(a)(1) on March 7, 2024. 2 JA 391-396.

ROUTING STATEMENT

This appeal involves a ballot question and is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(2). This appeal would also be presumptively retained by the Supreme Court under NRAP 17(a)(12) ("Matters raising as a principal issue a question of statewide public importance . . .").

STATEMENT OF THE ISSUES

1) Whether the district court erred in determining that both Petitions create a new requirement for the appropriation of state funding?

2) Whether Fair Maps' descriptions of effect are straightforward, succinct, and non-argumentative summaries of what the Petitions

are designed to achieve and how the Petitions intend to reach those goals?

3) Whether the district court erred in determining the Petitions are barred by issue preclusion?

4) Whether the Court should reconsider whether constitutional initiative petitions should be subject to Article 19, Section 6 of the Nevada Constitution and whether the 15-day hearing requirement in NRS 295.061(1) is "directory" and not mandatory?

STATEMENT OF THE CASE

Fair Maps filed Initiative Petitions C-03-2023 and C-04-2023 (collectively "Petitions") with the Respondent Nevada Secretary of State seeking to amend the Nevada Constitution. 1 JA 12-17, 47-52. The Petitions seek to establish an independent redistricting commission in response to the partisan gerrymandering practices that have harmed Nevada's electoral process. Petition C-03-2023 would require an independent redistricting commission to map electoral districts following the next decennial census. Petition C-04-2023 would require an independent redistricting commission to map electoral districts following the 2026 general election. Otherwise, with the exception of the timing of the initial redistricting, the Petitions are identical.

In yet another cynical attempt to prevent the voters from determining whether to implement changes to the redistricting process, Respondent Eric Jeng ("Jeng") filed Complaints and Opening Briefs in Support of the Complaints on December 7, 2023 to prevent Fair Maps from circulating the Petitions. 1 JA 1-138. The Complaints assert two causes of action: 1) "Violation of Unfunded Mandate Prohibition, Nev. Const. Art. 19, Sec. 6" and 2) "Violation of Description of Effect

Requirement, NRS 295.009(1)(b)." *Id.* at 1-9, 35-44. Fair Maps filed its Answers and Answering Briefs on December 18, 2023 and December 26, 2023, explaining the Petitions do *not* create new requirements for appropriations or expenditures that do not otherwise exist, but rather shift the existing, mandatory expense the Legislature already incurs to the new independent redistricting committee, which would still be located within the legislative branch. *Id.* at 161-181. Jeng filed his Replies in support of his Opening Briefs on January 3, 2024. 2 JA 182-264. The Secretary of State filed limited responses to Jeng's Complaints on January 22, 2024. *Id.* at 271-76.

Based on a new argument raised in Jeng's Replies, Fair Maps filed Motions to Strike a portion of Jeng's Replies, or in the alternative, Motions for Leave to file sur-replies. *Id.* at 278-311. Additionally, due to the significant delay in the cases being set for hearing, Fair Maps filed Motions to Dismiss Jeng's Complaints. *Id.* at 312-321. Jeng filed Oppositions to both the Motions to Strike and the Motions to Dismiss on February 7, 2024. *Id.* at 322-343.

Despite the Complaints and associated briefs being fully submitted to the court, the matter was not set for hearing until February 15, 2024.

Id. at 351-52. Almost a month after the hearing, and despite verbally announcing a decision from the bench at the conclusion of the hearing, the district court did not enter its order until March 7, 2024 declaring the Petitions *void ab initio* and enjoined the Secretary of State from taking any action on the Petitions. *Id.* at 353-62. The district court further denied the Motions to Dismiss and the Motions to Strike. *Id.*

STATEMENT OF THE FACTS

Fair Maps filed the Petitions on November 14, 2023 to amend the Nevada Constitution by adding a new section, Section 5A, to the Nevada Constitution. 1 JA 12-17, 47-52. Petition C-03-2023 includes the following 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 individuals. Commission meetings shall be open to the public which shall have opportunities to participate in the 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 will require redistricting following each federal census.

Id. at 15-16. Petition C-04-2023 includes the same description of effect but replaces the last paragraph with the following: "The amendment will require redistricting following the 2026 election and each federal census thereafter." *Id.* at 50-51.

Despite the Legislature's preexisting mandatory duty to redistrict after every census, and the Legislature's regular funding of that mandatory duty, the district court concluded that the Petitions would require an expenditure of funds in violation of Article 19, Section 6 of the Nevada Constitution and declared the Petitions invalid. 2 JA 353-62.[1] Jeng did not submit any evidence through declarations, testimony, or otherwise and the district court determined that the court "considers it obvious that the creation of a new, seven-member government body

[1] Due to the expedited nature of this appeal, Fair Maps has not yet received the transcript of the proceedings from the First Judicial District Court. Fair Maps will promptly supplement the appendix once it receives it.

tasked with undertaking a mandatory, difficult task will require an expenditure of government funds." *Id.* at 359. The court based this conclusion on "Nevada's own past experience with redistricting, the experiences of other states that have authorized redistricting commission like the one the Petition would create anew in Nevada, and the detailed requirements of the Petition itself." *Id.* at 359. The district court concluded that even "[a] reduction in costs elsewhere—such as in the Legislature's operational budged—does not suffice." *Id.* at 359. The district court further concluded that issue preclusion bars Fair Maps from "denying that the Petitions will require a government expenditure." *Id.* at 358.

The district court also found that the Petitions descriptions of effect were invalid. The court determined Fair Maps "is precluded from denying that the Petitions will require a state expenditure, and the Court in any event independently concludes that they would require such an expenditure." *Id.* at 360. Further, the district court found Petition C-04-2023 deficient "for failing to explain that the Petition would require mid-cycle redistricting and invalidate the existing legislative plans and congressional districts early, in 2027, when they would otherwise remain

in force until 2031." *Id.* at 360. The district court ultimately declared the Petitions "*void ab initio*" and enjoined the Secretary of State from taking action on the Petitions. *Id.* at 361. This appeal followed.

SUMMARY OF THE ARGUMENT

The redistricting process is critical to Nevada's electoral system and already exists within the Nevada Constitution. The Petitions seek to improve the redistricting process, which is a change that should properly be made within the Constitution. Nevertheless, the district court denied Nevadans their constitutional right to propose and vote upon constitutional change unless the Petitions also established a tax within the Nevada Constitution. This decision was incorrect not only because the Petitions do not require an expenditure of state funds, but also because it would weaken the Nevada Constitution by including the very type of administrative and mechanical provisions that should be left up to the Legislature and not included within the principle governing document of the State.

In 2019, the United States Supreme Court determined that political gerrymandering is not unconstitutional per se. *See Rucho v. Common Cause*, 588 U.S. ___, 139 S. Ct. 2484, 2497-2508. As Justice Kagan stated

in her dissent in *Rucho v. Common Cause*, 588 U.S. ___, 139 S. Ct. 2484, 2525 (2019), gerrymandering is "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). In order to address basic equitable and fairness concerns over the electoral map process in Nevada, Fair Maps filed anti-gerrymandering Petitions to amend the Nevada Constitution to transfer responsibility for redistricting from the Nevada Legislature to a newly established independent redistricting commission.

The right of citizens to file initiative petitions is a constitutional right, enshrined in Article 19 of the Nevada Constitution. Jeng seeks not only to defend the practice of gerrymandering by opposing the Petitions but also has raised every legal and procedural argument he can think of to accomplish that goal and thwart Fair Maps' constitutional right to circulate an initiative petition—all in an effort to prevent the citizens of Nevada from having the opportunity to decide for themselves if they want an independent redistricting commission to draw electoral maps.

As discussed in more detail below, this Court should reverse the district court's order and allow the Petitions to proceed. The Petitions do not create a new expenditure or appropriation because they simply transfer the ongoing and longstanding practice of redistricting by the Legislature to an independent redistricting commission. Jeng failed to submit any admissible evidence and the district court relied solely on unfounded speculation to void the Petitions.

Further, the descriptions of effect for the Petitions are straightforward, succinct, and nonargumentative. These descriptions provide citizens the information they need to decide whether to sign the Petition. Additionally, the district court erred in applying the doctrine of issue preclusion because it was raised for the first time by Jeng in a reply brief. Notwithstanding this procedural flaw, the district court applied issue preclusion from a decision that was not final, and more importantly, from a decision that did not contain the same parties.

Finally, this Court should revisit the extent of the unfunded mandate rule in Article 19, Section 6 of the Nevada Constitution as set forth in *Education Freedom PAC v. Reid*, 138 Nev. Adv. Op. 47, 512 P.3d 296, 303 (2022), as the application of *Reid* can serve as a categorical bar

to initiative petitions. Even if the *Reid* holding is correct, *Reid* should not be applied to a case where a preexisting, mandatory government expenditure is simply transferred to another government body. The holding of *Reid* should also be revisited to the extent that the 15-day period to hold a hearing pursuant to NRS 295.060(1) is deemed discretionary. 138 Nev. Adv. Op. 47, 512 P.3d at 300-01. The impact of this holding serves only to frustrate and delay the expeditious processing of litigation concerning initiative petitions.

ARGUMENT

I. Standard of Review

When a district court decides a ballot matter without resolving disputed facts, as occurred here, de novo review applies. *Nevadans for Nev. v. Beers*, 122 Nev. 930, 942, 142 P.3d 339, 347 (2006); *see also Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 41, 292 P.3d 874, 878 (2013) (noting de novo review applies to a district court's order granting injunctive and declaratory relief). "The party challenging the initiative petition bears the burden of demonstrating that the proposed initiative is clearly invalid." *Helton v. Nev. Voters First PAC*, 138 Nev. Adv. Op. 45, 512 P.3d 309, 313 (2022).

II. Jeng Failed to Demonstrate the Petitions Propose a Change Requiring an Appropriation or the Expenditure of Money

No evidence was admitted or considered by the district court in support of Jeng's contention that the Petitions required the appropriation or expenditure of money. Instead, the district court remarked that in his experience, the operation of government costs money and therefore the Petitions fell afoul of Article 19, Section 6 of the Nevada Constitution. This is the precise situation presented in *Helton,* which rejected the "unsupported speculation" that the initiative petition "would require an expenditure of money to implement." 138 Nev. Adv. Op. 45, 512 P.3d at 318.

As demonstrated by the district court's order in this case, the application of *Reid* substantially impairs the ability for any initiative petition to make it on Nevada voters' ballots. Invalidating initiative petitions based on any speculative, unsubstantiated, hypothetical appropriation or expenditure deprives Nevadans of the right to propose initiatives and frustrates the purpose of Article 19, Section 6 of the Nevada Constitution.

Jeng's efforts to keep the Petitions from reaching Nevada's voters by claiming the Petitions are "unfunded mandates" fail. Article 19,

Section 2 of the Nevada Constitution provides that "subject to the limitations of Section 6 of this Article, the people reserve to themselves the power to propose, by initiative petition, statutes and amendments to statutes and amendments to this constitution, and to enact or reject them at the polls." Section 6 provides that Article 19 "does not permit the proposal of any *statute or statutory amendment* which makes an appropriation or otherwise requires the expenditure of money, unless such statute or amendment also imposes a sufficient tax, not prohibited by the Constitution, or otherwise constitutionally provides for raising the necessary revenue." Nev. Const. art, 19, § 6 (emphasis added).

"[A]n appropriation is the setting aside of funds, and an expenditure of money is the payment of funds." *Rogers v. Heller*, 117 Nev. 169, 173, 18 P.3d 1034, 1036 (2001). "A necessary appropriation or expenditure in *any set amount or percentage* is a *new requirement that otherwise does not exist*." *Id.* at 176, 18 P.3d at 1038 (emphasis added). "Stated differently, an initiative makes an appropriation or expenditure when it leaves budgeting officials no discretion in appropriating or expending the money mandated by the initiative—the budgeting official must approve the appropriation or expenditure, regardless of any other

financial considerations." *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 890, 141 P.3d 1224, 1233 (2006). Initiative petitions that create a "new requirement" for "expenditures or appropriations" must "contain a funding provision." *Reid*, 138 Nev. Adv. Op. 47, 512 P.3d at 303.

In a pair of opinions issued the same day, this Court recently considered whether two separate initiative petitions required an appropriation or the expenditure of money. *Id.* at 303-04; *Helton*, 138 Nev. Adv. Op. 45, 512 P.3d at 318. In *Reid*, the initiative petition to amend the Nevada Constitution sought to establish education freedom accounts, funded by the state, for schooling outside of public schools. 138 Nev. Adv. Op. 47, 512 P.3d at 299. The description of effect noted that previous statewide bases per pupil were $6,980 and $7,074, and that "[g]enerating the revenue to fund the accounts could necessitate a tax increase or reduction in government services." *Id.* This Court noted that the initiative petition required an appropriation of funds and the "initiative is creating a new requirement for the appropriation of state funding that does not now exist and provides no discretion to the Legislature about whether to appropriate or expend the money." *Id.* at 303-04. Specifically, and detrimental to the initiative petition, the

petition in *Reid* required "the Legislature to fund the education freedom accounts." *Id.* at 304.

In *Helton*, the initiative petition sought to amend the Nevada Constitution to implement open primary elections and ranked-choice general elections for specific officeholders. 138 Nev. Adv. Op. 45, 512 P.3d at 312-13. The initiative petition did not impose a new requirement of funding elections—but rather sought to reform the elections that were already required to occur. *Id.* at 312-13. Helton challenged the initiative petition, arguing, among other things, that the petition would require an expenditure of money to implement. *Id.* at 318. The *Helton* court ultimately affirmed the district court's conclusion that it was "unsupported speculation" that the initiative petition "would require an expenditure of money to implement." *Id.* In reaching this conclusion, the Court noted that Helton "offered some references to the expected costs to implement similar changes" in other states, but "did not provide any evidence regarding the expected costs to make the proposed changes to the Nevada election system." *Id.*

To begin, just as in *Helton*, Jeng presented no actual evidence to the district court about the supposed cost of the Petitions or the current

governmental cost to redistrict. 1 JA 1-138. The minimal evidence presented by Jeng referenced costs for independent redistricting in other states, with no evidence of any comparison to Nevada. *Id.* at 1-9 (references in unverified complaint to the cost of other states redistricting), 35-44 (same), 70-79, 104-114. The mere possibility of an expense is not enough—because the burden of demonstrating the invalidity of an initiative falls on the challenger, any unfunded-mandate claims cannot succeed without actual "evidence regarding the expected costs." *Helton*, 512 P.3d at 318.

Here, Jeng failed to meet his burden to demonstrate the invalidity of the Petitions by merely speculating regarding the expected costs and failing to provide any evidence of actual costs that could be incurred by the independent redistricting committee. This flaw proved fatal in *Helton,* and it holds the same fatal consequence here as well. The district court should have thus denied Jeng's challenges on that basis alone. Remanding for an evidentiary hearing would only provide Jeng with a de facto victory. As Jeng bore the burden below, his failure to submit evidence at the time of the hearing is incurable.

Besides Jeng's critical lack of evidence, here, unlike *Reid*, the Petitions do not "creat[e] a *new requirement for the appropriation of state funding that does not now exist*." 138 Nev. Adv. Op. 47, 512 P.3d at 303-04. The Nevada Legislature already has an established redistricting process, and the Petitions do not call for a specified appropriation; in fact, they do not call for funding at all. 1 JA 12-17, 47-52. The Nevada Constitution imposes a "mandatory duty" upon the Nevada Legislature at "its first session after the taking of the decennial census" to apportion "the number of Senators and Assemblymen . . . among legislative districts which may be established by law, according to the number of inhabitants in them." Nev. Const. art. 4, § 5. This mandatory duty has been regularly funded by the Legislature. *See, e.g.*, S.B. 1, 80th Leg. (Nev. 2021); S.B. 1, 66th Leg. (Nev. 1991); S.B. 1, 61st Leg. (Nev. 1981). Thus, just as holding elections was a recurring expense supported by the Legislature in *Helton*, here, redistricting is also a recurring expense supported by the Legislature. The Petitions do not alter that fact or require a new and specific level of appropriation.

Further to this point, funding for redistricting is generally not reflected in a budget line item. Instead, it is included in the general

appropriation to fund the Legislature's business. *See, e.g.*, S.B. 1, 80th Leg. (Nev. 2021); S.B. 1, 66th Leg. (Nev. 1991); S.B. 1, 61st Leg. (Nev. 1981). This is also true in the case of redistricting that occurred pursuant to supervision of the courts. In 2011, the Legislature failed to complete the redistricting process during the regular 120-day legislative session. S.B. 497, 76th Leg. (Nev. 2011) (redistricting bill vetoed by Governor); A.B. 566, 76th Leg. (Nev. 2011) (same). The task then fell to the courts after Governor Sandoval declined to call a special session on the subject. Brian L. Davie & Michael J. Stewart, *Legislative Redistricting, in* 2018 Political History of Nevada 401, 408 (issued by Nevada Secretary of State Barbara Cegavske, produced jointly with the Research Division of the Nevada Legislative Counsel Bureau). The First Judicial District Court appointed three special masters to develop maps, which the court ultimately adopted. *Id.* at 408-09. The Legislature did not appropriate specific funds to support the Court's oversight of the redistricting process prior to it doing so. *See generally* 76th Leg. (Nev. 2011); 77th Leg. (Nev. 2013).

Moreover, it is entirely possible that the Petitions would decrease the costs of redistricting. The Legislature could decide not to fund the

Commission at all, instead making it a volunteer effort. Nothing in the Petitions precludes that possibility. Alternatively, even if the Legislature decides to fund it, the Petitions could eliminate the possibility of intracycle redistricting. This could reduce the cost of redistricting altogether. Under the current scheme, the Legislature can re-draw the lines as many times as the Legislature deems appropriate. *See* Nev. Const. art. 19, § 5. The Legislature may also currently redistrict during a special session, further increasing the costs associated with redistricting. Conversely, the Petitions provide that the term of each commissioner expires once redistricting is complete. 1 JA 12-17, 47-52. Thus, the Petitions provide for uniformity and establish a single redistricting process for each census cycle. This could decrease redistricting costs by eliminating intracycle redistricting.

That Petition C-04-2023 will require redistricting after the 2026 general election does not change this conclusion. The Legislature has always had the prerogative to redistrict at any time. *See, e.g.*, *Legislative Redistricting,* in 2018 Political History of Nevada 401, 401-47. As such, the fact that Petition C-04-2023 will require redistricting after the 2026 general election does not create an "additional" redistricting. As is the

case with the other redistricting that will take place, Petition C-04-2023 merely redirects the task of redistricting from the Legislature to the commission. This is underscored by the fact that the Legislature has redistricted multiple times after a decennial census and before the next decennial census in the past. *See, e.g.*, A.B. 1, 11th Special Leg. (Nev. 1965) (redistricting out of cycle) S.B. 62, 57th Leg. (Nev. 1973) (same); A.B. 375, 72nd Leg. (Nev. 2003) (same).

These facts highlight the point that the Petitions do not call for a specific appropriation of any "set amount or percentage." The Petitions certainly do not require any budgeting official to "approve the appropriation or expenditure, regardless of any other financial considerations." *Herbst Gaming, Inc.*, 122 Nev. at 890, 141 P.3d at 1233. The Petitions simply task a new entity—the independent redistricting commission—with performing a function the Nevada Constitution already mandates. Thus, the Petitions are distinguishable from *Reid* and are more akin to the petition in *Helton*, which this Court determined would not require an expenditure of money to implement. 138 Nev. Adv. Op. 45, 512 P.3d at 318.

That this Court should reject the district court's interpretation of *Reid* as a bar to the Petitions is likely obvious. The district court's interpretation calls into doubt numerous constitutional provisions enacted by initiative petition, as an argument can certainly be made that each of these petitions in some way created a government expenditure. *See, e.g.*, Nev. Const. art. 1, § 21 (initiative petition recognizing validity of same-sex marriage and requiring the state to process same-sex marriage licenses, thereby requiring county clerks to process additional marriage licenses); Nev. Const. art. 1, § 22 (initiative petition allowing eminent domain proceedings and requiring the government to pay "the highest price the property would bring on the open market"); Nev. Const. art. 2, § 10 (initiative petition limiting campaign contributions and necessitating changes in the campaign finance reporting and compliance system); Nev. Const. art. 4, § 38 (initiative petition allowing the use of medical marijuana and implementing a cannabis compliance and taxation system); Nev. Const. art. 4, § 39 (initiative petition requiring increased usage of renewable energy necessitating changes to the state reporting and compliance structure); Nev. Const. art. 10, § 3 (initiative petition exempting household goods from taxation necessitating changes

to tax reporting systems and compliance training process); Nev. Const. art. 10, § 3B (initiative petition exempting durable medical equipment from taxation necessitating changes to state tax reporting systems and compliance training); Nev. Const. art. 11, § 6 (initiative petition establishing the priority of education funding and necessitating sufficient education funding before any other appropriation); Nev. Const. art. 15, § 16 (initiative petition establishing minimum wage increases and necessitating sufficient appropriations to pay minimum wage level state and local government employees).

The preclusion of constitutional amendments seeking to modify an already existing expense only chills the people's initiative power. Such an interpretation flies in the face of well-established policy directives for initiative proposals. The Petitions are entirely consistent with other initiative petitions that altered the Nevada Constitution and the district court erred in determining otherwise.

III. The Petitions' Descriptions of Effect Are Straightforward, Succinct, and Nonargumentative

NRS 295.009(1)(b) requires each initiative petition to "[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." The description of effect

"facilitates the constitutional right to meaningfully engage in the initiative process by helping to prevent voter confusion and promote informed decisions." *Las Vegas Taxpayer Accountability Comm. v. City Council of City of Las Vegas*, 125 Nev. 165, 177, 208 P.3d 429, 437 (2009) (internal quotation marks omitted). A description of effect "must be a straightforward, succinct, and nonargumentative summary of what the initiative is designed to achieve and how it intends to reach those goals." *Educ. Initiative PAC*, 129 Nev. at 37, 293 P.3d at 876. Because the description of effect is limited to only 200 words, it "cannot constitutionally be required to delineate every effect that an initiative will have; to conclude otherwise could obstruct, rather than facilitate, the people's right to the initiative process." *Id.* at 37-38, 293 P.3d at 876. "In determining whether a ballot initiative proponent has complied with NRS 295.009, it is not the function of this court to judge the wisdom of the proposed initiative." *Id.* at 41, 293 P.3d at 878 (internal quotation marks omitted). The opponent of the initiative bears the burden of demonstrating that the description of effect is insufficient. *Id.* at 42, 293 P.3d at 879.

First, the district court incorrectly concluded that the Petitions' descriptions of effect "fail to explain that the Petitions will result in the expenditure of state funds to fund the Commission." 2 JA 360. As discussed herein, the Petitions do not require a description of an expenditure because the Petitions do not necessitate such an appropriation. *See supra*, Section II. Accordingly, to the extent that the district court's conclusion on Article 19, Section 6 is reversed, then the descriptions of effect are valid.

Second, the district court also incorrectly concluded that the description of effect for Petition C-04-2023 fails to explain that "the Petition would require mid-cycle redistricting and invalidate the existing legislative plans and congressional districts early, in 2027, when they would otherwise remain in force until 2031." 2 JA 360. There is simply no requirement in Petition C-04-2023 that the previously drawn maps should be replaced. The Commission has the option to adopt the same maps previously 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. Indeed, it is exactly the type of "hypothetical" effect the Nevada

Supreme Court has held need not be included in the description of effect. *See Herbst Gaming, Inc.*, 122 Nev. at 889, 141 P.3d at 1232.

Ultimately, the descriptions of effect in the Petitions describe the changes to the redistricting process and are "a straightforward, succinct, and nonargumentative statement of what the initiative petition[s] will accomplish and how [they] will achieve those goals." *Educ. Initiative PAC*, 129 Nev. at 38, 293 P.3d at 876.

IV. The District Court Incorrectly Applied the Doctrine of Issue Preclusion to Bar Fair Maps' Arguments

The district court incorrectly concluded that issue preclusion barred Fair Maps from "denying that the Petitions will require a government expenditure." 2 JA 358-60. Jeng only raised issue preclusion for the first time in his reply brief in the district court. 2 JA 184, 226. It is well-established that a party cannot raise new arguments and/or issues for the first time in its reply brief. *See, e.g.*, *Phillips v. Mercer*, 94 Nev. 279, 283, 579 P.2d 174, 176 (1978); *Blouin v. Blouin*, 67 Nev. 314, 316, 218 P.2d 937, 938 (1950); *see also Zamini v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (noting "[t]he district court need not consider arguments raised for the first time in a reply brief."); *Knapp v. Miller*, 873 F. Supp. 375, 378 n.3 (D. Nev. 1994). The reasoning behind this rule is "the opposing

party is not afforded any opportunity to respond." *Knapp*, 873 F. Supp. at 378 n. 3.

> The reasons [why a court will not review issues first raised in the reply brief] are obvious. It robs the [opposing party] of the opportunity . . . to present an analysis of the pertinent legal precedent that may compel a contrary result. The rule also protects this court from publishing an erroneous opinion because we did not have the benefit of the [opposing party's] response.

Stump v. Gates, 211 F.3d 527, 533 (10th Cir. 2000); *see also Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011) (declining to consider argument because moving party "raised it for the first time in his reply brief, thereby depriving [the non-moving party] of a fair opportunity to respond"); *Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 502, 117 P.3d 193, 198-99 (2005) (arguments raised for first time in reply brief need not be considered). The district court's subsequent adoption of the untimely argument was therefore in error.

Even if this Court were to consider Jeng's untimely issue preclusion argument, issue preclusion is inapplicable here. *Alacantra v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014) ("We review a district court's conclusions of law, including whether claim or issue preclusion applies, de novo."). In *Personhood Nev. v. Bristol*, this Court

considered an appeal regarding appellant's proposed ballot initiative petition. 126 Nev. 599, 600, 245 P.3d 572, 573 (2010). The district court determined the proposed initiative violated the single subject rule and enjoined its placement from the general election ballot. *Id.* at 601, 245 P.3d at 574. The district court's determination was appealed; however, a decision was not rendered prior to the deadline for submitting initiatives with the necessary number of signatures to the Secretary of State. *Id.* The appeal was thus moot. *Id.*

Rather than dismissing the appeal, the *Bristol* court ordered supplemental briefing regarding whether the district court's order had a preclusive effect on future litigation. *Id.* at 601-02, 245 P.3d at 574. The Court determined that vacating the district court's order was not necessary, because it adopted Restatement (Second) of Judgments, which advocates that "issue preclusion principles do not apply when an appeal has been rendered moot." *Id.* at 604-05, 245 P.3d at 576. The Court ultimately concluded "*the district court's order has no preclusive effect*, and thus, there is no need to set the order aside to avoid it being used as binding precedent." *Id.* at 605, 245 P.3d at 576 (emphasis added).

Here, the district court allowed exactly what *Bristol* prohibited—the preclusive use of a prior district court's order when an appeal was rendered moot. In the 2020 Petition appeal, Fair Maps cross appealed, arguing the district court erred in determining that its original description of effect was misleading. *Jackson v. Fair Maps Nevada PAC*, No. 80563, 2020 WL 4283287, at *1 (Order of Affirmance, July 24, 2020). The cross-appeal was dismissed, with the Court noting, "[i]n light of our above-mentioned determination, however, *this issue is moot*." *Id.* (emphasis added). Thus, the district court incorrectly concluded that Fair Maps is precluded from arguing whether the Petitions will require expenditures because such a conclusion is categorically barred under *Bristol*.

Even if issue preclusion did apply to the Petitions, the required factors for issue preclusion were not met. To determine whether issue preclusion should apply, this Court articulated a four-part test: "(1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; . . . (3) the party against whom the judgment is asserted must have been a party or in privity with a party to

the prior litigation; and (4) the issue was actually and necessarily litigated." *Five Star Cap. Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008), *holding modified on other grounds by Weddell v. Sharp*, 131 Nev. 233, 350 P.3d 80 (2015). As the party asserting preclusion, Jeng bears the burden of proving the preclusive effect of the judgment. *Bennett v. Fidelity & Deposit Co. of Maryland*, 98 Nev. 494, 452, 652 P.2d 1178, 1180 (1982). Jeng failed to meet this burden.

First, this Court has never sanctioned the form of issue preclusion allowed by the district court in this case: non-mutual offensive issue preclusion, in which "the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.4 (1979). Instead, this Court has repeatedly stated that issue preclusion applies only in subsequent litigation "between the parties" to the prior case. *Five Star*, 124 Nev. at 1055, 194 P.3d at 713-14 (explaining that issue preclusion "applies to prevent relitigation of *only* a specific issue that was decided in a previous suit *between the parties*.") (emphasis added); *see also id.* at 1052, 194 P.3d at 711 (stating issue preclusion may "apply when the issues addressed in an earlier suit arose

in a later suit *between the parties*") (emphasis added). Those statements in turn are supported by this Court's pre-*Five Star* case law, where this Court likewise stated that issue preclusion applies only to "issues that were actually decided and necessary to a judgment in an earlier suit on a different claim *between the same parties*." *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 894, 59 P.3d 1212, 1216 (2002) (emphasis added). Because the parties from the 2020 Petition are not the same as the instant case, issue preclusion is not applicable. *See Jackson v. Fair Maps Nevada PAC*, No. 19-OC-002909 1B (Nev. 1st Jud. Dist. Ct. Jan 2, 2020), 1 JA 19-23 (2020 petition).

Second, the ruling on the 2020 Petition was not on the merits and did not become final. *See Bristol*, 126 Nev. at 605, 245 P.3d at 576. The entirety of the litigation related to the 2020 Petition, including Fair Maps' cross-appeal, was mooted as a result of the district court's approval of an amended petition with a revised description of effect. Therefore, there is no binding or final judgment that would bind Fair Maps. Third, the Petitions are not identical. Not only are the years different, but the 2020 Petition required an earlier redistricting. 1 JA 54-58. Here,

Petition C-03-2023 requires that redistricting only be completed "following each federal census." *Id.* at 15-16.

Accordingly, Jeng failed to satisfy his burden to prove the preclusive effect of the 2020 Petition judgment and the district court incorrectly determined Fair Maps was precluded from maintaining that the Petitions do not require an expenditure of state funds.

V. The Untenable Application of *Reid* Unduly Limits the Fundamental Right to Amend the Nevada Constitution by Initiative Petition

The "right to initiate change in this state's laws through ballot proposals is one of the most basic powers enumerated in this state's constitution." *Univ. & Cmty. College Sys. Of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 734, 100 P.3d 179, 195 (2004). Further, "[t]his court has consistently held that the initiative powers granted to Nevada's electorate are broad." *We the People Nevada v. Miller*, 124 Nev. 874, 886, 192 P.3d 1166, 1174 (2008). Indeed, in interpreting initiative petitions, this court "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. Rts. v. Heller*, 122 Nev. 894, 912, 141 P.3d 1235, 1247 (2006).

As the concurrence in *Reid* properly noted, "under the plain language of Article 19, Section 6 of the Nevada Constitution, its funding mandate applies only to initiative petitions proposing statutes or statutory amendments, not to initiatives proposing constitutional amendments." *Reid,* 512 P.3d at 306 (Herndon, J., concurring). Section 6 is "unambiguous and clearly singles out two distinct initiative-based actions available to the people: proposals for new statutes and proposals for amendments to existing statutes; while specifically excluding a third initiative-based action available to the people: proposals to amend the constitution." *Id.* (Herndon, J., concurring). When a constitutional provision is unambiguous, the court will apply it according to the plain language of the provision. *Beers*, 122 Nev. at 942, 142 P.3d at 347 (2006); *see also In re Resort at Summerlin Litig.*, 122 Nev. 177, 185, 127 P.3d 1076, 1081 (2006) (noting when "a general statutory provision and a specific one cover the same subject matter, the specific provision controls"). "Because a state constitution is meant to be a basic set of laws and principles that set out the framework of the state's government, including a funding provision for each specific basic law

and principle within that document would be inappropriate." *Reid*, 512 P.3d at 307 (Herndon, J., concurring).

Applying Article 19, Section 6 to constitutional initiatives and creating a requirement for ballot initiatives proposing changes to the Nevada Constitution to identify a specific source of funding runs afoul of the constitutional right to file ballot questions. *See, e.g.*, Nev. Const. art. 19, § 2. Under the district court's expansive interpretation of *Reid*, any constitutional petition that increases expenses in any way is invalid. The expansive application of *Reid* would seemingly invalidate a number of constitutional provisions that have previously been enacted by initiative petition. *See, supra*, Section II.

Moreover, any concern that a constitutional initiative petition is an unfunded mandate will require the initiative petition to include a taxing provision in the Nevada Constitution. Currently, the Nevada Constitution delegates the power to tax to the Legislature. While the Constitution directs the Legislature to impose taxes in certain circumstances, Nev. Const. art. 10, §1 (property tax); Nev. Const. art. § 5 (mining tax), and exempts certain things from tax, Nev. Const. art. 10, § 1 (income and inheritance tax); Nev. Const. art. 10, § 3 (household

goods and furniture); Nev. Const. art. 10, § 3A (food); Nev. Const. art. 10, § 3B (durable medical equipment), the Constitution *does not actually impose any taxes*. By requiring taxes to be imposed directly by or within the Constitution on a constitutional initiative petition, the Nevada Constitution will fundamentally change. Due to the complicated nature of taxes and how they apply, the imposition of taxes is better suited for easily amendable statutes rather than the Constitution. Moreover, allowing initiative petitions to be challenged based on the mere possibility that a petition will require an appropriation or expenditure quickly creates a slippery slope. Challenges can quickly morph into disputes about the level of funding which may be required, which in turn may lead to long evidentiary hearings in the district court, including the lengthy presentation of testimony and retaining experts. This in turn would only further delay any proposed initiative petitions and effectively prevent any initiative petition from making it to the ballot. Ultimately, an initiative petition "'must propose policy—it may not dictate administrative details.' Including administrative details in the Constitution would impermissibly ignore its very definition as "original legislation" and

would effectively turn on its head the fundamental concept of the Constitution as organic law." *Nevadans for the Prot. of Prop. Rts.*, 122 Nev. at 915, 141 P.3d at 1249 (internal quotation makrs omitted). The ultimate import of *Reid* is that any initiative petition to amend the Nevada Constitution which includes any possibility of an expenditure, no matter how remote or speculative that expenditure may be, will need to include its own tax provision to survive an unfunded mandate challenge. This is not tenable and would fundamentally distort Nevada's Constitution.

In sum, this Court should modify the *Reid* decision to explain that Article 19, section 6 applies only to initiative petitions seeking a statutory change, but not to initiative petitions seeking a constitutional change. Alternatively, this Court should find that *Reid* applies only in cases in which there is evidence of a direct and non-discretionary appropriation or expenditure requirement in the initiative petition itself. *See Helton*, 138 Nev. Adv. Op. 45, 512 P.3d at 318; *Herbst Gaming*, 122 Nev. 877, at 890-91, 141 P.3d at 1232-33. *Reid* should not apply in cases, such as the instant action, where funding is shifted from a mandatory preexisting expense already funded by the Legislature,

where the requirement for new spending is speculative, or where the petition will allow government officials to exercise discretion in implementing the petition. To apply and interpret *Reid* to essentially act as a categorical bar to all constitutional initiative petitions that do not insert a tax into the Constitution effectively deprives citizens of the constitutional right to amend their own Constitution.

VI. *Reid*'s Holding That NRS 295.061(1) Is Directory Unreasonably Serves to Keep Initiative Petitions off the Ballot

This Court's prior interpretation of NRS 295.061(1)'s 15-day hearing-setting requirement as "directory," rather than mandatory, significantly impacts the constitutional right to file an initiative petition. *Reid*, 138 Nev. Adv. Op. 47, 512 P.3d at 300-01. The lengthy delays and obstructive maneuvers, which occurred here, continue to plague all initiative petitions cases and encourage litigants to use challenges to delay an initiative petition from being place on the ballot.

While this court emphasized that "district courts must make every effort to comply with the expedited, statutory time frame for considering initiative challenges," this ideal is not met in practice. *Reid*, 138 Nev. Adv. Op. 47, 512 P.3d at 301. Litigants are well aware that the practical

effects of initiative petition challenges being filed in the First Judicial District Court can create dispositive delays. Indeed, it is difficult to dispute that an important goal of any lawsuit filed against a constitutional initiative petition is to reduce the already limited period in which petitions must gather signatures on the petition. Defeating a petition simply by running out the clock on the signature gathering prior is just as effective as defeating a petition on substantive legal arguments.

For example, here, Jeng waited until the last possible day under NRS 295.061(1) to challenge the Petitions. 1 JA 1-138. Jeng then filed unnecessary peremptory challenges, knowing that no other judge in the First Judicial District Court was available to hear the case. *Id.* at 139-142. These peremptory challenges required the case to be assigned to a Senior Judge, who was not appointed until January 10, 2024 (Petition C-03-2023) and January 24, 2024 (Petition C-04-2023), despite Judge Russell's December 15, 2023 orders transferring the cases to a senior judge. *Id.* at 143-148. The case then faced additional delays, as a hearing was originally set for March 8, 2024, *92 days from the filing of the Complaints* and 115 days from the filing of the Petitions. After Fair Maps requested an earlier hearing, the hearing was ultimately set for February

15, 2024, *70 days after the filing of the Complaints*—a far cry from NRS 295.061(1)'s 15-day hearing requirement.

Even after the hearing at which a verbal decision was announced, the Petitions languished for an additional 20 days until the district court finally issued its order, adopting Jeng's proposed order in full. 2 JA 353-62. In sum, from the time the Complaints were filed to the time the district court issued its order, it took 90 days for a decision to be rendered on the Petitions. Ultimately, without this Court's intervention, litigants will continue to abuse the initiative process to unreasonably delay initiative petitions from ever reaching voter's ballots. *See, e.g.*, *Pest Comm. v. Miller*, 626 F.3d 1097, 1109 (9th Cir. 2010) (recognizing "that challenges by opponents have tied initiative petitions up in litigation for extended periods of time or that, in some cases, they have left proponents without sufficient time to gather signatures.").

CONCLUSION

For all the above reasons, this Court should reverse the district court's order.

AFFIRMATION

The undersigned does hereby affirm that the preceding document does not contain the Social Security number of any person.

Dated this 20th day of March 2024.

McDONALD CARANO LLP

By: */s/ Adam Hosmer-Henner*

Lucas Foletta (NSBN 12154)
Joshua Hicks (NSBN 6679)
Adam Hosmer-Henner (NSBN 12779)
Katrina Weil (NSBN 16152)
100 West Liberty St., 10th Floor
Reno, Nevada 89501
lfoletta@mcdonaldcarano.com
jhicks@mcdonaldcarano.com
ahosmerhenner@mcdonaldcarano.com
kweil@mcdonaldcarano.com

Attorneys for Appellant Fair Maps

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font, Century Schoolbook font. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 7285 words.

Under NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion about matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions if this brief does not conform to the requirements of the Nevada Rules of Appellate Procedure.

Dated this 20th day of March 2024.

McDONALD CARANO LLP

By: */s/ Adam Hosmer-Henner*

Lucas Foletta (NSBN 12154)
Joshua Hicks (NSBN 6679)
Adam Hosmer-Henner (NSBN 12779)
Katrina Weil (NSBN 16152)
100 West Liberty St., 10th Floor
Reno, Nevada 89501
lfoletta@mcdonaldcarano.com
jhicks@mcdonaldcarano.com
ahosmerhenner@mcdonaldcarano.com
kweil@mcdonaldcarano.com

Attorneys for Appellant Fair Maps

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDONALD CARANO LLP and that on March 20, 2024, a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system.

/s/ *Pamela Miller*
An Employee of McDonald Carano