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14 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
15 **IN AND FOR CARSON CITY**

16 ERIC JENG, an individual,	Case No.: 23 OC 000137 1B
17 18 Plaintiffs,	Dept. No.: I
19 vs.	
20 FRANCISCO V. AGUILAR, in his official 21 capacity as NEVADA SECRETARY OF 22 STATE,	
23 Defendant.	

24 **FAIR MAPS NEVADA'S ANSWERING BRIEF IN RESPONSE TO PLAINTIFF'S**  
25 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF COMPLAINT**  
26 **FOR DECLARATORY AND INJUNCTIVE RELIEF CHALLENGING INITIATIVE**  
27 **PETITION C-04-2023**

28 Intervenor Fair Maps Nevada, a Nevada political action committee ("Fair Maps"), by and through its attorneys, hereby submits its Answering Brief in Response to Plaintiff Eric Jeng's ("Plaintiff") Memorandum of Points and Authorities in Support of Complaint for Declaratory and Injunctive Relief Challenging Initiative Petition C-04-2023 ("Opening Brief" or "Op. Br."). This Answering Brief is supported by the following Memorandum of Points and Authorities, the pleadings and papers on file with the Court, and any oral argument entertained by the Court at a hearing in this matter.

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**I. INTRODUCTION**

In a cynical attempt to keep important redistricting ballot questions from the voters, Plaintiff has sued to prevent Fair Maps from circulating Initiative Petition #C-03-2023 (“Petition”). The Petition is a common-sense response to gerrymandering practices that have badly impacted Nevada’s electoral process. The Court should reject Plaintiff’s misplaced attack on the Petition and allow Nevadans to decide whether it qualifies for the ballot. As one member of the Supreme Court stated: “Part of the Court’s role in [our system of government] . . . is to defend its foundations. None is more important than free and fair elections.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-07 (2019) (Kagan, J., dissenting). Because the Petition satisfies the requirements of the Nevada Constitution and state statute, the Court should dismiss Plaintiff’s claims.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

Fair Maps filed the Petition on November 14, 2023 to amend the Nevada Constitution. Complaint (“Compl.”), Ex. 1. The Petition includes the following description of effect (“Description”):

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 the 2026 election and each federal census thereafter.

Compl., ¶ 7.

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1 Plaintiff filed a Complaint for Declaratory Relief and an Opening Brief in Support of  
2 Complaint for Declaratory and Injunctive Relief on December 7, 2023. *See generally*  
3 Compl.

4 **III. LEGAL STANDARD**

5 Article 19, Section (2) of the Nevada Constitution enshrines the people’s right to amend the  
6 Nevada Constitution by initiative petition. Specifically, it states that “the people reserve to  
7 themselves the power to propose, by initiative petition, . . . amendments to this Constitution.”  
8 Nev. Const. art. 19, § 2. The Nevada Constitution further provides that the Legislature “may  
9 provide by law for procedures to *facilitate* the operation thereof.” *Id.* (emphasis added.) In  
10 interpreting such laws, the courts “must make every effort to sustain and preserve the people’s  
11 constitutional right to amend their constitution through the initiative process.” *Nevadans for the*  
12 *Prot. Of Prop. Rights v. Heller*, 122 Nev. 894, 912, 141 P.3d 1235, 1247 (2006).

13 **IV. ARGUMENT**

14 **A. The Initiative Petition Does Not Unlawfully Mandate an Unfunded Expenditure**

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

23 “[A]n appropriation is the setting aside of funds, and an expenditure of money is the  
24 payment of funds.” *Rogers v. Heller*, 117 Nev. 169, 173, 18 P.3d 1034, 1036 (2001). “A  
25 necessary appropriation or expenditure in *any set amount or percentage* is a new requirement  
26 that otherwise does not exist.” *Id.* at 176, 18 P.3d at 1038 (emphasis added). The Nevada  
27 Supreme Court recently determined that initiative petitions that require “expenditures or  
28 appropriations” must “contain a funding provision.” *Education Freedom PAC v. Reid*, 138 Nev.

1 Adv. Op. 47, 512 P.3d 296, 303 (2022).

2 In *Reid*, the initiative petition sought to establish education freedom accounts, funded by  
3 the state, for schooling outside of public schools. 512 P.3d at 299. The Nevada Supreme Court  
4 noted that the initiative petition required an appropriation of funds and the “initiative is creating  
5 a new requirement for the appropriation of state funding that does not now exist and provides  
6 no discretion to the Legislature about whether to appropriate or expend the money.” *Id.* at 303-  
7 04.

8 Here, unlike *Reid*, the initiative does not “creat[e] a new requirement for the  
9 appropriation of state funding that does not now exist.” The Nevada Legislature already has an  
10 established redistricting process, and the Petition does not call for a specified appropriation; in  
11 fact, it does not call for funding at all. The Nevada Constitution imposes a “mandatory duty”  
12 upon the Nevada Legislature at “its first session after the taking of the decennial census” to  
13 apportion “the number of Senators and Assemblymen . . . among legislative districts which may  
14 be established by law, according to the number of inhabitants in them.” Nev. Const. art. 4, § 5.  
15 This mandatory duty has been regularly funded by the Legislature. *See, e.g.*, S.B. 1, 80th Leg.  
16 (Nev. 2021); S.B. 1, 66th Leg. (Nev. 1991); S.B. 1, 61st Leg. (Nev. 1981). Thus, redistricting  
17 is a recurring expense supported by the Legislature. The Petition does not alter that fact or  
18 require a new and specific level of appropriation.

19 Further to this point, it should be noted that the funding for redistricting is generally not  
20 reflected in a budget line item. Instead, it is included in the general appropriation to fund the  
21 Legislature’s business. *See, e.g.*, S.B. 1, 80th Leg. (Nev. 2021); S.B. 1, 66th Leg. (Nev. 1991);  
22 S.B. 1, 61st Leg. (Nev. 1981). This is also true in the case of redistricting that occurred pursuant  
23 to supervision of the courts. In 2011, the Legislature failed to complete the redistricting process  
24 during the regular 120-day legislative session. S.B. 497, 76th Leg. (Nev. 2011) (redistricting  
25 bill vetoed by Governor); A.B. 566, 76th Leg. (Nev. 2011) (same). The task then fell to the  
26 courts after Governor Sandoval declined to call a special session on the subject. Brian L. Davie  
27 & Michael J. Stewart, *Legislative Redistricting*, in 2018 Political History of Nevada 401, 408  
28 (issued by Nevada Secretary of State Barbara Cegavske, produced jointly with the Research

1 Division of the Nevada Legislative Counsel Bureau). The First Judicial District Court appointed  
2 three special masters to develop maps, which the court ultimately adopted. *Id.* at 408-09. The  
3 Legislature did not appropriate specific funds to support the Court’s oversight of the redistricting  
4 process prior to it doing so. *See generally* 76th Leg. (Nev. 2011); 77th Leg. (Nev. 2013).

5 Moreover, it is entirely possible that the proposed amendment would decrease the costs  
6 of redistricting. The Legislature could decide not to fund the Commission at all, instead making  
7 it a volunteer effort.<sup>1</sup> Nothing in the Petition precludes that possibility. Alternatively, even if  
8 the Legislature decides to fund it, the Petition could eliminate the possibility of intracycle  
9 redistricting. This could reduce the cost of redistricting altogether. Under the current scheme,  
10 the Legislature can re-draw the lines as many times as the Legislature deems appropriate. *See*  
11 Nev. Const. art. 19, § 5. The Legislature may also redistrict during a special session, further  
12 increasing the costs associated with redistricting. Conversely, the Petition provides that the term  
13 of each commissioner expires once redistricting is complete. Compl., Ex. 1, Sections 4, 5A.  
14 Thus, the Petition provides for uniformity and establishes a single redistricting process for each  
15 census cycle. This could decrease redistricting costs by eliminating intracycle redistricting.

16 These facts underscore the point that the Petition does not call for a specific  
17 appropriation of any “set amount or percentage.” It certainly does not require any budgeting  
18 official to “approve the appropriation or expenditure, regardless of any other financial  
19 considerations” as argued by Plaintiff. *Herbst Gaming v. Heller*, 122 Nev. 877, 890, 141 P.3d  
20 1224, 1233 (2006) (per curiam). It simply tasks a new entity—the redistricting commission—  
21 with performing a function the Nevada Constitution already mandates. Thus, the Petition is  
22 distinguishable from *Reid*.

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25 <sup>1</sup> Notably, the number of free redistricting software packages continues to grow. *See, e.g., District*  
26 *Builder, a free and open source redistricting tool*, <https://www.districtbuilder.org> (last accessed  
27 Dec. 26, 2023); *Autoredistrict, a free and open source computer program*, <http://autoredistrict.org>  
28 *and Fair?*, GOVERNING, [https://www.governing.com/nov/can-new-technology-tools-keep-](https://www.governing.com/nov/can-new-technology-tools-keep-redistricting-honest-and-fair)  
*redistricting-honest-and-fair* (last accessed Dec. 26, 2023).

1 That this Court should reject Plaintiff's assertion of *Reid* as a bar to the Petition is likely  
2 obvious. Plaintiff's interpretation calls into doubt numerous constitutional provisions enacted  
3 by initiative petition. *See, e.g.*, Nev. Const. art. 1, § 21 (initiative petition recognizing validity  
4 of same-sex marriage and requiring the state to process same-sex marriage licenses); Nev. Const.  
5 art. 1, § 22 (initiative petition allowing eminent domain proceedings and requiring the  
6 government to pay "the highest price the property would bring on the open market"); Nev.  
7 Const. art. 2, § 10 (initiative petition limiting campaign contributions and necessitating changes  
8 in the campaign finance reporting and compliance system); Nev. Const. art. 4, § 38 (initiative  
9 petition allowing the use of medical marijuana and implementing a cannabis compliance and  
10 taxation system); Nev. Const. art. 4, § 39 (initiative petition requiring increased usage of  
11 renewable energy necessitating changes to the state reporting and compliance structure); Nev.  
12 Const. art. 10, § 3 (initiative petition exempting household goods from taxation necessitating  
13 changes to tax reporting systems and compliance training process); Nev. Const. art. 10, § 3B  
14 (initiative petition exempting durable medical equipment from taxation necessitating changes to  
15 state tax reporting systems and compliance training); Nev. Const. art. 11, § 6 (initiative petition  
16 establishing the priority of education funding and necessitating sufficient education funding  
17 before any other appropriation); Nev. Const. art. 15, § 16 (initiative petition establishing  
18 minimum wage increases and necessitating sufficient appropriation to pay state employees).

19 The preclusion of a constitutional amendment seeking to modify an already existing  
20 expense only chills the people's initiative power. Such an interpretation flies in the face of well-  
21 established policy directives for initiative proposals. Indeed, "the right to initiate change in this  
22 state's laws through ballot proposals is one of the basic powers enumerated in this state's  
23 constitution." *Univ. Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 734, 100 P.3d 179, 195  
24 (2004). Thus, the Petition is entirely consistent with other initiative petitions in the Nevada  
25 Constitution.

26 That the Petition will require redistricting after the 2026 general election does not change  
27 this conclusion. The Legislature has always had the prerogative to redistrict at any time. *See,*  
28 *e.g., Legislative Redistricting, in 2018 Political History of Nevada* 401, 401-47. As such, the

1 fact that the Petition will require redistricting after the 2026 general election does not create an  
2 “additional” redistricting. As is the case with the other redistricting that will take place, the  
3 Petition merely redirects the task of redistricting from the Legislature to the commission. That  
4 this is the case is underscored by the fact that the Legislature has redistricted multiple times after  
5 a decennial census and before the next decennial census in the past. *See, e.g.*, A.B. 1, 11th  
6 Special Leg. (Nev. 1965) (redistricting out of cycle) S.B. 62, 57th Leg. (Nev. 1973) (same);  
7 A.B. 375, 72nd Leg. (Nev. 2003) (same).

8 **B. Constitutional Initiative Petitions Should Not Be Subject to Article 19, Section 6 of**  
9 **the Nevada Constitution**

10 As the concurrence in *Reid* properly noted, “under the plain language of Article 19, Section  
11 6 of the Nevada Constitution, its funding mandate applies only to initiative petitions proposing  
12 statutes or statutory amendments, not to initiatives proposing constitutional amendments.” *Reid*,  
13 512 P.3d at 306 (Herndon, J., concurring). Section 6 is “unambiguous and clearly singles out  
14 two distinct initiative-based actions available to the people: proposals for new statutes and  
15 proposals for amendments to existing statutes; while specifically excluding a third initiative-  
16 based action available to the people: proposals to amend the constitution.” *Id.* (Herndon, J.,  
17 concurring). When a constitutional provision is unambiguous, the court will apply it according  
18 to the plain language of the provision. *Nevadans for Nev. v. Beers*, 122 Nev. 930, 942, 142 P.3d  
19 339, 347 (2006); *see also In re Resort at Summerlin Litig.*, 122 Nev. 177, 185, 127 P.3d 1076,  
20 1081 (2006) (noting when “a general statutory provision and a specific one cover the same  
21 subject matter, the specific provision controls”). “Because a state constitution is meant to be a  
22 basic set of laws and principles that set out the framework of the state’s government, including  
23 a funding provision for each specific basic law and principle within that document would be  
24 inappropriate.” *Reid*, 512 P.3d at 307 (Herndon, J., concurring).

25 Ignoring the plain language of Article 19, Section 6 and creating a requirement for ballot  
26 initiatives to identify a specific source of funding runs afoul the constitutional right to file ballot  
27 questions. *See, e.g.*, Nev. Const. art. 19, § 2. Under Plaintiff’s proposed expansive interpretation  
28 of *Reid*, any constitutional petition that increases expenses in any way is invalid. As described

1 above, this reading would invalidate a number of constitutional provisions enacted by initiated  
2 petition. This reading also badly misconstrues the Nevada Supreme Court’s prior case law  
3 addressing the issue. Prior to *Reid*, the Nevada Supreme Court had *not* concluded that Article  
4 19, Section 6 applies to constitutional initiatives. *Reid*, 512 P.3d at 307-08 (distinguishing  
5 *Rogers*, 117 Nev. at 173, and *Herbst*, 122 Nev. at 890-91 from *Reid*) (Herndon, J., concurring).

6 **C. The Description of the Petition Is Not Deficient**

7 NRS 295.009(1)(b) requires each initiative petition to “[s]et forth, in not more than 200  
8 words, a description of the effect of the initiative . . . if the initiative . . . is approved by the  
9 voters.” The Nevada Supreme Court has noted that “[a] description of effect serves a limited  
10 purpose to facilitate the initiative process . . .”, *Educ. Initiative PAC v. Comm. To Protect Nev.*  
11 *Jobs*, 129 Nev. 35, 37, 293 P.3d 874, 876 (2013), and that a description of effect should be  
12 reviewed with an eye toward that limited purpose, *see id.* Thus, while a description of effect  
13 need not “delineate every effect that an initiative will have,” it “must be a straightforward,  
14 succinct, and nonargumentative statement of what the initiative will accomplish and how it will  
15 achieve those goals.” *Id.* at 38, 293 P.3d at 876. A description of effect cannot “be deceptive  
16 or misleading.” *Id.* at 42, 293 P.3d at 879.

17 In reviewing a description of effect, “it is inappropriate to parse the meanings of words and  
18 phrases used in a description of effect” as closely as a reviewing court would a statutory text.  
19 *Id.* at 48, 293 P.3d at 883. Such an approach “comes at too high a price in that it carries the risk  
20 of depriving the people of Nevada of their constitutional right to propose laws by initiative . . .  
21 .” *Id.* Thus, a reviewing court “must take a holistic approach” to the required analysis. *Id.*  
22 “The opponent of a ballot initiative bears the burden of showing that the initiative’s description  
23 of effect fails to satisfy this standard.” *Id.* at 42, 293 P.3d at 879.

24 Plaintiff’s first contention regarding the Description is that it fails to state that the Petition  
25 will “result in the expenditure of state funds to fund the Commission.” Op. Br. at 8-9. As  
26 discussed herein, the Petition does not require a description of the expenditure because the  
27 expenditure is already allocated through existing legislative processes. *See supra*, sections A-

28 B.

1 Plaintiff also contends that the Description should include a statement that the maps drawn  
2 by the Legislature in 2021 may be replaced. Op. Br. at 9-10. However, there is no requirement  
3 in the Petition that the previously drawn maps should be replaced. The Commission has the  
4 option to adopt the same maps previously drawn by the Legislature if the maps comply with the  
5 proposed amendment. What the Legislature and Commission may choose to do in the future is  
6 not an effect that can be definitively conveyed to voters. Indeed, it is exactly the type of  
7 “hypothetical” effect the Nevada Supreme Court has held need not be included in the description  
8 of effect. *See Herbst Gaming*, 122 Nev. at 889, 141 P.3d at 1232. Thus, the description in the  
9 Petition describes the changes to the redistricting process and “is a straightforward, succinct,  
10 and nonargument statement of what the initiative petition will accomplish and how it will  
11 achieve those goals.” *Educ. Initiative PAC*, 129 Nev at 38, 293 P.3d at 876.

12 While the Description contained within the Petition is legally sufficient and holistically  
13 sound, should this court determine that Fair Maps needs to revise the Description to reference  
14 the possibility that the Petition will require an expenditure of state funds or the possibility of  
15 2021 maps being revised, Fair Maps may revise the Description in accordance with the Court’s  
16 findings. NRS 295.061(3) (clarifying that the proponent of an initiative is afforded the  
17 opportunity to amend a description of effect to resolve any inadequacies identified by the court).

18 **D. CONCLUSION**

19 For all of the above reasons, the Court should deny Plaintiff’s attempt to keep the Petition  
20 off the ballot and dismiss Plaintiff’s suit.

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**AFFIRMATION**

The undersigned does hereby affirm that pursuant to NRS 239B.030, the preceding document does not contain the social security number of any person.

Dated this 26th day of December, 2023.

McDONALD CARANO LLP

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDONALD CARANO LLP and that on December 26, 2023, I served the within **ANSWERING BRIEF IN RESPONSE TO COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF CHALLENGING INITIATIVE PETITION C-04-2023** on the parties in said case by placing a true copy thereof enclosed in sealed envelopes with postage prepaid thereon in the United States Post Office mail at 100 West Liberty Street, 10<sup>th</sup> Floor, Reno, Nevada 89501 addressed as follows:

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I am familiar with the firm's practice for collection and processing of correspondence for mailing with the United States Postal Service.

The envelopes addressed to the above parties were sealed and placed for collection by the firm's messengers and will be deposited today with the United States Postal Service in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 26, 2023 at Reno, Nevada.

By *Laena St-Jules*  
An employee of McDonald Carano LLP