

**In the
Supreme Court of the State of Nevada**

FAIR MAPS NEVADA, a political
action committee,

Appellant,

vs.

ERIC JENG, an individual; and
FRANCISCO V. AGUILAR, in his
official capacity as NEVADA
SECRETARY OF STATE,

Respondents.

Electronically Filed
Mar 27 2024 04:51 PM
Elizabeth A. Brown
Clerk of Supreme Court

Case No.: **88263**

First Judicial District Court
Case Nos.: 23 OC 00137 1B
23 OC 000138 1B

RESPONDENT ERIC JENG'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed.

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Dated this 27th day of March, 2024.

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INTRODUCTION

The Petitions at issue in this appeal would create an entirely new government body and task it with an expensive, procedurally and substantively demanding duty. But the Petitions do not raise any revenue to fund this new body, and their descriptions of effect do not warn potential signatories of the associated expenses. The Petitions therefore violate Article 19, Section 6’s prohibition on unfunded mandates in initiative petitions, and they contain deficient descriptions of effect in violation of NRS 295.0061(1). The district court properly enjoined the Secretary of State from taking further action on them.

This challenge should not have been necessary, because Fair Maps Nevada previously proposed a substantively identical petition in advance of the 2020 election, and the district court ruled four years ago that it “will result in the expenditure of state funds.” *Jackson v. Fair Maps Nev. PAC*, No. 19-OC-000209-1B (Nev. 1st Jud. Dist. Ct. Jan. 2), JA000028, *aff’d*, No. 80563, 2020 WL 4283287 (Nev. July 24, 2020) (unpublished disposition), JA000032–34. This Court affirmed after Fair Maps Nevada declined to press its cross-appeal challenging that ruling. *See Jackson*, 2020 WL 4283287. But when Fair Maps Nevada proposed two petitions

that are substantially identical to the one in *Jackson* four years later, it opted to pretend that the *Jackson* litigation never happened.

The district court correctly held that the *Jackson* decision bars Fair Maps Nevada from denying that the Petitions would require a government expenditure, because that issue was actually litigated and decided against Fair Maps Nevada in *Jackson*. The district court also correctly held in the alternative that the Petitions mandate an unfunded expenditure by creating a new government body to engage in an expensive, mandatory task without providing any revenue to fund it. Fair Maps Nevada’s contrary arguments ignore the substantial record support for the district court’s conclusion and are irreconcilable with the governing legal test. The district court therefore rightly held that the Petitions violate Article 19, Section 6 and that their descriptions of effect are inadequate.

The Court should affirm.

STATEMENT OF THE CASE

On November 14, 2023, Fair Maps Nevada filed Initiative Petitions C-03-2023 and C-04-2023 (the “Petitions”) with the Secretary of State. JA000012–17; JA000047–52. The Petitions seek to amend Article 4,

Section 5 of the Nevada Constitution to establish an “Independent Redistricting Commission” and require that the Commission, rather than the Legislature, assume redistricting responsibilities. JA000013; JA000048. The only difference between them is that Petition C-04-2023 would require an additional, mid-decade round of redistricting immediately after the adoption of the Petition, while Petition C-03-2023 would not require the Commission to commence its duties until after the next decennial census. JA000013; JA000048.

On December 7, 2023, Plaintiff-Respondent Eric Jeng timely commenced separate cases in the First Judicial District Court challenging each of the Petitions. JA000001–35; JA000036–69. He alleged that both Petitions violate Article 19, Section 6 of the Nevada Constitution’s prohibition on unfunded mandates by creating a new government body to engage in a costly redistricting process without raising any offsetting revenue, and NRS 295.009(1)’s description of effect requirement, by failing to explain that the Petitions would require an expenditure of state funds and that Petition C-04-2023 would require an additional round of mid-cycle redistricting. JA000001–35; JA000036–69. Jeng simultaneously filed Complaints and memoranda of law in both

cases. JA000001–35; JA000036–69; JA000070–130; JA000104–138.

After intervening to defend the Petitions, Fair Maps Nevada filed a responsive brief regarding each Petition on December 26, 2023. JA000161–71, JA000172–81. Jeng filed a reply brief regarding each Petition on January 4, 2024. JA000182–223; JA000224–64. Eighteen days later, on January 22, Fair Maps Nevada filed its Motion to Dismiss and Motion to Strike in each case. JA000278–94; JA000295–311; JA000312–16; JA000317–21. Jeng opposed both motions in both cases on February 8. JA000322–25; JA000326–29; JA000330–36; JA000337–43.

The district court held a consolidated hearing of all pending issues in both cases on February 15. After hearing argument from both parties, the court orally denied the Motions to Dismiss and the Motions to Strike and held that both Petitions violate Article 19, Section 6’s prohibition on unfunded mandates and contain legally deficient descriptions of effect. The district court entered its written order on March 6, and this appeal followed. JA000353–62; JA000391–93; JA000394–96.

STATEMENT OF THE FACTS

Each of the Petitions would amend Article 4, Section 5 of the Nevada Constitution to establish a new, seven-member state body called

the “Independent Redistricting Commission,” and require that the Commission, rather than the Legislature itself, undertake redistricting of Nevada’s state legislative plans and congressional districts after each decennial census. JA000013; JA000048.

The Petitions also impose a host of procedural and substantive requirements that the Commission would be required to follow in carrying out this task. JA000014; JA000049. Substantively, the Commission would have to ensure that districts comply with the U.S. Constitution and applicable federal law, have an approximately equal number of inhabitants, are geographically contiguous, 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,” do not “unduly advantage or disadvantage a political party,” reflect county, city, and township boundaries, minimize the division of communities of interest, are reasonably compact, and consider the number of politically competitive districts. JA000014; JA000049. Procedurally, the Commission’s meetings would be required to be open to the public, and the Commission would be obligated to ensure that the public has opportunities to view, present

testimony, and participate in hearings. JA000013–14; JA000048–49.

The Petitions are identical, with one exception: Petition C-04-2023 would require that the Commission redraw Nevada’s state legislative plans and congressional districts in 2027. JA000049.

Neither Petition provides for any new revenue to fund its mandates.

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 such individuals. Commission meetings shall be open to the public which 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 will require redistricting following each federal census.

JA000015. Petition C-04-2023’s description of effect replaces the last paragraph with the following: “This amendment will require redistricting following the 2026 election and each federal census thereafter.” JA000050.

This was not the first time that Fair Maps Nevada had sponsored a petition proposing this constitutional language. In 2019, Fair Maps Nevada sponsored an initiative petition that was materially identical to Petition C-04-2023. JA000019–20. The petition was challenged in court, and in *Jackson*, No. 19-OC-000209-1B, JA000025–29, the First Judicial District Court held that it required a government expenditure and that the description of effect—which made no mention of this—was legally deficient. JA000028–29.¹ In particular, the court concluded that the description of effect was “inadequate in that it does 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.” JA000028. The court rewrote the description of effect to specify that the 2019 petition “will result in the expenditure of state funds to

¹ The plaintiff in *Jackson* limited his challenge to the description of effect and did not allege an Article 19, Section 6 violation. JA000026.

fund the Commission.” JA000029. The court also concluded that the description did not “adequately inform voters that the Petition would result in redistricting in 2023 after the Legislature has already drawn electoral districts after the 2020 Census” and rewrote the description to expressly state that the 2019 petition would lead to new maps “which could replace maps drawn by the Legislature after the 2020 census.” JA000028–29.

Both parties to *Jackson* appealed, and this Court affirmed, holding that the amended description of effect ordered by the district court was not misleading and that Fair Maps Nevada’s cross-appeal was moot because “Fair Maps has not indicated that it would prefer to proceed with its original petition instead of its amended petition.” JA000032–33. The 2019 petition was never submitted to voters because it failed to attract sufficient signatures.

SUMMARY OF THE ARGUMENT

The district court rightly enjoined the Secretary from taking further action on the Petitions because they violate the requirements for Nevada constitutional initiatives.

First, the district court properly held that issue preclusion prevents

Fair Maps Nevada from relitigating whether the Petitions require an expenditure of state funds. The Petitions are materially identical to the petition considered in *Jackson*, which the district court held—in a case in which Fair Maps Nevada was a party—“will result in the expenditure of state funds.” JA000028. Issue preclusion bars Fair Maps Nevada from relitigating that question now, because: (1) the Petitions are substantively identical to the petition at issue in *Jackson*, (2) the 2020 ruling was on the merits and became final when Fair Maps Nevada chose not to pursue its cross-appeal of the expenditure issue, (3) Fair Maps Nevada was a defendant in the prior action, and (4) the issue was actually and necessarily litigated. *Five Star Cap. Corp. v. Ruby*, 124 Nev. 1048, 1053, 1055, 194 P.3d 709, 712–13 (2008). Jeng properly raised *Jackson*’s preclusive effect on this case and the district court did not abuse its discretion in rejecting Fair Maps Nevada’s argument that it was waived below.

Second, preclusion aside, the district court properly held that the Petitions contain an unfunded mandate in violation of Article 19, Section 6 because they would require an expenditure of state funds. The Petitions would create a new government body and require it to carry out a difficult

task. That body will necessarily require funding, as record evidence of Nevada's redistricting expenditures and other states' redistricting commission expenditures confirms. That result is compounded for Petition C-04-2023, which would also require an additional round of mid-cycle redistricting that would not otherwise be necessary.

Third, the Petitions' descriptions of effect are legally deficient, because they fail to explain that the Petitions will result in the expenditure of state funds to fund the Commission. Petition C-04-2023's description is also deficient because it further fails to inform voters that it would require otherwise unnecessary mid-cycle redistricting.

Finally, the Court should not revisit its holdings from two years ago in *Education Freedom PAC v. Reid*, 138 Nev. Adv. Op. 47, 512 P.3d 296 (2022), that Article 19, Section 6's unfunded mandate bar applies to initiatives proposing constitutional amendments and that NRS 295.0061's 15-day hearing-setting deadline in petition challenges is directory, not mandatory. The Court carefully considered those issues in *Reid*, and Fair Maps Nevada offers no weighty reasons to revisit them—only mere disagreement.

ARGUMENT

I. Issue preclusion bars Fair Maps Nevada from denying that the Petitions require government expenditures.

Fair Maps Nevada's contention that the Petitions do not require government expenditures fails at the outset because Fair Maps Nevada already litigated that issue and lost with respect to a materially identical petition it sponsored in advance of the 2020 general election. Issue preclusion therefore bars Fair Maps Nevada from relitigating that question. And contrary to Fair Maps Nevada's argument, Jeng did not waive the application of that doctrine.

A. Issue preclusion applies because Fair Maps Nevada litigated this question in 2020 and lost.

Issue preclusion bars Fair Maps Nevada's argument that the Petitions do not require a government expenditure, because Fair Maps Nevada litigated that question with respect to a substantively identical petition in 2020 and lost. *See Jackson*, No. 19-OC-00209-1B, JA000025–29. The district court held that issue preclusion barred Fair Maps Nevada from relitigating that question in this case. The Court reviews the applicability of issue preclusion *de novo*. *State, Univ. & Comm. College*

Sys v. Sutton, 120 Nev. 972, 984, 103 P.3d 8, 16 (2004).²

Issue preclusion applies where (1) the prior litigation involved “the same fact issue”, even if the legal claims are “substantially different,” provided that (2) the prior ruling was on the merits and became final, (3) the party to be precluded was a party to the prior action, and (4), the issue was “actually and necessarily litigated.” *Five Star Cap. Corp.*, 124 Nev. at 1053, 1055, 194 P.3d at 712–13 (quoting *LaForge v. State, Univ. & Cmty. Coll. Sys. of Nev.*, 116 Nev. 415, 420, 997 P.2d 130, 134 (2000)). Each of those elements is met here.

First, the Petitions are substantively identical to the petition at issue in *Jackson*, so whether the Petitions will require an expenditure of state funds is “the same fact issue” decided there. *Id.* at 1053, 194 P.3d at 712; *compare* JA000013–14 (Petition C-03-2023) *and* JA000048–49

² Issue preclusion also includes a discretionary component: “[o]nce it is determined that issue preclusion is available, the actual decision to apply it is left to the discretion of the district court.” *Sutton*, 120 Nev. at 984, 103 P.3d at 16. Fair Maps Nevada argues only that the mandatory requirements for issue preclusion are not met, and nowhere argues—in its opening brief or in the district court—that the district court should have refused to apply the doctrine on discretionary grounds. Fair Maps Opening Br. at 23–29; JA000288–89; JA000305–06. Any such argument is therefore waived. *Hung v. Behrad*, 138 Nev. Adv. Op. 50, 513 P.3d 1285, 1287 (2022).

(Petition C-04-2023), *with* JA000019–20 (Petition C-02-2019, at issue in *Jackson*). In two sentences of its opening brief, Fair Maps Nevada makes the conclusory argument that “the Petitions are not identical” because “the years [are] different” and “the 2020 Petition required an earlier redistricting.” Fair Maps Opening Br. 28. Fair Maps Nevada did not make that argument below, not even in the proposed sur-reply briefs it filed specifically to address issue preclusion. *See* JA000286–289 (arguing only that the plaintiffs in the two cases are different and the decision was not final and on the merits); JA000303–06 (same).³ The argument is therefore waived. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Regardless, Fair Maps Nevada’s distinction makes no difference: changing the year when redistricting occurs does not affect whether the Petitions will require a government expenditure whenever that happens. Nor does it matter that Jeng, unlike the plaintiff in *Jackson*, brings a challenge under Article 19, Section 6, because “issue preclusion may apply ‘even though the causes of action are substantially different, if the same fact issue is presented.’” *LaForge*, 116 Nev. at 420,

³ The district court considered the arguments in the proposed sur-reply briefs, found that they do not affect its conclusions, and denied Fair Maps Nevada’s request to file a sur-reply brief as moot. JA000357, 361.

997 P.2d at 134 (quoting *Clark v. Clark*, 80 Nev. 52, 56, 389 P.2d 69, 71 (1964)).

Second, the ruling in *Jackson* was on the merits and became final. The district court held that the petition “will result in the expenditure of state funds” and therefore ordered the use of an amended description of effect stating that the petition “will result in the expenditure of state funds to fund the Commission.” JA000028–29. Faced with that order, Fair Maps Nevada had a choice: it could challenge the order, or it could proceed with the amended description. Fair Maps Nevada chose the latter: while it initially cross-appealed from the order, it then told this Court that it preferred to proceed with the amended description of effect rather than press its challenge to the district court’s order. *See Answering Br. on Appeal & Opening Br. on Cross-Appeal, Jackson v. Fair Maps Nev. PAC*, 2020 WL 2042580, at *12 n.1 (Nev. Apr. 6, 2020) (explaining that Fair Maps Nevada would not pursue its cross appeal if the Court dismissed Jackson’s challenge to the amended description of effect). This Court therefore dismissed Fair Maps Nevada’s cross-appeal as moot. *See Jackson*, 2020 WL 4283287, at *1 (“[W]e note that Fair Maps has not indicated that it would prefer to proceed with its original petition

instead of its amended petition.”).

Fair Maps Nevada now argues that the dismissal of its cross appeal as moot robs the district court’s ruling of finality. Fair Maps Opening Br. 24–26 (citing *Personhood Nev. v. Bristol*, 126 Nev. 599, 245 P.3d 572 (2010)). But dismissal of an appeal as moot eliminates a judgment’s preclusive effect only if the “appeal is dismissed as moot *by no fault of the appellant.*” *Bristol*, 126 Nev. at 605, 245 P.3d at 576 (emphasis added). Fair Maps Nevada was directly responsible for the dismissal in *Jackson* because it opted to proceed with the amended description of effect rather than press its challenge to the district court’s order. *Bristol* therefore does not eliminate the preclusive effect of the district court’s order in *Jackson*. To rule otherwise would let a party eliminate the preclusive consequences of a judgment simply by appealing and then declining to pursue the appeal.

Third, “the party against whom the judgment is asserted”—Fair Maps Nevada—was “a party to the prior litigation.” *Five Star Cap. Corp.*, 124 Nev. at 1055, 194 P.3d at 713. Contrary to Fair Maps Nevada’s argument, it makes no difference that Jeng was not also a party in *Jackson*. If this Court wanted to require that both parties be the same for

issue preclusion, it could easily have said so in *Five Star*; indeed, it imposed that very requirement on the separate doctrine of claim preclusion. *See id.* at 1054, 194 P.3d at 712–13 (holding that for claim preclusion, “the parties or their privies [must be] the same”). By instead requiring only that the party being precluded be the same, *Five Star* unmistakably joined the “federal courts and a continually increasing majority of state courts” in recognizing non-mutual issue preclusion. 18A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. § 4464 (3d ed. 2023).

Fair Maps Nevada pulls this Court’s words from their context in arguing that *Five Star* also says issue preclusion applies only to issues previously decided “between the parties.” Fair Maps Opening Br. at 27 (quoting *Five Star Cap. Corp.*, 124 Nev. at 1055, 194 P.3d at 134)). The quoted sentence was addressing a different aspect of issue preclusion: that unlike “claim preclusion,” which “applies to preclude an *entire second suit* that is based on the same set of facts and circumstances as the first suit,” “issue preclusion, as stated in *LaForge*, applies to prevent relitigation of *only a specific issue* that was decided in a previous suit between the parties” *Five Star Cap. Corp.*, 124 Nev. at 1055, 194

P.3d at 713–14 (emphasis added). In the context of a comparison with claim preclusion, *Five Star*'s reference to a “previous suit between the parties” makes sense, as that is the only context in which both doctrines would potentially apply—claim preclusion, unlike issue preclusion, requires that “the parties or their privies are the same.” *Id.* at 1054, 194 P.3d at 713.

Fair Maps Nevada also cites “pre-*Five Star* case law” as requiring identical parties. Fair Maps Opening Br. at 28. But *Five Star* explained that there was a “lack of clarity in [prior] caselaw regarding the factors relevant to determining whether claim or issue preclusion apply,” and it therefore “establish[ed] clear tests for making such determinations” going forward. *Five Star Cap. Corp.*, 124 Nev. at 1054, 194 P.3d at 712–13. *Five Star*'s “clear test[]” for issue preclusion requires only that “the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation.” *Id.* at 1055, 194 P.3d at 713. That test is indisputably satisfied here.

Fourth, the issue of a government expenditure was actually and necessarily litigated, because the plaintiff's brief in the 2020 case argued that the petition would require state funding, JA000241–43, and the

Court so held when it ordered the description of effect revised to say so, JA000028–29. Fair Maps Nevada does not argue otherwise.

The requirements for issue preclusion are therefore met, and Fair Maps Nevada is precluded from denying that the Petitions will require a government expenditure. That conclusion is dispositive, because the Petitions raise no revenue to offset that expenditure, and their descriptions of effect do not describe it.

B. Jeng did not waive application of issue preclusion.

Rather than address issue preclusion head on, Fair Maps Nevada primarily argues that Jeng waived the doctrine by not expressly invoking it in his Complaints and initial supporting memoranda. The district court rejected this waiver argument, JA000357, and this Court reviews that rejection only for abuse of discretion, *see Fort Apache Homes, Inc. v. JPMorgan Chase Bank, N.A.*, No. 72257, 2019 WL 4390833, at *1 (Nev. Sept. 12, 2019) (unpublished disposition) (holding that district court was within its discretion in considering allegedly waived affirmative defense). There was no abuse of discretion here.

Far from waiving the relevance of *Jackson* to these cases, Jeng made it a central component of his arguments from his very first filings,

which repeatedly cited *Jackson*, attached the petition and orders as exhibits, and argued that *Jackson* compels the conclusion that the Petitions will require an expenditure of state funds for the same reason that the materially identical petition challenged in *Jackson* did so. JA000003–04, 08; JA000037, 39. Fair Maps Nevada was therefore on notice from the start of these cases that Jeng planned to rely on *Jackson*'s conclusion that the 2020 petition required a government expenditure. Jeng's opening filings did not call this argument issue preclusion, but that is because there was not yet anyone or anything to preclude: Fair Maps Nevada had not yet intervened in the case, much less made arguments inconsistent with *Jackson*'s holding that the substance of the Petitions required an expenditure.

Despite Jeng's repeated reliance on *Jackson* in the Complaints and supporting memoranda, Fair Maps Nevada chose to ignore the decision entirely in its responsive briefs, not once citing or otherwise acknowledging the decision, and making no effort to factually distinguish the Petitions from the one at issue in *Jackson* or explain why the district court should reach a different result this time. See JA000161–171; JA000172–181. Instead, Fair Maps Nevada proceeded to argue flatly that

the Petitions do not require a government expenditure: precisely the argument that *Jackson* rejected. JA000164–167; JA000175–177. Jeng’s reply briefs then appropriately “rebut[ted]” that “argument raised in the opposition,” First Judicial District Court Rule 3.9, by explaining that issue preclusion barred Fair Maps Nevada from making it. JA000184; JA000226. There was nothing improper about that argument.

The district court therefore did not abuse its discretion in considering the issue preclusion argument. The policy justification for the rule against raising new arguments in a reply brief has no application here. As Fair Maps Nevada itself explains, the reason for the rule is that “the opposing party is not afforded any opportunity to respond” to arguments made for the first time on reply. Fair Maps Opening Br. at 23–24 (quoting *Knapp v. Miller*, 873 F. Supp. 375, 378 n.3 (D. Nev. 1994)). Here, Fair Maps Nevada had every opportunity to address the effect of *Jackson* on this case, both because Jeng raised it in his Complaints and initial memoranda and because Fair Maps Nevada filed proposed sur-reply briefs entirely devoted to issue preclusion, which the district court considered and rejected on the merits. *See* JA000357–59.

Fair Maps Nevada does not cite a single case reversing a district

court's discretionary decision to consider an allegedly waived argument. The vast majority of the cases that Fair Maps Nevada cites involve waiver on appeal—an issue that does not implicate district court discretion at all. *See Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671 n. 7, 262 P.3d 705, 715 n.7 (2011); *Weaver v. State DMV*, 121 Nev. 494, 502, 117 P.3d 193, 198–99 (2005); *Phillips v. Mercer*, 94 Nev. 279, 283, 579 P.2d 174, 176 (1978); *Blouin v. Blouin*, 67 Nev. 314, 317, 218 P.2d 937, 938 (1950); *Stump v. Gates*, 211 F.3d 527, 533 (10th Cir. 2000). In *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007), the Ninth Circuit held only that a district court did not abuse its discretion in refusing to consider an entirely new privilege argument raised for the first time in a reply brief—it did not say that the district court could not have considered that argument if it wanted to. Finally, *Knapp*, 873 F. Supp. at 378, is a district court decision that itself exercises discretion to consider an allegedly waived argument from a reply brief, after explaining that it merely “refine[d]” the party’s original argument, rather than making an entirely new one. That is far closer to the scenario here.

At a minimum, the district court acted within its discretion in rejecting Fair Maps Nevada’s cry of waiver and considering Jeng’s issue

preclusion argument, so that decision provides no basis for reversal of the district court's judgment. And because issue preclusion bars Fair Maps Nevada from denying that the Petitions require a government expenditure, it is dispositive of this case, as it is undisputed that the Petitions raise no revenue to fund that expenditure as Article 19, Section 6 requires.

II. The Petitions mandate an unfunded expenditure because they create a new government body but do not fund it.

Preclusion aside, the result is the same. The Petitions mandate an unfunded government expenditure because they create a new government body, the Independent Redistricting Commission, require it to engage in a procedurally and substantively demanding task, and raise no revenue with which to fund it. JA000013–14; JA000048–49. They therefore violate Article 19, Section 6 of the Nevada Constitution.

Article 19, Section 6 prohibits any petition that “makes an appropriation or otherwise requires the expenditure of money, unless [it] also imposes a sufficient tax, not prohibited by the constitution, or otherwise constitutionally provides for raising the necessary revenue.” Nev. Const. art. 19, § 6. This prohibition applies to constitutional and statutory initiatives alike. *Reid*, 138 Nev. Adv. Op. 47, 512 P.3d at 303.

It serves to prevent initiative proponents from “creat[ing] a hole in the state’s budget” that the Legislature will have to fill, while requiring the people to consider and provide funding to cover the cost of their proposals. *Id.* And contrary to Fair Maps Nevada’s arguments, it is not limited to required appropriations of fixed amounts or percentages, and applies even if “the initiative leaves it up to the Legislature to determine how to fund the proposed change.” *Id.*

A. Record evidence supports the district court’s conclusion that redistricting requires funding.

The district court properly held that the Petitions facially require a government expenditure, explaining that it is “obvious that the creation of a new, seven-member government body tasked with undertaking a mandatory, difficult task will require an expenditure of government funds.” JA000359. The district court found that Nevada’s own past experiences with redistricting, the experiences of other states that have authorized redistricting commissions like the one the Petitions would create anew in Nevada, and the detailed requirements of the Petitions themselves all confirmed this conclusion. *Id.* Each of those factors was fully supported by materials in the district court record. *See* JA000074–75 (citing government documents showing substantial expenditures by

the California, Arizona, and Ohio redistricting commissions); JA000076 (citing government documents describing substantial expenditures by the Nevada Legislature to support its own redistricting activities); JA000185 (citing additional documents from the Nevada Legislature detailing staff and software expenditures to support redistricting).

Fair Maps Nevada never disputed any of these facts in the district court—it merely argued that they were inadequate as a matter of law to show a required expenditure—so there was no need for an evidentiary hearing on them. JA000174–77. In any event, the facts were amply supported by undisputed documentary evidence in the district court record, which confirms that carrying out these activities will, indeed, cost money. JA000074–76; JA000185. That evidence showed that redistricting commissions in other states have required millions of dollars of state funding to carry out their mandates. In California, the Citizens Redistricting Commission incurred more than \$10 million in costs before the adoption of the final set of maps from July 1, 2020, through December 27, 2021. JA000005; JA000039, JA000074–75, JA000109. In Arizona, appropriations for the Independent Redistricting Commission totaled \$12,716,227 for 2011-2017 and \$8,400,000 for 2021-

2022. JA000005; JA000040; JA000075; JA000109. And in Ohio, the Office of Budget and Management estimated that a constitutional amendment establishing a redistricting commission and requiring new districts to be redrawn would cost between \$11 million and \$15.2 million over an eight-year period. JA000005; JA000040; JA000075; JA000109. Redistricting expenditures under the Ohio Redistricting Commission amounted to \$625,000 from 2020 through October 2021, for “redistricting mapping software applications, consulting and research services, mileage reimbursements, and other such expenses related to the process of redistricting.” JA000006; JA000040; JA000075; JA000109.

Nevada’s own redistricting experiences support this conclusion, too. The Nevada Legislature has spent substantial funds on redistricting in the past. JA000006; JA000041; JA000075–76; JA000109–10; JA000185; JA000209–23; JA000227; JA000250–64. And the Nevada legislative committees that have previously undertaken reapportionment and redistricting have done so with the assistance of staff, including research staff, legislative counsel, redistricting and GIS specialists, and special masters, all of which carry significant expenses. JA000006; JA000041;

JA000075–76; JA000110; JA0000209–23; JA000250–64.⁴

The need for substantial funding should be no surprise given the demands of redistricting and the exacting requirements of the Petitions. The Petitions require that the Commission draw districts that comply with the U.S. Constitution and federal law, are approximately equal in population, are geographically contiguous, do not deny or abridge the equal opportunity of racial or language minorities, do not favor any political party, reflect city, county, and township boundaries, keep communities of interest together, are reasonably compact, and consider the number of politically competitive districts. JA000014; JA000048. Complying with these requirements will require significant expert and technological support, none of which is provided for in the Petitions.

Nor will the expenses of the Commission be limited to the redistricting itself. Under the Petitions, the Commission must hold

⁴ The Legislature relies on a fully staffed and salaried Committee to Conduct an Investigation into “Matters Relating to Reapportionment and Redistricting in Nevada.” *See* JA000245. Further, the Committee to Conduct an Interim Study of the Requirements for Reapportionment and Redistricting recommended redistricting software that costs money, including AutoBound by Citygate GIS, which is estimated to fall in the range of \$53,000-67,000. *See* JA000247. The Legislative Commission purchased the AutoBound software and any necessary hardware under the 2021 Session Budget. *See* JA000251–64.

meetings “open to the public,” with an opportunity for public viewing, testimony, and participation, provide public notice of proposed plans and an opportunity for public review and comment, and make its records available as public records. JA000013; JA000048. Meeting all of these requirements necessarily costs money, too, but the Petitions fail to raise any revenue to fund it.

Finally, as the district court also found, Petition C-04-2023 would additionally require an extra round of redistricting in 2027 that would not otherwise be mandatory, and therefore requires an additional expenditure of state funds for that additional redistricting, as well. JA000049. It makes no difference that the Legislature could *choose* to redistrict early in any event, because the Legislature is under no obligation to do so: Petition C-04-2023 creates a new obligation for mid-cycle redistricting that would not otherwise exist. *Rogers v. Heller*, 117 Nev. 169, 175–76, 18 P.3d 1034, 1038 (2001) (per curiam).

B. Fair Maps Nevada’s arguments that the Petitions will not require an expenditure are unpersuasive.

The district court did not err by relying on this substantial, undisputed evidence to conclude that the Petitions would result in a government expenditure.

In arguing otherwise, Fair Maps Nevada primarily relies on the Court's decision in *Helton v. Nevada Voters First PAC*, 138 Nev. Adv. Op. 45, 512 P.3d 309 (2022), which Fair Maps Nevada never even cited below. Fair Maps Opening Br. 10–15; *see* JA0000161–71; JA0000172–81. But the need for an expenditure under the Petitions here is far more obvious, and far less speculative, than it was in *Helton*. The *Helton* petition tasked *existing* government bodies—with existing funding streams—with adjusting their election procedures. *See Helton*, 138 Nev. Adv. Op. 45, 512 P.3d at 318; *see also* Fair Maps Opening Br. at 31; *Helton*, No. 84110, 2022 WL 1131077 (Nev. Mar. 1, 2022). Based on the face of the *Helton* petition, it was therefore at least possible—in the absence of contrary evidence—that election officials could comply with the *Helton* petition using their existing budgets and funding. Here, in contrast, it is *entirely impossible* that the Independent Redistricting Commission could carry out its mandatory activities under the Petitions using its existing funding stream, because *it has no existing funding stream*: the Independent Redistricting Commission does not currently exist.

Fair Maps Nevada's argument that, in the absence of the Petitions, existing government bodies like the Nevada Legislature or the Nevada

courts will otherwise have to engage in redistricting does nothing to change the analysis. The Nevada Legislature and Nevada courts, of course, are existing government bodies with an existing source of funding and existing staff. And neither was created by initiative petition and subject to the mandates of Article 19, Section 6. The fact that the Legislature has a pre-existing obligation to fund itself and any redistricting activities it conducts does nothing to change the fact that under the Petitions, it would now have an obligation to fund the new Commission: a new body, whose members explicitly *cannot* be current legislators, that is not already funded and will therefore require a new appropriation of funds.

Fair Maps Nevada’s argument that the Petition might “decrease the costs of redistricting” overall is similarly unavailing. Article 19, Section 6’s express text requires that initiatives requiring expenditures offset them by “raising the necessary revenue”—it is not enough to make offsetting cuts elsewhere. Nev. Const. art. 19, § 6; *see also Rogers*, 117 Nev. at 176, 18 P.3d at 1038 (requiring new “tax or revenue” to offset all required expenditures). A petition that requires a new expenditure is therefore subject to Article 19, Section 6 for *the full extent of that*

requirement, even if the Legislature might have appropriated some or all of the funding anyways. *See Rogers*, 117 Nev. at 176, 18 P.3d 1038 (explaining that where a petition required half of state revenues to be spent on education, “[t]he entire amount is a new requirement, since otherwise the legislature has broad discretion in determining education funding.”). It therefore makes no difference that funding for the Commission could conceivably be offset by cuts to the Legislature’s own operational budget—cuts that, in any event, are entirely speculative, and that nothing in the Petitions requires.

Finally, Fair Maps Nevada resorts to a policy argument, citing multiple constitutional provisions enacted by initiative petition that it suggests could be called into question by the district court’s decision. Affirming the decision of the district court and concluding that the Petition violates Article 19, Section 6 would be consistent with prior initiative petitions. None of the petitions cited by Fair Maps Nevada is analogous because each either tasked an existing government body or entity with activities already within its purview, Nev. Const. art. 1, § 21,⁵

⁵ Moreover, the current form of Article 1, Section 21 was the result not of an initiative petition but of a legislatively referred amendment under

id. art. 2, § 10, *id.* art. 4, § 38, *id.* art. 10, §§ 3, 3b, *id.* art. 11, § 6, or imposed at most incidental costs to maintain or adjust an existing process, Nev. Const. art. 4, § 39, *id.* art. 10, §§ 3, 3b, *id.* art. 15, § 16, *id.* art. 1, § 22. Some of the examples merely set priorities or impose conditions in the event that an existing government entity decides to do something, Nev. Const. art. 11, § 6, *id.* art. 1, § 22. Thus, as in *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 891, 141 P.3d 1224, 1233 (2006), where the initiative petition gave existing government officials discretion to decide whether or not to expend additional funds, many of the constitutional amendments Fair Maps Nevada references involve potential or uncertain expenditures, and none created an entirely new state body to carry out a mandatory, expensive task, as the Petitions do.

This Court should therefore affirm the district court's holding that the Petitions violate Article 19, Section 6 because they mandate a government expenditure to fund the Commission, without raising the necessary revenue to pay for it.

Article 16, Section 1, which is not subject to Article 16, Section 6's limitations on initiatives.

III. The Petitions’ descriptions of effect are unlawful.

The Petitions’ descriptions of effect violate NRS 293.009(1) because they fail to explain that the Petitions will result in the expenditure of state funds to fund the Commission or that Petition C-04-2023 would require mid-cycle redistricting that would not otherwise be required. Under NRS 295.009(1)(b), initiative petitions must “set forth, in not more than 200 words, a description of the effect of the initiative or referendum if the initiative or referendum is approved by the voters.” The description of effect “must identify what the law proposes and how it intends to achieve that proposal” and “must not be deceptive or misleading,” *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 42, 293 P.3d 874, 879 (2013). To accurately explain the consequences of the initiative, the description must identify “the need for or nature of the revenue source” to fund the proposed initiative. *Reid*, 138 Nev. Adv. Op. 47, 512 P.3d at 304.

The Petitions’ descriptions of effect are legally deficient because they fail to explain that they will result in the expenditure of state funds to fund the Commission, and they do not identify the “the need for or nature of the revenue source” that will fund that expenditure. The

district court therefore correctly concluded that the descriptions fail to sufficiently “identify what the law proposes and how it intends to achieve that proposal.” *Educ. Initiative PAC*, 129 Nev. at 42, 293 P.3d at 879.⁶

The description of effect for Petition C-04-2023 is separately deficient for failing to explain that the Petition would require otherwise unnecessary mid-cycle redistricting and thereby invalidate the existing legislative plans and congressional districts early, in 2027, when they would otherwise remain in force until 2031. Petition C-04-2023’s description says only that the Petition “will require redistricting following the 2026 election and each federal census thereafter.” Fair Maps Nevada strains to justify this deficiency by arguing that the Commission could simply adopt the same maps already drawn by the

⁶ In the district court, Fair Maps Nevada proposed amended descriptions of effect that would have added one sentence stating that “[t]he existing and ongoing expense” of redistricting “will be shifted to the Commission but will remain based in the legislative branch.” JA000294; JA000311. Fair Maps Nevada does not appear to press for this amended description on appeal. Regardless, the proposed amended descriptions of effect do not cure the problem, because they describe a *shift* in expenditures rather than an increase in expenditures, and nothing in the Petitions requires that the Legislature offset the cost of the Commission by reducing the Legislature’s own operational budget. The proposed amended descriptions of effect therefore remain inadequate and, in fact, exacerbate the misleading nature of the descriptions, by spinning a required expenditure as a wholly speculative “shift.”

Legislature “if the maps comply with the proposed amendment.” Fair Maps Opening Br. at 22. Fair Maps Nevada’s argument recognizes that under Petition C-04-2023, the Commission would have to undergo the entire redistricting process in 2027, complying with all of the Petition’s extensive procedural and substantive requirements in doing so—steps that would otherwise be entirely unnecessary. The hypothetical possibility that the Commission might then adopt the same maps already drawn by the Legislature does not change the significance of this requirement.

IV. This Court should not overrule its precedent.

Implicitly acknowledging that its appeal cannot succeed under the Court’s existing precedent, Fair Maps Nevada asks the Court to overrule two holdings from its decision just two years ago in *Reid*: (1) the holding that initiatives proposing constitutional amendments are subject to Article 19, Section 6’s unfunded mandate bar, and (2) the holding that NRS 295.061(1)’s 15-day hearing-setting deadline in petition challenges is directory rather than mandatory.

The Court should decline Fair Maps Nevada’s invitation to revisit these now-settled aspects of Nevada law. This Court takes *stare decisis*

seriously, and it “will not overturn [precedent] absent compelling reasons for so doing.” *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008). “Mere disagreement does not suffice.” *Id.* And mere disagreement is all that Fair Maps Nevada offers.

A. The Court should not reconsider Article 19, Section 6’s application to constitutional amendments.

Two years ago in *Reid*, the Court held that “regardless of whether the initiative petition is proposing statutory or constitutional changes, if the initiative petition requires expenditures or appropriations, it must include funding provisions.” *Reid*, 138 Nev. Adv. Op. 47, 512 P.3d at 303. This holding was consistent with the Court’s prior statements that “[s]ection 6 applies to *all* proposed initiatives, without exception, and *does not permit* any initiative that fails to comply with the stated conditions.” *Rogers*, 117 Nev. at 173, 18 P.3d at 1036; *see also Herbst Gaming*, 122 Nev. at 890–91, 141 P.3d at 1233 (stating that Article 19, Section 6 “prevents the electorate from creating the deficit that would result if government officials were forced to set aside or pay money without generating the funds”—a purpose which is only achieved if the requirement applies to all initiative petitions). And it is consistent with Article 19, Section 6’s purposes because—as *Reid* well explains—“there

is no benefit to carving out a loophole for initiative petitions proposing constitutional changes.” *Reid*, 138 Nev. Adv. Op. 47, 512 P.3d at 302.

Fair Maps Nevada provides no adequate reason for the Court to revisit a question that it settled so recently. *Reid* carefully considered each of the arguments that Fair Maps Nevada makes, and it rejected them all. *See Reid*, 138 Nev. Adv. Op. 47, 512 P.3d at 301–03. It addressed Article 19, Section 6’s text, and concluded that it is “ambiguous because it conflicts internally with Article 19, Section 2.” *Id.* at 302. It addressed the argument that it would be improper for constitutional provisions to include funding provisions, explaining that funding instead “could be addressed by statute.” *Id.* at 302 n. 1. And it emphasized the central policy objective of Article 19, Section 6: requiring the electorate to consider, and address, the costs of their proposed initiatives, *id.* at 302—a policy objective that is flatly inconsistent with Fair Maps Nevada’s argument that only the Legislature may impose a tax.

Fair Maps Nevada evidently disagrees with those conclusions, but it provides no reasons—much less “weighty and conclusive” ones—to justify the Court revisiting this settled question. *Miller*, 124 Nev. at 597, 188 P.3d at 1124 (quoting *Kapp v. Kapp*, 31 Nev. 70, 73, 99 P. 1077, 1078

(1909)).

B. This Court should not reconsider its holding that NRS 295.061(1)'s 15-day hearing-setting requirement is directory.

Reid also held with equal clarity that NRS 295.061(1)'s requirement that a hearing be set within 15 days after the filing of a petition challenge is “directory,” rather than “mandatory,” and does not justify the dismissal of a challenge. *Reid*, 138 Nev. Adv. Op. 47, 512 P.3d at 301. This Court explained that it would be “harsh and absurd to dismiss a party’s challenge to an initiative merely because the district court failed or was not able to set the hearing within 15 days through no fault of the party filing the complaint,” as NRS 295.061(1) requires. *Id.* The Court therefore held that, while “district courts must make every effort to comply with” the 15-day deadline, a court’s failure to meet that deadline provides no basis for dismissal. *Id.*

Here too, Fair Maps Nevada offers mere disagreement, without any of the weighty reasons that would be needed to justify the Court revisiting this settled question. The procedural history of this case mirrors that of *Reid* almost exactly. There, just as here, the district court was unable to set a hearing on an initiative petition challenge within the

15-day statutory deadline in NRS 295.061(1). *Reid*, 138 Nev. Adv. Op. 47, 512 P.3d at 300–01. And there, just as here, the delay was partly caused by the challenger exercising his right to preempt the assigned judge in a circumstance where no other active judge was available. *Id.* at 300; Nev. Sup. Ct. R. 48.1. *Reid* therefore addressed exactly the circumstances of this case when it held that the statutory requirement to set the hearing within 15 days after the filing of the complaint is “directory,” not mandatory, and that it is *not* a basis for dismissal. 138 Nev. Adv. Op. 47, 512 P.3d at 300–01. Nothing that happened in this case suggests that this holding should be revisited.

If anything, this case reaffirms that it would be “harsh and absurd” to dismiss *a party’s* challenge due to *the court’s* failure to meet the 15-day deadline. Jeng timely filed this action under the very tight, 15-day statutory deadline. NRS 295.061(1). And while—just as in *Reid*—Jeng did preempt the initially assigned judge under Nevada Supreme Court Rule 48.1, that preemption itself caused very little delay in this case. The district court acted promptly to assign the cases to the other First Judicial District Court judge and—when that judge proved unavailable due to his impending retirement—to request assignment of a senior

judge. JA000143; JA000146. All of that occurred within just eight days of the commencement of these cases, by December 15. *See* JA000143; JA000146.

Following that, however, this Court was unable to assign a senior judge until January 10, 2024, in one case, JA000265, and until January 24 in the other, JA000277. By then, NRS 295.061(1)'s 15-day deadline had passed. Jeng points this out not to criticize the Court—there are many reasons, particularly over the holiday season, why it could take some time to assign a new judge. But it would be “harsh and absurd” indeed to dismiss this case as a result. *Reid*, 138 Nev. Adv. Op. 47, 512 P.3d at 301.

Finally, if any of the parties is to blame for this case not being heard within the 15-day deadline, it is Fair Maps Nevada. Plaintiff informed Fair Maps Nevada of this challenge *the day after* he commenced the cases and filed the Complaints and supporting memoranda. But Fair Maps Nevada then waited *eighteen days* before filing its response briefs—a delay that is completely inconsistent with Fair Maps Nevada's position that the matter should have been dismissed because it was not heard by December 22, fifteen days after the Complaints were filed.

CERTIFICATE OF COMPLIANCE

1. I certify that Respondent's Answering 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 it has been prepared in a proportionally-spaced typeface, size 14, Century Schoolbook.

2. I further certify that Respondent's Answering Brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the Opposition exempted by NRAP 32(a)(7)(C), it contains 8047 words.

3. Finally, I hereby certify that I have read Respondent's Answering 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 Answering Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in Respondent's Answering Brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions

in the event that Respondent's Answering Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 27th day of March, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 2024, a true and correct copy of **RESPONDENT’S ANSWERING BRIEF** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court’s electronic filing system:

By: /s/ Danielle Fresquez
Danielle Fresquez, an Employee of
BRAVO SCHRAGER LLP