IN THE SUPREME COURT OF NEVADA

NO SOLAR TAX PAC, a Nevada political action committee,

Appellant,

vs.

CITIZENS FOR SOLAR AND ENERGY FAIRNESS, a Nevada political action committee; and, THE HONORABLE BARBARA K. CEGAVSKE, in her official capacity as Secretary of State of the State of Nevada,

Respondents.

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CASE NO. 70146

First Judicial Dist. Ct. 16 OC 00030 1B

OPENING BRIEF

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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.

1. Appellant No Solar Tax PAC is a committee for political action ("PAC") registered with the Nevada Secretary of State. It has no parent corporation and has no stock issued.
2. Kevin Benson, Esq., Nevada Bar No. 9970, of White Hart Law, LLC, represents No Solar Tax PAC in this Court and also appeared for Solar in the district court.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to NRAP 3A(b)(1) and NRAP 3A(b)(3). This is an appeal from a final order resolving all claims presented to the district court. NRAP 3A(b)(1). It is also an appeal from an order granting an injunction. NRAP 3A(b)(3).

The final order was entered on April 7, 2016. Notice of entry of the order was served on April 8, 2016. The notice of appeal was filed on April 8, 2016. This appeal is timely because it was filed less than 30 days after the entry of the final judgment, as required by NRAP 4(a)(1).

ROUTING STATEMENT

This case is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(3) because it is a case involving a ballot or election issue, more specifically: whether a petition which refers to the voters certain parts of a statute, but not an entire statute, is a valid referendum petition under Nev. Const. Art. 19, § 1, which permits a referendum on a "statute … or any part thereof," and whether the Secretary of State should be enjoined from placing such a referendum petition on the 2016 general election ballot.

ISSUE PRESENTED FOR REVIEW

Nev. Const. Art. 19, § 1 permits referenda on a "statute … or any part thereof." This Referendum attempts to refer to the voters those provisions of Chapter 379, Statutes of Nevada (2015), that authorized the Public Utilities Commission to impose new rates and charges on net metering customers. Did the district court err when it declined to apply the plain language of Nev. Const. Art. 19, Section 1, and instead held that this Referendum is not a valid referendum because it seeks to repeal only certain parts of the statute, and therefore is "amending" the law?

STATEMENT OF THE CASE

On January 25, 2016, Appellant No Solar Tax PAC ("Solar") filed a referendum petition with the Secretary of State seeking to repeal part of Statutes of Nevada, Chapter 379 (2015) that relate to net metering systems. Joint Appendix ("JA") 8. Specifically, the Referendum seeks to repeal only those parts of Chapter 379 that authorized the Nevada Public Utilities Commission to impose new rates and charges on net metering customers that are different from the rates and charges imposed on other members of the same rate class. JA 8-13. The Referendum would leave other parts of Chapter 379 intact.[1] *Id.*

On February 16, 2016, the Citizens for Solar and Energy Fairness ("CSEF"), filed its Complaint for Declaratory and Injunctive Relief pursuant to NRS 295.009 and NRS 295.061. JA 1. Also on February 16, 2016, CSEF filed its opening brief in support of its Complaint. JA 19.

The Complaint contains two claims. First, it alleged that the Referendum was an initiative petition, not a referendum, because it "amended" the law by changing its meaning, even though CSEF concedes that the Referendum only asks the voters to repeal certain parts of Chapter 379. JA 5. Second, the Complaint

[1] The Petition would repeal language in Section 2.95 of Chapter 379 related to the "cap" on net metering systems. The cap was reached in August 2015. Section 2.95 allows net metering to continue after that cap is reached. Thus the current law already effectively removed the cap, and the Referendum would not change that.

alleged that the Referendum's Description of Effect ("DOE") was defective under NRS 295.009. *Id.*

On March 2, 2016, Solar filed its Answer and Answering Brief. JA 37, 43. On March 4, 2016, the Secretary of State filed her Answer. JA 59. On March 9, 2016, CSEF filed its Reply Brief. JA 65.

The matter could not be set for hearing before the district court until March 28, 2016. On that date, the district court heard arguments from counsel for all parties. JA 177-225.

After hearing arguments, the district court ruled that the Referendum was more properly characterized as an initiative petition instead of a referendum. JA 45-46. The district court found that the Referendum "proposes a substantial change to the law and not a yay or nay vote on a statute or part thereof." JA 227. It also stated: "The subject Referendum Petition does not present a yay or nay vote on a part of a statute, but rather systematic changes to various portions and words of the statute in a piecemeal approach." *Id.* Finally, the district court held: "The subject Referendum Petition is not a referendum as provided for in Article 19, Section 1 of the Nevada Constitution, but is actually an attempt to amend the statute which requires an initiative pursuant to Article 19, Section 2 of the Nevada Constitution." *Id.*

Based on this holding, the district court granted CSEF declaratory and injunctive relief on its first claim and enjoined the Secretary of State from placing the Referendum on the ballot. JA 227. However, the district court stayed the injunction pending appeal so that signatures could be gathered and verified to determine if the Referendum qualifies for the ballot. *Id.*

STATEMENT OF FACTS

In 2015, the Legislature enacted and the Governor signed into law Chapter 379 of the 2015 Statutes of Nevada. 2015 Stat. Nev. Ch. 379. Among other things, Chapter 379 authorized the Public Utilities Commission to impose new rates and charges on net metering customers that are different from the rates and charges imposed on other customers in the same rate class. *Id.* at § 2.3, 2.5, 2.95, 4.5.

Relying on this statute, the Public Utilities Commission entered an order on December 23, 2015 which slashed the rates that net metering customers were paid for the excess energy they produced from approximately 11 cents / kWh to less than 3 cents / kWh. It also imposed a new, much higher, fixed monthly fee on net metering customers. PUC Order in Dockets #15-07041, 15-07042 (Dec. 23, 2015).[2]

[2] Available at: http://pucweb1.state.nv.us/PDF/AxImages/DOCKETS_2015_THRU_PRESENT/2015-7/8412.pdf (Last visited May 1, 2016). The Court may take judicial notice of the existence of and contents of the PUC's officials orders. NRS 47.130.

The PUC's new tariff led to substantial controversy. In February, 2016, the PUC amended its order to give some relief to those homeowners who installed their systems prior to the decision, but it still refused to grandfather those customers in at the old rates, even though all parties before it recommended grandfathering. PUC Order in Dockets #15-07041, 15-07042 (Feb. 12, 2016).[3] Hundreds of people attended the PUC hearings to express their disagreement with its actions.[4] *Id.*

Appellant filed the instant Referendum petition with the Secretary of State on January 25, 2016. JA 8. The Referendum asks the voters whether they approve or disapprove of those provisions in Chapter 379 that authorized the PUC to impose the new rates and charges on net metering customers. JA 8-13. If the voters disapprove of those provisions, the effect will be to abolish the PUC's new tariff on net metering customers, while allowing net metering to continue after the cap. All other parts of Chapter 379 would remain in the law. *Id.*

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[3] Available at: http://pucweb1.state.nv.us/PDF/AxImages/DOCKETS_2015_THRU_PRESENT/2015-7/9692.pdf (Last visited May 1, 2016).

[4] *See* e.g., *Ralston Live*, March 17, 2016. Available at: http://www.pbs.org/video/2365692428/ (Last visited May 1, 2016) (discussing controversy with PUC Chairman, in which the Chairman concedes that the new tariff will cause financial distress to some customers). The Court may take judicial notice of the public information in the media generally covering the controversy surrounding the PUC's decision. NRS 47.130.

However, the language in Chapter 379 authorizing the new rates and charges is not compartmentalized into one section or subsection of the statute. Instead, the language is scattered throughout Chapter 379, particularly in Sections 2.3, 2.5, 2.95, and 4.5. As a result, in some cases, the Referendum refers to the people only those parts of the statute which have to do with the new rates and charges. JA 10.

SUMMARY OF THE ARGUMENT

The district court made a truly unprecedented decision in this case. It ruled that the Referendum, which meets all the formal requirements of Nev. Const. Article 19, Section 1, is invalid because it would "substantially change" the law and is therefore should be characterized as an initiative petition instead. It appears that no court in the nation has ever invalidated a referendum petition on these grounds. This decision is contrary to the plain language of the Nevada Constitution.

Nev. Const. Art. 19, § 1 expressly permits a referendum on a "statute or … part thereof." There is no dispute that this Referendum only seeks to repeal part of the statute. Therefore the district court erred when it failed to apply the plain language of the Constitution.

The people's referendum power is coequal, coextensive, and concurrent with the power of the Legislature to repeal all or part of a statute. Therefore the people

are authorized to repeal any part of a statute through referendum that the Legislature could repeal through a bill.

The referendum power includes the power to "change" the law by rejecting those parts of it that the people disagree with. Nearly all referenda on a part of a law will "change" the remaining law to some degree, yet the Nevada Constitution explicitly permits referenda on only part of a law. Thus the district court applied an incorrect standard when it determined that the Referendum is invalid because it would "substantially change" the law.

Finally, the standard applied by the district court restricts the right to referendum, both legally and practically. It fails to offer any guidance to people drafting petitions as to what is valid and what is not. It will only generate confusion, uncertainty, and litigation. The district court's decision must therefore be reversed.

STANDARD OF REVIEW

This district court's ruling that the Referendum is not a valid referendum petition is a conclusion of law, which is reviewed *de novo. Nevadans for Nevada v. Beers*, 122 Nev. 930, 942, 142 P.3d 339, 347 (2006). The opponent of a petition bears the burden of demonstrating that the petition is "clearly invalid." *Las Vegas Taxpayer Accountability Comm. v. City Council of City of Las Vegas*, 125 Nev. 165, 176, 208 P.3d 429, 436 (2009).

ARGUMENT

I. The District Court's Decision Conflicts with the Plain Language of the Nevada Constitution.

The district court's decision must be overturned because it conflicts with the plain language of the Nevada Constitution. Nev. Const. Art. 19, § 1 provides in pertinent part: "A person who intends to circulate a petition that a statute or resolution **or part thereof** enacted by the legislature be submitted to a vote of the people, before circulating the petition for signatures, shall file a copy thereof with the secretary of state." (Emphasis added.)

Sections 2 and 3 of Article 19, § 1 repeatedly refers to a referendum on "a statute … or *any* part thereof:"

> Whenever a number of registered voters of this state equal to 10 percent or more of the number of voters who voted at the last preceding general election shall express their wish by filing with the secretary of state, not less than 120 days before the next general election, a petition in the form provided for in Section 3 of this Article that any statute or resolution **or any part thereof** enacted by the legislature be submitted to a vote of the people, the officers charged with the duties of announcing and proclaiming elections and of certifying nominations or questions to be voted upon shall submit the question of approval or disapproval of such statute or resolution **or any part thereof** to a vote of the voters at the next succeeding election at which such question may be voted upon by the registered voters of the entire State. The circulation of the petition shall cease on the day the petition is filed with the secretary of state or such other date as may be prescribed for the verification of the number of signatures affixed to the petition, whichever is earliest.

Nev. Const. Art. 19, § 1(2) (emphasis added). Section 3 continues:

> If a majority of the voters voting upon the proposal submitted at such election votes approval of such statute or resolution **or any part thereof**, such statute or resolution **or any part thereof** shall stand as the law of the state and shall not be amended, annulled, repealed, set aside, suspended or in any way made inoperative except by the direct vote of the people. If a majority of such voters votes disapproval of such statute or resolution **or any part thereof**, such statute or resolution **or any part thereof** shall be void and of no effect.

Nev. Const. Art. 19, § 1(3) (emphasis added).

The Nevada Constitution authorizes referenda on only a part of a statute by using the plain language "a statute … or any part thereof." Nev. Const. Art. 19, § 1(2). The phrase "part thereof" is not qualified in any way. In fact, the Constitution refers to referenda on statutes "or *any* part thereof" no fewer than six times. Nev. Const. Art. 19, § 1(2), 1(3).

The plain meaning of the word "part" is "*(1)*: one of the often indefinite or unequal subdivisions into which something is or is regarded as divided and which together constitute the whole *(2)*: an essential portion or integral element." "Part." Merriam-Webster.com. Accessed April 22, 2016. http://www.merriam-webster.com/dictionary/part.

The word "part" is *indefinite*; it can mean a number of components. For example, it could mean a section of a statute, or subsection, or a sentence, or phrase. It can also mean an idea, a policy, or a method. It is significant that the Nevada Constitution uses the indefinite word "part" instead of "section" or other, more precise term. If it was intended that partial referendums could be had only on

"sections" of a law, the Constitution could have easily and simply said "or any section thereof." But it does not. The Nevada Constitution uses the indefinite word "part" instead. This shows that "part thereof" was intended to apply broadly. Additionally, this broad application is made clear by the repeated use of the phrase "or *any* part thereof" throughout Article 19, § 1.

The word "any" means: "*(1)*: one or some indiscriminately of whatever kind: *a* : one or another taken at random <ask *any* man you meet> *b* : every —used to indicate one selected without restriction <*any* child would know that>" "Any." Merriam-Webster.com. Accessed April 22, 2016. http://www.merriam-webster.com/dictionary/any.

The plain meaning of the word "any" is to refer to an indefinite thing of whatever kind. *Id.* For example, "any person" means just that – *any* person, of whatever kind, without restriction, whether an individual or a corporation. *See e.g.*, *W. Sur. Co. v. ADCO Credit, Inc.*, 251 P.3d 714, 716 (Nev. 2011) (term "any person" in statute means that *any* person, not just a consumer, could bring an action under the statute).

The phrase "any part thereof" is not ambiguous. It cannot be reasonably interpreted to mean only a section or subsection of a statute, but not certain sentences or phrases within a statute. Nothing in the Nevada Constitution limits the term, or even suggests that the word "part" is so limited. Indeed, such a

construction is foreclosed because Article 19, § 1 uses the term "*any* part thereof" no fewer than six times. The Nevada Constitution must be given its plain meaning, which is that any part of a statute can be subject to referendum, whether that is a section, a subsection, or a sentence within a statute.

The district court erred by ignoring the plain language of Nev. Const. Art. 19, § 1 and holding that the Referendum is invalid. When unambiguous, the plain meaning of the words in the Constitution is controlling. *We People Nevada ex rel. Angle v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008). "The rule is cardinal and universal that if a law is plain and unambiguous, there is no room for construction or interpretation." *Ex parte Rickey*, 31 Nev. 82, 100 P. 134, 141 (1909). "[W]hen the language of a statute is plain, its intention must be deduced from such language, and the Court has no right to go beyond it." *State v. Washoe Cty. Comm'rs*, 6 Nev. 104, 107 (1870).

Other states have simply applied the plain language of their constitutions and allowed referenda similar to the Referendum here. The Michigan Attorney General opined that a referendum on single sentences or parts of subsections within a statute was allowed. Mich. Op. Atty. Gen. 1941-42, No. 20573, p. 266. The referendum at issue there would repeal a part of a subsection of the fish and game law which read: "Bluegills and sunfish from the 25th day of June to the 31st day of December, provided that it shall be unlawful to take bluegills and sunfish

through the ice or have in possession on the ice between the hours of six o'clock in the evening and six o'clock in the morning, eastern standard time,". *Id.* It would also repeal another sentence of the law making certain commercial licenses revocable at the will of the director of conservation. *Id.* Referring to the plain language of the Michigan Constitution, the Michigan Attorney General concluded that the referendum was proper because it was on a "part" of the statute. *Id.*

Likewise, according to the plain language of Nev. Const. Art. 19, § 1, "any part thereof" means just what it says: that *any* part of a statute may be subject to referendum. The district court therefore erred in holding that this Referendum is invalid, because the Referendum only refers certain parts of a statute, which is explicitly permitted by the plain text of the Nevada Constitution.

II. The People's Referendum Power is Coequal with the Legislature's Power, Therefore the People Can Repeal Any Part of a Statute the Legislature Could Repeal.

This Court has previously held that the people's petition power is "'coequal, coextensive, and concurrent' with that of the Legislature." *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 122 Nev. 894, 914, 141 P.3d 1235, 1248 (2006); s*ee also We People Nevada ex rel. Angle v. Miller*, 124 Nev. 874, 887, 192 P.3d 1166, 1174, n. 39 (2008) (the people ultimately hold all legislative power).

That which the Legislature can do, so can the people. The Legislature can, of course, enact a statute with various parts. It can also repeal certain phrases,

sentences, or subsections within a statute. The people can likewise reject any of those parts through referendum. Nev. Const. Art. 19, § 1.

Other states have recognized that the people are empowered through referendum to repeal any part of a law that the legislature could repeal through a bill. For example, the Arizona Constitution provides in pertinent part that the people have reserved to themselves "the power to approve or reject at the polls any Act, or item, section, or part of any Act, of the Legislature." Ariz. Const. Art. IV, pt. 1, § 1(1).

The Arizona Attorney General concluded that the people were entitled to repeal the part of a single-section law that moved the observance of Columbus Day from a Monday to a Sunday, while keeping the part of the act that designated the third Monday in January as Martin Luther King, Jr. Day. 1989 Ariz. Op. Atty. Gen. 156 (Oct. 19, 1989). The result would be to keep the newly-created Martin Luther King, Jr. Day as a paid holiday, while restoring Columbus Day as a paid holiday as well.

The Arizona Attorney General found the referendum was valid, reasoning that the lawmaking authority of the people and the Legislature were equal: "The Legislature certainly has the power to adopt legislation which repeals only a part of a section of a statute and, therefore, so do the people." *Id.* The opinion continues: "To conclude that the people may not repeal part of a section would mean that the

people could not exercise their full right of referendum over a single section act. This is an absurd result which we conclude the framers of our constitution could not have intended." *Id.*

The Oregon Attorney General likewise opined: "As coordinate in legislative powers we conclude the people have power to delete by referendum any item, section or part of an Act which the legislature could itself have deleted in the legislative process." 32 Or. Op. Atty. Gen. 156 (March 16, 1965).

The people are ultimately the source of all legislative power in the State, and the referendum power is coequal with the power of the Legislature. *We People Nevada*, 124 Nev. at 887, 192 P.3d at 1174, n. 39; *Protection of Property Rights*, 122 Nev. at 914, 141 P.3d at 1248. Thus, through the referendum process, the people can delete any part of a statute which the Legislature could have deleted. This includes certain phrases or clauses within a section, as well as whole sections. As Oregon and Arizona observed, anything less would be at odds both with the text of the constitution and with the people's coequal legislative authority.

The district court's decision ignores the plain language of the Nevada Constitution and effectively restricts the people's referendum powers to a level significantly less than the powers the Legislature enjoys.

III. This Referendum is Valid Because It Seeks to Repeal the Part of Chapter 379 Authorizing New Fees and Charges on Net Metering Customers, Which the Nevada Constitution Expressly Allows.

The district court held that the Referendum is not valid "because it does not present a yay or nay vote on part of a statute, but rather systematic changes to various portions and words of a statute in a piecemeal approach." JA 227.

The district court's characterization of the Referendum is incorrect both factually and legally. The Referendum does indeed request a yay or nay vote on a part of a statute: the part of Chapter 379 that authorized the PUC to impose unaffordable new rates and charges on net metering customers. The Referendum effectively asks voters: Do you approve or disapprove of that part of Chapter 379 that allowed for the PUC's new rates and charges on rooftop solar customers?

The district court was correct in that the Referendum "systematic[ly]" refers those parts of Chapter 379 that authorized the new rates and charges. JA 227. But it was incorrect to characterize this as a "piecemeal" approach. *Id*. There is nothing "piecemeal" about this Referendum. It does not pick words or phrases at random. Instead, it was carefully and correctly drafted to repeal a discrete part of Chapter 379: that part that authorized the new rates and charges on net metering customers (collectively the "new tariff").

The only reason the Referendum seeks to repeal certain subsections and clauses within Chapter 379 is because the parts of Chapter 379 that authorize the

new rates and charges are scattered throughout the law. They are not neatly contained in their own section of the law. In short, the Referendum was drafted the way it was because *that is how Chapter 379 was drafted*.

Section 2.3 of Chapter 379 contains the bulk of the provisions regarding the new rates and charges that the PUC is authorized to impose. However, Chapter 379 also makes other changes that either reference the rates and charges permitted by Section 2.3, or that authorize additional new rates or charges. For example, the old law prohibited a utility from charging residential customers based on the time of the day or week that they use power. NRS 704.085. Section 2.5 amends this provision by stating that it does not apply to net metering customers. This would effectively authorize the PUC to impose special, different time-of-use rates on net metering customers, who were previously protected from such rates, the same as all other residential customers. The Referendum repeals that part of Section 2.5 that authorizes the PUC to treat net metering customers differently.

However, the real difficulty begins with Section 2.95 of Chapter 379. Section 2.95 changed the "net metering cap" to 235 megawatts, and also stated that

net metering can continue after the cap is reached, but at the new tariff imposed in accordance with Section 2.3.[5] The relevant portion of Section 2.95 provides:

> **Sec. 2.95.**
> NRS 704.773 is hereby amended to read as follows:
> 704.773 1. A utility shall offer net metering ~~[, as set forth in]~~***:***
> ***(a) In accordance with the provisions of this section,*** NRS ***704.774 and*** 704.775, to the customer-generators operating within its service area until the ***date on which the*** cumulative capacity of all net metering systems ~~[operating in this State is equal to 3 percent of the total peak capacity of]~~ ***for which*** all utilities in this State ~~[.]~~ ***have accepted or approved completed applications for net metering is equal to 235 megawatts.***
> ***(b) After the date on which the cumulative capacity requirement described in paragraph (a) is met, in accordance with a tariff filed by the utility and approved by the Commission pursuant to section 2.3 of this act.***

2015 Stat. Nev. Ch. 379.

Section 2.95 therefore did two significant things: (1) it effectively removed the "net metering cap" by explicitly requiring net metering to continue after the cap is reached; and (2) it required that after the cap is reached, the new tariff would apply.

Section 2.95 effectuated these changes by adding new language, deleting language, and retaining some existing language. Consequently, a petitioner who is

[5] Under the old law, the cap was "3 percent of the total peak capacity of all utilities in this State." That was problematic because the total peak capacity changes, so 3% was a moving target. Section 2.95 changed the cap to 235MW, which is a fixed target that is more easily measured. It was not intended to be a significant increase in the net metering cap. Minutes of the Assembly Committee on Commerce and Labor (May 25, 2015). The 235MW cap was reached in August 2015. Las Vegas Review Journal, "NV Energy says cap on net metering reached." Available at: http://www.reviewjournal.com/business/nv-energy-says-cap-net-metering-reached (Last visited: May 1, 2016).

in favor of continuing net metering, but against the new, unaffordable rates and charges cannot simply run a referendum on Section 2.95 as a whole. Doing so would repeal *both* the new tariff *and* the continuation of net metering after the cap is reached. Since the cap was reached in August 2015, the result of repealing all of Section 2.95 (or all of Chapter 379 for that matter) would be no more net metering at all.

Accordingly, the Referendum seeks to repeal the part of Section 2.95 that subjects net metering to the new tariff, while keeping Section 2.95's requirement that net metering continue after the cap is reached:

> **Sec. 2.95.** NRS 704.773 is hereby amended to read as follows:
> 704.773 1. A utility shall offer net metering**[:**
> **(a)]** In accordance with the provisions of this section, NRS 704.774 and 704.775, to the customer-generators operating within its service area **[until the date on which the cumulative capacity of all net metering systems for which all utilities in this State have accepted or approved completed applications for net metering is equal to 235 megawatts.**
> **(b) After the date on which the cumulative capacity requirement described in paragraph (a) is met, in accordance with a tariff filed by the utility and approved by the Commission pursuant to section 2.3 of this act]**.

Referendum, Section 2.95. JA 10.

This case demonstrates exactly why the Nevada Constitution uses the indefinite term "part" rather than "section" or some other, specific part of a statute. The "part" of the statute that this Referendum is trying to repeal is the authorization for the new tariff. But, simply by an accident of how the statute was

drafted, that cannot be accomplished except by repealing certain phrases and subsections within Section 2.95, rather than the entirety of Section 2.95.

If the people want to reject only that part of Chapter 379 that authorized the expensive new rates and charges, they should be entitled to do so. Indeed, that is just what the Nevada Constitution permits.

The people's right of referendum cannot be dependent on how the statute happens to be organized or drafted. That conflicts with the plain language of Nev. Const. Article 19, § 1, and also with the people's coequal power, as Arizona and Oregon have recognized. As the Arizona Attorney General concluded, it would be an absurd result because it would elevate the form of the statute over a substantive constitutional right. 1989 Ariz. Op. Atty. Gen. 156 (Oct. 19, 1989). Unfortunately, the district court did just that in this case. Accordingly, the district court's decision must be reversed.

IV. The People Are Empowered to Change the Law Through Referendum.

A. This Referendum does not enact new language into law, therefore it is not an initiative petition.

The difference between a referendum and an initiative is that only an initiative can add new material to the law. "Referendum is the electorate's power to approve or disapprove already-enacted legislation, while initiative is the electorate's power to directly enact legislation by popular vote." *Garvin v. Ninth Judicial Dist. Court ex rel. Cty. of Douglas*, 118 Nev. 749, 753, 59 P.3d 1180, 1183 (2002).

Put slightly differently: "Initiative is that power reserved to the people to propose new laws; referendum, on the other hand, gives them the power to veto those laws passed by their representatives." *Forman v. Eagle Thrifty Drugs & Markets, Inc.*, 89 Nev. 533, 537, 516 P.2d 1234, 1236 (1973) (*ovr'd on other grounds by Garvin*, 118 Nev. at 765, 59 P.3d at 1190). As this Court stated in *Forman*: "The initiative and referendum powers granted to the citizens of this state are extremely broad."

In *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 892, 141 P.3d 1224, 1234 (2006), the Nevada Supreme Court rejected the argument that an initiative petition was actually a referendum. The petition in that case clearly created new law that did not previously exist, even though it also would declare old laws which conflicted with the new language "null and void." *Id.* The court distinguished that petition, which created new law, from a referendum, which does not. *Id.* Quoting from a California case, the court stated "[e]nactment is not a quality of the referendum." *Id.* (quoting *Whitmore v. Carr*, 2 Cal. App. 2d 590, 593, 38 P.2d 802, 804 (1934)).

In *Whitmore*, a local referendum was placed on the ballot and the voters approved it. *Whitmore*, 38 P.2d at 803. However, the ordinance that was the purported subject of the referendum had actually never been passed by the city council. *Id.* The court noted that the referendum power is "the right reserved to the

people to adopt or reject any act or measure which has been passed by a legislative body." *Id.* Since the ordinance had never become law by the act of the city council, a referendum to "approve" it could not *enact* it. *Id.* at 804. Enactment, the court stated, had to be accomplished by initiative instead. *Id.*

Clearly, a referendum cannot "enact" new law in the ordinary sense of proposing new language, as did the petition in *Herbst*. Nor can a referendum attempt to enact a law that had not already been adopted by a legislative body, as in *Whitmore*.

The Referendum in this case attempts neither of those things. It is not attempting to "enact" law in a manner that is outside the scope of the referendum power. Instead, it only seeks to repeal a part of an existing statute.

Because Nev. Const. Art. 19, § 1 expressly permits referenda that repeal "any part" of a statute, there is no such thing as an "impermissible amendment" or "enactment" when a referendum petition seeks to repeal a part of existing law. In such cases, any changes the referendum makes to the law as a result are necessarily lawful, valid, and within the scope of the referendum power.

B. Whether a petition "substantially changes" the law is an incorrect standard, and one that will only create uncertainty and invite litigation.

In this case, the district court concluded that the Referendum "proposes a substantial change to the law and not a yay or nay vote on a statute or part thereof."

JA 227. Unfortunately, neither in the order nor at the hearing did the district court give any guidance as to when a change is "substantial" or not. *See* JA 221-224 (district court's ruling from the bench).

Prior to the district court's decision in this case, it appears that no court in the nation has ever invalidated a referendum petition on the basis that it would "substantially change" or otherwise impermissibly "amend" the law, and must be brought as an initiative instead.

Obviously, repealing an entire statute by referendum would "substantially change" the law in the sense that the people can completely eliminate a policy or program the Legislature enacted. That is the nature of the referendum: it is the people's opportunity to reject and veto an act of the Legislature. In addition to the power to reject a whole act of the Legislature, Nev. Const. Art. 19, § 1 undeniably also allows the people to reject "any part" of a statute. Repealing only a part of a statute will virtually always "change" the policy or meaning of the remaining statute to some degree, in contrast to just rejecting the whole policy or program.

For example, the Arizona referendum rejected only the part of the statute moving Columbus Day to a Sunday, while keeping the new designation of Martin Luther King Day, with the effect of essentially creating a new paid holiday. *See* 1989 Ariz. Op. Atty. Gen. 156. But the referendum was nevertheless valid, because Arizona, like Nevada, allows referenda on a part of a statute. *Id.*

The Arizona Attorney General appropriately applied the plain language of the constitution to find the referendum valid. If we do not apply the plain language of Article 19, § 1 as discussed above, then we are left with a line-drawing exercise. At what point does a referendum change the meaning or policy of a statute *too much* and thus become an initiative instead?

It is possible to imagine a referendum that truly reverses the meaning of a statute, rather than simply reject it. For example, a referendum that struck the word "not" as in: "smoking is [~~not~~] permitted within 100 feet of a school." Perhaps only in such extreme and unusual cases can it reasonably be argued that a partial referendum has crossed the line from rejecting a statute or part thereof to "enacting" law, without too much risk of interfering with honest attempts at drafting referenda.[6] But no such case is presented here.

The Referendum in this case asks the voters to reject that part of Chapter 379 which authorized the PUC to impose special new rates and charges on net metering customers. If the Referendum succeeds, it will "change" the law by repealing the new rates and charges. This is plainly not a "piecemeal" attempt to strike words

[6] However, even this would be making an exception to the plain language of Nev. Const. Art. 19, § 1. As such, it must be narrowly construed and applied to only that very extreme kind of situation. It cannot be allowed to expand to more generally restrict the ability to run a referendum on only a part of a law. Furthermore, it is doubtful that even this exception necessary. Undersigned counsel could find no examples of any such referenda in Nevada or elsewhere that qualified for the ballot.

from a statute. Instead, it is a rejection of one part of the statute: the authorization for the new tariff. Like the Arizona, Michigan, and Oregon Constitutions, Nev. Const. Art. 19, § 1 permits referenda on any part of a statute. Therefore the people are entitled to, if they choose, repeal only that part of Chapter 379 that authorized the new rates and charges.

This is not unlike the referendum rejecting the part of a statute that limited bluegill and sunfish fishing in the winter, which the Michigan Attorney General approved. Mich. Op. Atty. Gen. 1941-42, No. 20573, p. 266. Nor is it any more of a change than striking the part of a statute moving the observance of Columbus Day to a Sunday, while keeping the part designating Martin Luther King, Jr. Day as a new holiday. 1989 Ariz. Op. Atty. Gen. 156.

As the instant case itself demonstrates, the district court's refusal to apply the plain language of the Constitution results in a restriction on the right of referendum. It removes the ability of the people to reject the part of Chapter 379 that is unpopular (the new costly rates and charges on net metering customers), while keeping the part that is popular (continuing net metering). Instead, the district court's decision forces the petitioners to undertake what even CSEF acknowledged is the more expensive, more difficult, riskier, and more time-consuming process of proposing a statutory initiative. And all for no apparent reason. There is no harm in allowing the people to exercise their right to reject part

of a law they disagree with. If a majority of voters wish to repeal a part of a law, it is their prerogative to do so.

If the district court's decision is not overturned, it is easy to imagine any number of situations where a statute could logroll popular provisions with unpopular ones. For example, imagine a one-sentence statute that provided: "Candidates shall not use campaign contributions for personal use, except that campaign contributions may be used to pay for rent or mortgage, clothing, college tuition or other educational expenses, and automobiles for the candidate, and his or her spouse and children, regardless of whether the same is related to the campaign or official duties of the candidate."

Suppose the people run a referendum to strike everything after "personal use," so that what remained would read: "Candidates shall not use campaign contributions for personal use." Is this a "substantial change" or a "piecemeal" approach that would render the referendum completely void, as the district court ruled in this case? Clearly such a referendum would change the law to something other than what the Legislature originally had in mind. But that does not mean the referendum inappropriately "enacts" law or "amends" the law. Instead, referenda of this sort is exactly what is authorized by Nev. Const. Art. 19, § 1 when it permits a referendum on any part of a statute. This ensures that the people have a meaningful ability to veto those acts of the Legislature that they disapprove of.

In short, a partial referendum may result in a "substantial change" in the law in the sense that the state of the law afterwards is not something the Legislature intended. But the whole point of a referendum is to reject something the Legislature intended, and Nev. Const. Art. 19, § 1 explicitly authorizes referenda on only a part of a statute. So the fact that a partial referendum would result in a substantial change in the law is not a legitimate reason to invalidate a referendum petition.

Furthermore, a standard such as "substantial change" is too amorphous to give any guidance to the courts or to the people trying to draft petitions. In virtually any case there would be room to argue whether the result of the referendum is a "substantial" change or not, and thus whether the referendum is valid. This would invite litigation, yet offer no guidance to the courts on how to resolve the dispute. That uncertainty is itself a restriction on the right to referendum.

It is not the courts' function to judge whether a referendum is wise, or whether there might be a "better" course through an initiative petition. Instead, the district court should have applied the plain language of Nev. Const. Art. 19, § 1 that a referendum may be had on any part of a statute.

This rule is a simple and bright-line rule that both petitioners drafting referenda and courts reviewing them can easily apply to determine if the petition is

a valid referendum. It maximizes the right to run a referendum, and ensures that the right is not thwarted merely by how the statute happens to be drafted.

Unfortunately, the district court's decision in this case directly conflicts with Nev. Const. Art. 19, § 1 and improperly restricts the people's constitutional right to referendum. It therefore must be reversed.

CONCLUSION

For the foregoing reasons, Appellant No Solar Tax PAC respectfully requests that this Court REVERSE the decision of the district court.

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CERTIFICATE OF COMPLIANCE

1. 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). This brief has been prepared in a proportionally space typeface using Word 2013 in 14 font size and in Times New Roman.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 6,142 words.

3. Finally, I hereby certify that I have read this appellate 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 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the 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 the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 6th day of May, 2016.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I declare that I am an employee of White Hart Law, LLC and on this 6th day of May, 2016, I served a copy of the foregoing Appellant No Solar Tax PAC's Opening Brief by Nevada Supreme Court CM/ECF Electronic Filing to:

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