

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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Elizabeth A. Brown  
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REV. LEONARD JACKSON,

Appellant,

vs.

FAIR MAPS NEVADA PAC,  
NEVADA SECRETARY OF STATE,

Respondents.

**Case No.: 80563**

District Court Case No.:  
19 OC 00209 1B

**COMBINED REPLY BRIEF AND**  
**ANSWERING BRIEF ON CROSS-APPEAL**

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## DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the Appellant is an individual, therefore there are no parent corporations or publicly-held companies that own 10% or more of the party's stock.

Kevin Benson appeared for Appellant Rev. Leonard Jackson in proceedings in the District Court and has appeared for Appellant before this Court.

DATED this 22<sup>nd</sup> day of April, 2020.

By: \_\_\_\_\_

  
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## **I. SUMMARY OF THE ARGUMENT**

The Court should reject Respondent Fair Maps' attempts to make this appeal about the policy of redistricting reform. The question before the Court is whether the Petition's description of effect accurately conveys to voters what the Petition will do. It does not, and therefore it is invalid.

This appeal is not moot because amending the description of effect and refiling the Petition does not make it a "new" petition. The original version of the Petition is the same petition as the amended version, thus the Petition at issue in this appeal is the same Petition that was challenged in the district court.

NRS 295.061(3) does not prohibit an appeal from a district court's order in a challenge to a petition's description of effect. That statute only prohibits another district court challenge.

Appellant Jackson has standing to appeal because the district court granted only partial declaratory relief in his favor. It denied declaratory relief on the issue of whether the proposed Commission will replace the Legislature's 2021 maps with new maps in 2023.

The district court erred by failing to make findings of fact and by taking it upon itself to rewrite the description of effect. The description of effect as rewritten by the district court is still inaccurate and misleading.

## II. ARGUMENT

### 1. **The Question Before the Court is Whether the Description of Effect is Inaccurate or Misleading.**

A preliminary matter, the Court should ignore Fair Maps' rhetoric regarding the policy of redistricting reform, which is meant only to distract from the actual legal issues presented. For example, Fair Maps argues that Jackson's arguments are simply policy objections to its proposal, and accuses Jackson of "defend[ing] gerrymandering by opposing the Petition."<sup>1</sup> Answering Brief, p. 6.

The primary question before the Court is whether the Petition's description of effect accurately conveys to voters what the policy is that the Petition proposes. To answer that question, courts necessarily must examine the petition and make findings as to what its "true effect" will be. Fair Maps mistakes (or willfully conflates) this inquiry for a critique of the policy it is proposing.

As discussed in the combined Answering Brief on Cross-Appeal, below, the district court correctly found that Fair Maps' description of effect was inaccurate and misleading because it mischaracterized its proposed redistricting commission:

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<sup>1</sup> Fair Maps also seems to believe that Jackson and/or his counsel have a duty to assist Fair Maps in rewriting its description of effect. *See* Answering Brief, p. 7. That duty is squarely and solely placed on Fair Maps by NRS 295.009(1)(b). As Jackson's counsel stated during the hearing, it would be an ethical conflict for him to help Fair Maps redraft its description. JA 91-92. In any event, each of Fair Maps' proposed alternatives were problematic. Jackson's counsel attempted, twice, to explain why each of the alternative descriptions were inadequate, and was stopped by the district court both times. JA 89-91; JA 112-114.



the commission is not “independent,” nor is it actually required to stop partisan gerrymandering. Fair Maps is free to advocate for its proposed policy for redistricting reform, but it is not free to misrepresent that policy in the Petition’s description of effect. NRS 295.009(1)(b). That is the core issue here. Whether Fair Maps’ proposal is wise or unwise policy, or whether it is “good” or “bad” for voters to support it or oppose it, is not before the Court.

## **2. The Appeal is Not Moot**

Fair Maps’ substantive argument begins with a “heads we win, tails you lose” proposition: (1) that this appeal is moot because “the Petition” at issue in the Complaint has been amended and is therefore no longer at issue; and, (2) NRS 295.061(3) bars both an appeal and also bars any challenge to the amended petition because the amended petition was filed “in compliance with the order of the court.” *See* Answering Brief, pp. 13-17.

In other words, Fair Maps is arguing that, once a petition has been “amended in compliance with the order of the court,” (NRS 295.061(3)), there is no method whatsoever to challenge the district court’s order. For the reasons discussed below, this argument must be rejected.

### **A. Amending the Petition does not moot this Appeal.**

“The question of mootness is one of justiciability.” *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). A live controversy must

exist through all stages of the case. *Id.* The court’s duty is “to resolve actual controversies by an enforceable judgment.” *Id.* Accordingly, if this Court cannot grant effective relief, the appeal is moot. *Id.*

Fair Maps first argues that the Petition, in its original form, has been enjoined from appearing on the ballot, and that injunction remains in effect. A.Br. p. 14. It argues that this appeal is moot because “Appellant cannot obtain further relief by gratuitously supplementing that injunction.” *Id.* Fair Maps’ argument must be rejected because it focuses solely on the injunction and ignores the other relief sought in the Complaint, i.e., declaratory relief that the Description of Effect violates NRS 295.009(1)(b) because, among other things, it “fails to inform voters that the Commission will ‘undo’ [the Legislature’s] maps and create new maps in 2023...” JA 6.

This appeal is clearly not moot because the District Court’s order does not grant such declaratory relief. A live controversy exists regarding whether the Description of Effect ordered by the district court is accurate and non-misleading to voters. *See* O.Br. pp. 9-13 (arguing that it is inaccurate and misleading); A.Br. pp. 24-30 (arguing that it’s not). This Court can grant effective relief by holding that the district court’s description of effect is inaccurate and misleading, and remanding for further proceedings. Additionally, a live controversy exists

regarding whether the district court even has the jurisdiction to rewrite the description of effect, or whether its role is only to make findings of fact.

Fair Maps also argues that Jackson did not challenge the amended petition in a separation action, nor did he challenge it through an amended pleading in the district court.<sup>2</sup> A.Br. 14. It asserts that there is no injunction against the *amended* petition, thus, the argument goes, there is nothing to appeal from. A.Br. 14-15. The flawed premise of Fair Maps' argument is that the "amended petition" is an entirely new and separate petition from the original Petition. Fair Maps cites no authority for this argument. That is because it is contrary to law.

NRS 295.061(3) states: "If a **description of the effect** of an initiative or referendum required pursuant to NRS 295.009 is challenged successfully pursuant to subsection 1 **and such description** is amended in compliance with the order of the court, **the amended description** may not be challenged." (Emphasis added.) The statute's plain language consistently refers to the *description*, not to the petition. Amending the description pursuant to NRS 295.061(3) does not create an entirely new petition that is distinct from the original petition. Accordingly, the so-called "amended petition" is the same petition as the original Petition. This appeal is not moot because it involves the same petition at issue before the district court.

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<sup>2</sup> Had Jackson done either of those things, it is certain that Fair Maps would argue that they are all barred by NRS 295.061(3), so it is disingenuous to suggest that Jackson should have or must have done so.

The case law cited by Fair Maps is inapplicable because those cases involve events that rendered the petitions moot, none of which are present in this case.<sup>3</sup> For example, in *Personhood Nevada*, the proponents failed to get enough signatures by the deadline, so the initiative could not appear on the ballot no matter how the court ruled. 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). *Personhood* was a classic case of mootness because the court could no longer grant any effective relief, and its ruling would be tantamount to an advisory opinion. Similarly, in *Miller v. Burk*, the ballots had already been printed for the primary ballot, meaning the court could not order effective relief as to that election and the appeal was moot, as to that election only. 124 Nev. 579, 599 n. 70, 188 P.3d 1112, 1126 (2008). *Guinn v. Legislature of State of Nev.*, 119 Nev. 460, 476, 76 P.3d 22, 33 (2003) is similar because the Legislature passed the revenue-generating bills by a two-thirds vote, which made the question on appeal – whether a two-thirds vote was required – academic.

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<sup>3</sup> Fair Maps also cites to *Church v. Washoe Cty.*, 409 P.3d 53 (Nev. 2018) (unpublished) for the proposition that ballot-related challenges can be expedited. It argues that Appellant Jackson has delayed these proceedings and only requested the case be expedited after Fair Maps’ motion to dismiss was denied. Fair Maps ignores that Jackson filed his opening brief more than 2 months early, and moved to expedite at the same time. In any event, the holding in *Church* was that the appellant failed to demonstrate that his challenge was “capable of repetition, yet evading review.” *Id.* at \*4. He failed to request that the challenge be expedited, which is often done in election cases, and thus was not able to prove that the challenge would virtually always “evade review.” *Id.* at \*4-5.

Here by contrast, Fair Maps has not identified any event that has rendered each of the issues in this appeal moot. The questions remain: (1) is the district court's rewritten description of effect inaccurate and misleading? (2) Does the district court have jurisdiction to rewrite the description of effect? (3) Did the district court fail to make adequate factual findings? All of these are live controversies for which this Court can grant effective relief.

B. NRS 295.061(3) does not bar an appeal of the district court order.

Fair Maps' second argument is that NRS 295.061(3) bars this appeal. A.Br. 15. It argues that Jackson successfully challenged the description of effect, which was amended pursuant to the court's order. *Id.* NRS 295.061(3) states that "the amended description may not be challenged." According to Fair Maps, that means even an appeal of the court's order is prohibited. A.Br. 15.

The only authority Fair Maps cites for this proposition is the legislative history of NRS 295.061(3). However, that legislative history addresses only additional separate lawsuits challenging the description; it says nothing about appeals from the district court's order. The legislative history cited by Fair Maps is clearly discussing "challenges" as meaning district court actions brought pursuant to NRS 295.009. The word "challenge" in NRS 295.061(3) refers to challenges filed in the First Judicial District Court within the 15-day time limit. There is nothing in NRS 295.061(3) or its legislative history that indicates that it bars

*appeals* from a district court order requiring amendments to the description of effect. It is clear that the intent of the Legislature was to prohibit successive, separate lawsuits, not to prohibit appeals.

Fair Maps relies on *Ford v. Showboat Operating Co.*, 110 Nev. 752, 756, 877 P.2d 546, 549 (1994) for the proposition that “the right to appeal is statutory; where no statute or court rule provides for an appeal, no right to appeal exists.” Fair Maps essentially argues that NRS 295.061(3) statutorily takes away the right to appeal. That argument must be rejected because, as discussed above, nothing in the statute purports to limit the right to appeal. Second, *Showboat* dealt with the situation where there is an *absence* of any law or court rule authorizing an appeal. Here, an appeal is clearly authorized by court rule, NRAP 3A(b)(1), which allows for appeals from final judgments.

**3. This Court has already concluded that Appellant has standing to appeal.**

A. Jackson has standing because the district court did not grant him the full relief he requested.

Fair Maps’ next argument is that Appellant Jackson is not an “aggrieved” party and therefore has no standing to appeal. A.Br. 17. Fair Maps mostly reiterates the arguments it made in its Motion to Dismiss, which this Court denied on March 26, 2020. The Court should again reject these arguments.

A party is “aggrieved” within the meaning of NRAP 3A(a) when the party is “adversely and substantially affected by the challenged judgment.” *Jacinto v. PennyMac Corp.*, 129 Nev. 300, 303, 300 P.3d 724, 726 (2013). For example, a party is aggrieved when the judgment denies a claim or affects a personal or property right. *Id.*

In *Jacinto*, this Court held that a homeowner was aggrieved and had standing to appeal even though the district court granted the homeowner’s petition for judicial review and imposed sanctions on the bank in the form of attorney’s fees. *Id.* The homeowner had sought a modification of his home loan and sanctions against the bank in addition to attorney’s fees, but the district court declined to grant either. *Id.* This Court held that the denial of that relief was a sufficient grievance to confer standing on the homeowner to appeal. *Id.*

Like in *Jacinto*, Appellant Jackson is aggrieved by the judgment in this case because, although the district court granted some of the relief he requested, the district court did not grant the declaratory relief he requested. Specifically, the district court did not grant declaratory relief that the Description of Effect violates NRS 295.009(1)(b) because, among other things, it “fails to inform voters that the Commission will ‘undo’ [the Legislature’s] maps and create new maps in 2023...” Complaint, JA 6.

Similar to its mootness argument, Fair Maps' standing argument ignores these details. It argues that Appellant Jackson "obtained the full relief requested" because the district court declared that the Petition failed to satisfy the requirements of NRS 295.009(1)(b). A.Br. 18. However, Fair Maps ignores the fact that the district court rewrote the description of effect in a manner that denies Jackson's request for declaratory relief that the Petition must inform voters that it will adopt new maps in 2023. Instead, the district court rewrote the description of effect to state that the Commission merely "could" adopt new maps in 2023.

Fair Maps next attempts to paint this problem as something new, raised for the first time on appeal. A.Br. 19. Its argument is incorrect both factually and legally. First, the Complaint very clearly states that it is requesting declaratory relief on this precise issue. The Third Cause of Action alleges that the Description of Effect is invalid because "[i]t fails to inform voters that the Commission will 'undo' those maps and create new maps in 2023..." JA 6. Thus the issue was in fact raised before the district court, and the district court rejected Jackson's request in favor of Fair Maps' argument that the Commission might or might not adopt new maps in 2023. *See* JA 43 (Answering Brief); JA 101-02 (hearing transcript).

Second, Fair Maps argues that Jackson had to include all affidavits and documents in support of the challenge with the complaint, pursuant to NRS 295.061(1). Whether affidavits or other evidence was submitted with the



Complaint is irrelevant to the question of whether the issue of replacing the maps was raised before the district court. It plainly was. To the extent Fair Maps is arguing that Jackson did not adequately *support* that argument with affidavits and documents filed with the Complaint, it has waived that argument because it failed to raise it in the district court. Furthermore, Jackson’s argument is amply supported by evidence in the record: the language of the Petition itself, which states that the Commission “shall” adopt a redistricting plan by July 1, 2023. JA 50.

Like in *Jacinto*, Jackson has standing because, although he received some of the requested relief, the district court’s order denies other requested relief. Contrary to Fair Maps’ argument (A.Br. 19), Jackson would obtain additional relief if he prevails in this appeal: the judgment would be reversed and the district court’s description of effect would be declared invalid because it is inaccurate and misleading. Clearly Jackson has standing to appeal.

B. Jackson is aggrieved because the district court failed to make findings of fact and exceeded its jurisdiction.

Additionally, Jackson is also aggrieved by the district court’s failure to make findings of fact and the district court’s act of rewriting the description of effect. The district court does not have the jurisdiction to rewrite the description, as discussed in the Opening Brief. When the court enters an order outside its jurisdiction, a party purportedly bound by that order can be aggrieved. *See e.g., In re Estate of Forney*, 44 Nev. 279, 285, 194 P. 331, 332 (1921) (administrator of

estate was aggrieved where probate court ordered him to dispose of property where it lacked jurisdiction to do so, even though administrator was not personally interested in the property).

#### **4. The District Court Exceeded its Jurisdiction by Rewriting the Description of Effect.**

As discussed in the Opening Brief, the district court exceeded its jurisdiction by itself rewriting the description of effect, instead of making findings of fact regarding the true effect of the Petition.

Fair Maps argues that the plain language of NRS 295.061(3) authorizes the district court to rewrite the description of effect. A.Br. 20. It asserts that the language “amended in compliance with the order of the court” means that either the petition proponent or the district court can revise the description of effect. *Id.*

It is actually Fair Maps’ reading of NRS 295.061(3) that is contrary to the plain language of the statute. The statute uses the passive voice, stating that it applies if “such description is amended in compliance with the order of the court.” It does not expressly say *who* does the amending, but it is readily apparent that it means someone other than the court, because it states that it must be amended “in compliance” with the court order. If the Legislature intended the court itself to rewrite the description of effect, it would have and could have simply said “as amended by the court.”

In fact, the legislative history shows that NRS 295.061(3) was intended to require the petition proponent to amend and refile the petition. In introducing the bill, Assemblywoman Gansert explained that it was intended to deal with the problem that initiative petitions would be challenged in court and “those initiative petitions were not required to go back to the Secretary of State to be refiled. If there was an issue with the summary or the petition, it could be remedied, but did not need to be refiled with the Secretary of State.” Minutes the Assembly Committee on Elections, Procedures, Ethics, and Constitutional Amendments, March 29, 2007, p. 21.

The bill was designed to require that the initiative be refiled with the Secretary of State after any change was made to it. *See id.* This section became NRS 295.015(2). It was also designed to prevent successive challenges if the description was amended in compliance with the court order. This section became NRS 295.061(3). The problem the legislation was intended to solve was that the courts would order a change to the petition, but then the amended version never became easily available to the public because it was never refiled with the Secretary of State. AB 322 was intended to take the courts *out* of the business of amending petitions, and instead to put the onus on the petition proponents to do so.

Fair Maps next argues that the district court in this case did not *mandate* that Fair Maps use the description it wrote, but instead ordered only that the

“deficiencies *may* be cured through the revised description of effect provided herein.” A.Br. 21. Thus it was merely a recommendation, which it argues this Court endorsed in *Prevent Sanctuary Cities v. Haley*, 421 P.3d 281, 2018 Nev. Unpub. LEXIS 442, Case No. No. 74966 (Nev. 2018) (unpublished – NRAP 36) (noting that the district court did not provide a “recommendation” for correcting the description).

This argument misses the point. Whether the district court expressly mandates the description or not is irrelevant. Even if not mandated, if the district court proposes its own description of effect, and the petition proponent uses that description verbatim, the petition is necessarily amended “in compliance with” the court order. Thus, for purposes of NRS 295.061(3), there is no practical difference between the district court mandating or recommending a specific description. Either way, the revised description cannot be challenged.

This presents a problem (and is why Appellant Jackson is aggrieved) when, as here, the district court’s description of effect is still inaccurate or misleading. Under NRS 295.061(3), that description cannot be challenged in the district court again. According to Fair Maps, the new description would be immune from any legal challenge, including an appeal, even if it is patently inaccurate or misleading.<sup>4</sup>

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<sup>4</sup> The order in this case was drafted by Fair Maps. JA 127.

The district court exceeds its jurisdiction by rewriting the description because, by doing so, it effectively amends the petition itself, usurping the role of the petition proponent as contemplated in NRS 295.061(3).

#### **5. The District Court Erred by Failing to Make Findings of Fact**

As this Court discerned in *Prevent Sanctuary Cities*, the role of the district court is to make findings of fact regarding the true effect of the petition, which the petition proponent then uses to create an amended description that complies with the order. ; *see also Las Vegas Taxpayer Accountability v. City Council of Las Vegas*, 125 Nev. 165, 183-84, 208 P.3d 429, 441 (2009) (district court made findings of fact regarding the “true effect” of the referendum, and based on those findings determined that the description of effect was invalid).

In this case, the district court’s order simply states that “[t]he description of effect does not adequately explain to voters what is meant by the term ‘independent’ or the phrase ‘fair and competitive.’”. JA 130. The order does not contain any actual findings of fact regarding the true effect of the petition.

Fair Maps argues that Appellant Jackson waived any argument related to findings of fact because he did not attach any affidavits or other evidence to his Complaint. A.Br. 22. Fair Maps is incorrect. Appellant Jackson filed his Opening Brief with his Complaint, and the Opening Brief contained numerous citations, quotations, and discussion of the laws in other states which create truly

“independent” redistricting commissions, quite unlike the one proposed here. JA 10-14. It is unnecessary to submit affidavits or other evidence in this case because the issues primarily revolve around a legal analysis of the Petition itself and a comparison to other states’ laws, which were included in the Opening Brief.

Finally, Fair Maps attempts again to obfuscate the actual issues on appeal. It argues that whether the Commission is in fact “independent” and whether it is actually required to draw “fair and competitive” electoral districts “are policy questions that the courts do not need to resolve at all...” A.Br. 24. Those are not policy questions. They are factual questions that are properly before the courts because the description of effect claimed that the Commission would be “independent” and that it would draw “fair and competitive” maps, when neither of those statements are, in fact, true.

It is both appropriate and necessary for courts to determine what the facts really are, in order to assess whether the description of effect accurately conveys to voters what the petition will do. Calling those balls and strikes is exactly the courts’ role under NRS 295.009 and 295.061(1).

Fair Maps also argues that it was unnecessary for the district court to make express findings of fact because omitted findings of fact are presumed to support Jackson as the prevailing party. A.Br. 23. It relies on *Fenkell v. Fenkell*, 86 Nev. 397, 403, 469 P.2d 701, 704 (1970), quoting: “Any fact necessary to support the

order is presumed to have been proven in the absence of an affirmative showing to the contrary.” However, that case is inapposite because the district court in that case *did* make findings of fact, which the appellant challenged as not being supported by the evidence. *Id.*, 86 Nev. at 400. The quote Fair Maps relies on does not support its argument. The court was stating that, in the absence of a full record, the district court’s findings of fact are presumed to be supported by substantial evidence.<sup>5</sup> *Id.* at 403.

With respect to description of effect challenges, this Court has recognized the importance of factual findings. This Court stated: “Without factual findings regarding the initiative's effect, [the petition proponent] has been provided no guidance under which it could craft an amended description of effect satisfying NRS 295.009(1)(b) and, thereby, invoking the finality of NRS 295.061(3).”

*Prevent Sanctuary Cities v. Haley*, 421 P.3d 281, 2018 Nev. Unpub. LEXIS 442, Case No. No. 74966 (Nev. 2018).

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<sup>5</sup> There is case law stating that this Court will imply findings when supported by the record. *See e.g., Certified Fire Prot. Inc. v. Precision Constr. Inc.*, 128 Nev. 371, 384, 283 P.3d 250, 259 (2012). If Fair Maps is arguing that express findings are not necessary because this Court will imply them from the record, then it is conceding that there is sufficient evidence in the record to support the district court’s determination that its description of effect is inaccurate and misleading. As explained above, findings of fact are important and necessary in description of effect challenges, thus it would be inappropriate to imply such findings in these types of cases.

Accordingly, it is necessary for the district court to make findings of fact, both so that the petitioner can redraft the petition, and so that it can evaluate whether the description of effect complies with NRS 295.009(1)(b). The district court failed to do so in this case, therefore a remand is necessary.

**6. The District Court’s Description of Effect is Inaccurate and Misleading.**

The district court erred by rewriting the description of effect in a manner that is still inaccurate and misleading. Specifically, the last sentence of the district court’s description of effect states in pertinent part: “This amendment requires redistricting after each federal census, beginning in 2023, which **could** replace maps drawn by the Legislature after the 2020 census...” (emphasis added). JA 131. This is inaccurate and misleading because the text of the Petition itself *mandates* that the Commission adopt new maps in 2023. It states that the Commission “shall” adopt a redistricting plan “[n]ot later than July 1, 2023.” JA 43.

Fair Maps asserts that Jackson “does not contend that the words of the Petition dictate the effect he contends will occur.” A.Br. 30. Actually, that *is* what Jackson contends. See O.Br., p. 10. While the Petition does not expressly *prohibit* the Commission from adopting the Legislature’s plan, it does expressly state that the Commission shall adopt a plan by July 1, 2023. The entire point of the Petition is obviously to enact a new plan, as soon as possible after the initiative takes effect.



The directive to adopt a redistricting plan that meets certain new criteria is tantamount to directing the Commission to adopt a new plan.

Fair Maps argues that, despite this mandate in the Petition itself, it is “argumentative” and “speculative” for the description of effect to say that the Commission “will” adopt new maps in 2023. A.Br. 25. Instead, it argues that it is accurate to state that the Commission “could” adopt new maps because it is theoretically possible that the Commission will simply adopt the same maps the Legislature adopts in 2021. *Id.* Fair Maps acknowledges that the Commission could only adopt the Legislature’s 2021 maps “if the maps comply with the proposed amendment.” *Id.*

In other words, Fair Maps is arguing that the description of effect is perfectly accurate because, *if* the commissioners ignore the mandate in the Petition, *if* the Legislature’s maps comply with the new requirements in the Petition, *if* the commissioners (who will differ significantly in political affiliation from the Legislature) agree with the Legislature’s maps, and *if* that agreement is supported by a super majority of commissioners, that it is *possible* that the Commission will adopt the Legislature’s maps.

That is a lot of *ifs* that would have to be met for it to even be *possible* for the Commission to adopt the Legislature’s 2021 maps. Indeed, nothing could be more speculative. To even suggest that that outcome is a possible, let alone a plausible

effect of the Petition, is simply not credible. Accordingly, the Court should reject Fair Maps' argument that the district court's description of effect is "factually accurate." A.Br. 27. First, it is not "factually accurate" because, as explained above, there is no realistic possibility of the Commission adopting the Legislature's 2021 maps.

Second, even if it were "factually accurate," that does not mean the description of effect is valid. A description of effect can be factually accurate, and yet highly misleading. For example, in *Taxpayers for the Prot. of Nev. Jobs v. Arena Initiative Comm.*, this Court struck down a petition where the description of effect was factually accurate in the sense that it correctly stated that the initiative would create a special tax district to fund the construction of an arena, and outlined the criteria for where such a district could be located. Nevertheless, the Court found that the description was invalid because it did not disclose that those criteria effectively limited the location of an arena to a certain site on the Strip that was owned by a proponent of the petition. 2012 Nev. Unpub. LEXIS 1101, at \*8, Case Nos. 57157, 58350 (Aug. 1, 2012).

Likewise, the Court should find the district court's description of effect inaccurate and misleading because there is no realistic possibility that the Commission will simply adopt the Legislature's 2021 maps.

Finally, the Court should also reject Fair Maps' rhetoric about voters who it asserts "support partisan gerrymandering." A.Br. 27-28. The point of Jackson's argument is to candidly lay out the political landscape to further show why the district court's description is materially inaccurate and misleading. Voters need to be aware that, if this Petition becomes law, it will require mid-decade redistricting that will "undo" what the Legislature does in 2021. Some voters will welcome that change, others will not. Obviously a voter's position will be influenced by the voter's political affiliation. The reality is that partisan politics is important to voters, and that is why the description of effect must reflect reality. A voter who wants to keep the status quo will be less likely to support the Petition if he knew that it would replace the Legislature's 2021 maps. A voter who wants to change the status quo will be more likely to support the Petition if she knows that it will replace the Legislature's maps. Thus it is important information that voters need to be aware of in order to make an informed decision.

Fair Maps is trying to draw the Court into its rhetoric of trying to denigrate anyone who doesn't support its Petition as necessarily being in favor of "gerrymandering." It is arguing that the policy proposed by the Petition is the "correct" policy. It could equally be argued that this Petition will result in electoral districts that are even less representative of Nevada citizens. But of course, these policy arguments and issues are not before the Court.

This case is not about whether redistricting reform in general, or the policy proposed in this particular Petition, is wise or unwise, good or bad. The question before the Court is whether the description of effect accurately describes the effect of the Petition. It does not. The district court's order must therefore be reversed.

### **III. CONCLUSION**

For the reasons stated above and in the Opening Brief, Appellant Rev. Jackson respectfully requests that this Court reverse in part and: (1) hold that the district court's description of effect is inaccurate and misleading and therefore violates NRS 295.009(1)(b); (2) hold that the district court exceeded its jurisdiction by rewriting the description of effect; (3) hold that the district court failed to make adequate findings of fact; and, (4) remand for further proceedings consistent with those holdings.

## **ANSWERING BRIEF ON CROSS-APPEAL**

### **I. ISSUES ON APPEAL**

1. Did the district court correctly conclude that it is inaccurate and misleading to characterize the proposed redistricting commission as “independent” when a majority of its members are directly appointed by the Legislature, those members select the remaining members, and its funding is entirely controlled by the Legislature?
2. Did the district court correctly conclude that it is inaccurate and misleading to tell voters that the proposed redistricting committee will create “fair and competitive electoral districts” when in fact the Petition does not require it to do so?
3. Did the district court correctly conclude that the petition proponents must inform voters that the Petition will increase the costs of redistricting because it would require mid-decade redistricting?

### **II. STATEMENT OF RELEVANT FACTS**

On November 4, 2019, Respondent Fair Maps Nevada PAC, filed a constitutional initiative petition designated as #C-02-2019 by the Secretary of State. JA 49. The initiative petition seeks to amend the Nevada Constitution to require that redistricting be performed by a commission rather than by the Legislature (“the Initiative”). JA 49. The Initiative proposes to add a new Section 5A to Article 4, Section 5 of the Nevada Constitution, which would be titled:

“Apportionment; Creation of Independent Redistricting Commission.” Initiative, Section 5A.<sup>6</sup> JA 49-50.

The Initiative would create the “Independent Redistricting Commission” (“Commission”) within the legislative branch of state government. Initiative, Section 5A(1). Starting in the year 2023, the Commission would apportion the number of Senators and Assemblymen among the state legislative districts and would apportion the number of representatives to the United States House of Representatives among the congressional districts. *Id.*

The Commission would consist of seven members. Initiative, Section 5A(2). The Senate Majority Leader, Senate Minority Leader, Speaker of the Assembly, and Assembly Minority Leader each appoint one commissioner. *Id.* These four commissioners appoint three additional commissioners, each of whom has not been registered or affiliated with either of the two largest political parties in the State within the last four years, and is not registered or affiliated with the same political party as another commissioner. *Id.*

Additionally, a commissioner cannot, within the four years preceding appointment and during their term on the Commission, be a registered lobbyist, a candidate for partisan office, an elected official to a partisan office, an officer or

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<sup>6</sup> Unless otherwise noted, the citations to the text of the Initiative are to the *proposed* constitutional section and subsection numbers in Section 2 of the Initiative.

member of the governing body of a political party, a paid consultant or employee of a partisan elected official, candidate, PAC, or caucus, an employee of the Legislature or the State of Nevada (except employees of the judicial branch, the armed forces, or a state institution of higher education). Initiative, Section 5A(3). Nor may a commissioner be related within the third degree of consanguinity or affinity to any such individual. JA 49-50.

All meetings of the Commission must be open to the public and the Commission shall ensure that the public has the opportunity to view, present testimony, and participate in the hearings before the Commission. All Commission materials shall be public records. Initiative, Section 5A(5). *Id.*

The Commission shall adopt a redistricting plan not later than July 1, 2023, and thereafter not later than 180 from the release of the decennial census. Initiative, Section 5B(2). JA 50.

A final plan requires five affirmative votes, including votes from at least one commissioner from each of the two largest political parties and one commissioner not registered or affiliated with either of those parties. *Id.*

The Commission must draw districts according to certain criteria, and must apply those criteria in the order listed in the Initiative. Initiative, Section 5B(1). These criteria include ensuring that, on a statewide basis, the districts “do not

unduly advantage or disadvantage a political party.” *Id.* The last criteria that the Commission may consider is the number of politically competitive districts. *Id.*

The Description of Effect of the Initiative states in full:

This measure will amend the Nevada Constitution to establish an Independent Redistricting Commission to oversee the mapping of fair and competitive electoral districts for the Nevada Senate, Nevada Assembly, and U.S. House of Representatives.

The Commission will consist of seven Nevada voters, four who will be appointed by the leadership of the Nevada 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. All meetings of the Commission shall be open to the public who shall have opportunities to participate in hearings before the Commission.

The Commission will ensure, to the extent possible, that the electoral districts comply with the United States 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 by the Commission beginning in 2023 and thereafter following each federal census.

JA 51.

Appellant / Cross-Respondent Rev. Jackson commenced this case on November 26, 2019 by filing his Complaint (JA 1) and Opening Brief (JA 7) in the district court. Jackson included in his Opening Brief citations to and discussion of other states’ truly independent redistricting committees. JA 10-12. He also discussed how the language of the Petition itself states that it is not in fact required



to end partisan gerrymandering or to create competitive districts. JA 15-16.

Likewise, Jackson showed that the Petition itself states that the Commission shall adopt a redistricting plan not later than July 1, 2023. JA 17.

### **III. SUMMARY OF ARGUMENT**

The district court correctly ruled that the Petition’s description of effect is inaccurate and misleading because the proposed redistricting committee is not “independent.” The Legislature would directly appoint a majority of the proposed Commission’s members, who would in turn appoint the other members. The Legislature would maintain complete control of the Commission’s funding, and the Petition does not require the Legislature to fund the Commission at all. There are no safeguards to prevent commissioners from acting in their own self-interest, such as a prohibition on commissioners running for office in a district they just drew. In sum, this proposed Commission meets almost none of the criteria that define a truly “independent” redistricting commission. The district court was therefore correct in holding that “independent” is inaccurate and misleading.

The description of effect also states that the proposed Commission would draw “fair and competitive” electoral maps. However, nothing in the Petition actually requires it to do so. Instead, the Commission is directed to consider only excessive partisan unfairness and to consider competitiveness only to the extent practical, after addressing all other mapping criteria. Thus the Petition does not

require the Commission to stop partisan gerrymandering, as the proponents claim. Again, the district court was correct in holding that it is inaccurate to claim that the Commission would create “fair and competitive” maps.

The district court correctly required the description of effect to inform voters that the Petition would increase the cost of redistricting because it would require mid-decade redistricting only two years after the Legislature redistricts in 2021.

#### **IV. ARGUMENT**

##### **1. Standard of Review**

The district court’s findings of fact will be upheld on appeal unless they are clearly erroneous or are not supported by substantial evidence. *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). Questions of law are reviewed *de novo* (*id.*), including a district court’s decision to grant declaratory and injunctive relief which depends on a pure question of law. *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 41, 293 P.3d 874, 878 (2013).

##### **2. Legal Standard for the Description of Effect**

NRS 295.009(1)(b) requires that every initiative “[s]et 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 purpose of the description of effect is to “prevent voter confusion and promote informed decisions.” *Nevadans for Nev. v. Beers*, 122 Nev. 930, 939, 142 P.3d 339, 345 (2006).

The description of effect must appear on every signature page. NRS 295.009(1)(b). Thus “[t]he importance of the description of effect cannot be minimized, as it is what the voters see when deciding whether to even sign a petition.” *Coal. for Nev.’s Future v. RIP Commerce Tax, Inc.*, No. 69501, 2016 Nev. Unpub. LEXIS 153, at \*5 (May 11, 2016) (unpublished decision – NRAP 36(c), citing *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 37, 293 P.3d 874, 876 (2013) and *Las Vegas Taxpayer Accountability Comm. v. City Council*, 125 Nev. 165, 177, 208 P.3d 429, 437 (2009)).

For that reason, the description of effect “must be a straightforward, succinct, and nonargumentative summary of what the initiative is designed to achieve.” *Educ. Initiative*, 129 Nev. at 37, 293 P.3d at 876. The district court must also analyze “whether the information contained in the description is correct and does not misrepresent what the initiative will accomplish and how it intends to achieve those goals.” *Id.*, 129 Nev. at 35. 293 P.3d at 883.

### **3. The District Court Correctly Held that the Proposed Redistricting Commission is Not “Independent.”**

The first sentence of the Petition’s description of effect states in relevant part: “This measure will amend the Nevada Constitution to establish an **Independent** Redistricting Commission.” (Emphasis added.) However, the Commission is not independent, thus that statement is inaccurate and seriously misleading. The

Commission is not independent for two main reasons: its composition and its funding.

A. The Commission is not independent because legislative leadership would directly appoint a majority of the commissioners.

First, a majority of the Commission is directly appointed by the major parties' legislative leadership. JA 49 (Petition, Section 5A(2)). The Petition prohibits certain politically-active people from serving as commissioners. *See id.* (Petition, Section 5A(3)) (prohibiting from serving those who in the previous four years have been partisan candidates or elected officials, lobbyists, most state employees, paid political staff, etc., and their close relatives). These exclusions only prevent a certain sub-set of politically-involved people from serving on the Commission. For example, it does not prevent a legislator from appointing a campaign volunteer, nor does it prevent nonpartisan elected officials or city council members from being appointed. The exclusions do not create independence because the appointments are still directly made by legislative leadership. Thus the exclusions do nothing to ensure that appointees are insulated from political pressures, are not beholden to the legislative leadership, and do not stand to gain personally or politically from serving on the Commission.

The composition and selection of the Commission as proposed in the Petition is contrary to truly "independent" redistricting commissions that have been adopted in other states. Four other states have given primary redistricting

responsibility to independent commissions. In each of them, the independence of the commissioners is ensured by having a body *other than* the legislative leadership either appoint the commissioners directly, or create the pool from which commissioners are chosen.

In Arizona, the commission on appellate court appointments creates an initial pool of 25 nominees, ten from each of the two largest parties, and five not from those two parties. Ariz. Const. art. IV, pt. 2, § 1(4), (5). Legislative leadership can only appoint commissioners from this pool. *Id.* at (6).

In Colorado, a panel of three retired appellate court justices or judges randomly select nominees from all applicants who meet the minimum qualifications, then the panel creates pools for each of the two major parties and for nonpartisans. Colo. Const. Art. V, Section 44.1. Applicants are selected based on, among other things, their experience, analytical skills, and ability to remain impartial. *Id.* at 44.1(8)(1),(2). The panel of judges must ensure that the commission reflects Colorado's racial, ethnic, gender, and geographical diversity. *Id.* at 44.1(10). Legislative leadership can choose sub-pools from their respective party's pool, but ultimately the panel of retired judges make the final selection. *Id.* at 44.1(8)-(10).

In California, Proposition 11 of 2008 amended the California Constitution to create the Citizens Redistricting Commission. That amendment expressly states:

“The selection process is designed to produce a commission that is independent from legislative influence and reasonably representative of this State’s diversity.” Cal. Const. Art. XXI, Section 2(c)(1). Government auditors create a pool from the qualified applicants. Cal. Govt. Code § 8252. Legislative leadership can reduce the pool, but then the auditors pick a majority of the commissioners by lottery, and those commissioners appoint additional commissions from the remaining members of the pools, who form a minority of the commission. *Id.*

In Michigan, the secretary of state must make the application to serve as a commission widely available to the general public in all areas of the state. Mich. Const., Art. IV, § 6. The secretary of state must also mail 10,000 applications to randomly selected voters. *Id.* The secretary of state then creates the pools by randomly selecting from the qualified applicants, but shall also use accepted statistical methods to ensure that the pool represents the geographical and demographic diversity of the state. *Id.* Similar to California, legislative leadership can reduce the pools by striking a certain number of names, but the secretary of state, by lottery, makes the final selections of commissioners from the remaining pool. *Id.*

Additionally, most states prohibit commissioners from running for partisan office or being appointed to an office or government employment for a certain period of time *after* serving on the commission. *See e.g.*, Ariz. Const. art. IV, pt. 2,

§ 1(13) (ineligible for public office and cannot be a paid lobbyist for three years after serving); Cal. Const. Art. XXI, Section 2(c)(6) (ineligible for office for 5 to 10 years, depending on the office); Mich. Const. Art. IV § 6(1)(e). This reduces the incentive for commissioners to draw maps that would favor their own future political ambitions.

By contrast, the Petition in this case: (1) allows legislative leadership to directly appoint a majority of the Commission; (2) allows the commissioners to run for an office for which they just finished drawing new districts; and (3) allows the commissioners to be appointed to an office or any other government position immediately after completing redistricting. Thus the Petition permits substantial political influence over individual commissioners and the Commission itself. Nor does the Petition prevent individual commissioners from acting solely for their own political interests.

**B. The Commission is not independent because it has no independent funding.**

Redistricting can be an expensive and difficult process. *See* “Reapportionment and Redistricting,” Legislative Counsel Bureau Bulletin No. 11-04 (January 2011).<sup>7</sup> It requires a large amount of data, staff with technical

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<sup>7</sup> Available at: <https://www.leg.state.nv.us/Division/Research/Publications/InterimReports/2011/Bulletin11-04.pdf>

expertise, and specialized software. *Id.* Additionally, the Commission would require administrative staff to manage its materials, schedule, notice, and hold its meetings, and respond to requests and input from the public. The Commission will also need legal guidance to ensure that it complies with the Voting Rights Act and other federal requirements, as well as the requirements in the Petition.

Despite these substantial costs, the Petition does not provide for any funding or funding mechanism for the Commission. In fact, the Petition does not require that the Commission be funded at all. Again, this contrasts starkly with truly independent commissions in other states.

For example, the Michigan Constitution mandates that the legislature shall fund the commission, and sets forth a formula for the amount. It states: “the legislature **shall** appropriate funds sufficient to compensate the commissioners and to enable the commission to carry out its functions, operations and activities, which activities include retaining independent, nonpartisan subject-matter experts and legal counsel, conducting hearings, publishing notices and maintaining a record of the commission's proceedings, and any other activity necessary for the commission to conduct its business, **at an amount equal to not less than 25 percent of the general fund/general purpose budget for the secretary of state for that fiscal year.**” Mich. Const. Art. IV § 6(5) (emphasis added).



Other states have similar language, and also mandate that the legislature fund the commission adequately to ensure that it can carry out its duties.

California requires that the legislature appropriate funds for the commission according to a formula, but in no event less than \$3 million for each cycle of redistricting. Cal. Govt. Code. § 8253.6.

The Arizona Constitution similarly requires that the legislature fund the commission, and mandates that it be appropriated \$6 million for its first year of operation. Ariz. Const. Art. 4, Part 2, Section 1(18). The commission has express authority to challenge the sufficiency of the funding appropriated. *Id.*

The Legislature is the branch of government that holds the purse strings. *State Emps. Ass'n v. Daines*, 108 Nev. 15, 21, 824 P.2d 276, 279 (1992). As such, it has tremendous power to control the Commission by deciding whether, when, how much, and for what purposes to appropriate money for the Commission. Likewise, it can direct the Legislative Counsel Bureau whether or not provide assistance to the Commission. *See* NRS 218F.110 (LCB staff hired and duties defined pursuant to budget approved by Legislative Commission).

In the context of the separation of powers doctrine, this Court has recognized that the judiciary cannot truly function as an independent branch of government if it is not able to require the disbursement of funds necessary to carrying out its basic duties. *State ex rel. Harvey v. Second Judicial Dist. Ct.*, 117 Nev. 754, 770, 32 P.3d

1263, 1273 (2001). Similarly here, the Commission cannot operate independently of the Legislature if it has no independent control of the funding necessary to perform its duties. Indeed, the problem is exacerbated in this case because the Petition declares the Commission to be part of the legislative branch and to be executing legislative powers. Petition, Section 5A(7). That raises the question of whether it would itself be a violation of the separation of powers doctrine should a court attempt to order the Legislature to fund the Commission, or fund it in any particular way or amount. *Cf. Ariz. Const. Art. 4, Part 2, Section 1(18)* (expressly granting the commission standing in court and the power to challenge the adequacy of its funding).

C. The Description of Effect is inaccurate and misleading because the Commission is not “independent.”

“[A]n initiative petition signer must be informed at the time of signing of the nature and effect of that which is proposed. Failure to so inform the signatories and voters is deceptive and misleading...” *Stumpf v. Lau*, 108 Nev. 826, 833, 839 P.2d 120, 124 (1992) (internal quotations omitted).

The Petition’s Description of Effect states that the Petition would establish an “independent” redistricting commission. The Description of Effect is invalid because it would mislead voters into believing that the Commission is independent from the political influence of the Legislature and other officials, when in fact it is not.

As discussed above, the Commission is not “independent” because a majority of the Commission is directly appointed at the sole discretion of the legislative leadership. Additionally, the Petition does not prevent Commissioners from running for or being appointed to an office immediately after redistricting is complete. Finally, the Petition does not require that the Commission be funded. Consequently, the Legislature will be able to exercise substantial, if not total, control over the Commission by determining whom to appoint and how or whether to fund the Commission.

Fair Maps argues that the Description of Effect is not misleading because the Commission would be “independent” in the sense that it is not entirely controlled by the Legislature. *See* Opening Brief of Cross-Appeal, pp. 32-34. Fair Maps points to Section 5A (7) of the Petition, which states: “The powers granted to the Commission are legislative functions not subject to the control or approval of the Legislature and are exclusively reserved to the Commission.” *Id.* at 34; JA 50.

Essentially, Fair Maps is arguing that the Commission is “independent” simply because the Legislature does not directly approve or reject the Commission’s plan. That is a very unusual and constrained definition of “independent,” and certainly not one that the typical voter would understand. “Independent” is defined as “[f]ree from outside control; not depending on another's authority.” Oxford English Dictionary,

<https://www.lexico.com/en/definition/independent> Given the ordinary meaning of “independent” and the structure of independent redistricting commissions in other states, voters expect that an “independent” commission is one which is, in practical terms, insulated from political influences and pressures.

Fair Maps concedes that the Legislature would directly appoint a majority of the commissioners and it does not contest the fact that the Legislature would have control over the Commission’s funding. Opening Brief on Cross-Appeal, p. 34. Nor does Fair Maps contest the fact that this Commission is not in any way similar to independent commissions in other states. For example, Fair Maps does not contest that there is no mechanism for ensuring actual independence of the commissioners, the Petition allows politically-connected and ambitious people to serve on the commission, and that it does not prevent commissioners from immediately running for a district that they just drew.

To the extent Fair Maps is now arguing that these findings are not supported by substantial evidence (Opening Brief on Cross-Appeal, p. 33), that argument fails for two reasons. First, there is substantial evidence to support the district court’s decision because these are all conclusions that are drawn from the text of the Petition itself. JA 49-50. Second, Fair Maps never contested these issues, but instead argued that they are not germane to its unusual and constrained definition of “independent.” The district court correctly rejected that argument.

Contrary to Fair Maps argument (Opening Brief on Cross-Appeal, p. 32), the district court did not engage in “hyper-technical examination” of the description of effect. If anything, it is Fair Maps that is engaging in hyper-technical parsing of words by asserting that “independent” means something completely different than what it is generally understood to mean in both everyday language and specifically with respect to redistricting commissions.

If Fair Maps wants to pursue the policy of creating a non-independent additional arm of the Legislature to perform redistricting, it is of course free to do so. Whether that is good policy or bad policy is not this issue here. The issue here is that Fair Maps cannot tell voters that it is creating an independent commission when that is not what it is doing. The district court correctly held that the description of effect is invalid because, taken as a whole, it is *not* “a straightforward, succinct, and non-argumentative summary” that “is correct and does not misrepresent what the initiative will accomplish.” *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 48, 293 P.3d 874, 883 (2013).

**4. The description of effect is inaccurate and misleading because the Petition does not actually require the Commission to end partisan gerrymandering or otherwise draw “fair and competitive” maps.**

The Petition’s Description of Effect represents that it will end partisan gerrymandering in Nevada by creating “fair and competitive electoral districts.” But this is a promise it cannot and will not keep. The Description of Effect is materially misleading because in fact the Petition requires neither fairness nor competitiveness.

The Petition sets forth various criteria that the Commission must use when creating districts. *See* JA 50 (Petition, 5B(1)). The Petition states that the criteria must be followed in the order listed in the Petition. *Id.* Most of these criteria reflect the general federal requirements to comply with the Voting Rights Act and the one-person, one-vote doctrine. *See id.* In addition to these minimum requirements, the Petition states that the Commission should ensure that the districts “do not unduly advantage or disadvantage a political party.” *Id.* By use of the term “unduly,” it is clear that the Petition is designed and intended to tolerate **un**fairness between the political parties. The Petition sets forth no definitions or mechanism for determining when a party is “unduly” advantaged or disadvantaged. There will obviously be disagreement on that question, but the Petition contains no guidelines for resolving that issue.

The Petition also invites other types of unfairness, besides partisan bias. The Petition contains no requirements that the Commissioners fairly represent Nevada’s racial, language, ethnic, gender, geographic, or demographic diversity. All of the Commissioners could be white, male, wealthy residents of Clark County, for example. This would leave all other Nevadans without any formal representation in drawing districts that, among other things, are supposed to keep communities intact, while also ensuring that minorities retain their political voice.

Finally, partisan competitiveness is the very *last* of the criteria that the Commission is to consider when drawing districts. The Petition provides that the criteria must be applied in the order presented, so competitiveness will always be the last item considered. JA 50 (Petition, 5(B)(1)). Thus the Petition in fact expressly makes competitiveness subordinate to all other criteria. *Id.* And most importantly, the Petition does not even require that the Commission create competitive districts, and instead instructs it to “consider” competitiveness “to the extent practicable.” *Id.*

Again, Fair Maps does not really dispute that the Commission is *not* required to create fair and competitive districts. *See* Opening Brief on Cross-Appeal, p. 34-35. Instead, Fair Maps asserts that that doesn’t matter because “the description informs the reader about the **purpose** of the Petition—the establishment of an independent redistricting commission to oversee the adoption of fair and

competitive electoral maps.” *Id.* at 34 (emphasis added). Fair Maps goes so far as to argue that “...the ultimate result is not relevant to whether the description of effect accurately states the Petition’s purpose and how it intends to achieve it.” *Id.* at 34-35.

This position is essentially the opposite of what Nevada law requires. Fair Maps has, intentionally or not, substituted the word “purpose” for “effect.” Nevada law is clear that the “ultimate result” (i.e., the effect) is exactly what the description of **effect** must describe. *See e.g., Education Initiative*, 129 Nev. at 48 (the description of effect must describe “what the initiative will accomplish,” not what its purpose is); *Las Vegas Taxpayer*, 125 Nev. at 183-84, 208 P.3d at 441 (striking down description of effect that did not accurately describe the petition’s “true effect”).

In *Coal. for Nev.’s Future v. RIP Commerce Tax, Inc.*, No. 69501, 2016 Nev. Unpub. LEXIS 153, at \*10 (May 11, 2016) (unpublished decision – NRAP 36(c)), the *purpose* of the petition was to repeal the commerce tax, and the description of effect stated that the effect of the petition would be a repeal of the tax. Nevertheless, this Court struck down the description of effect because it did not disclose the actual, practical effect: that the repeal would unbalance the state budget. *Id.*



Thus, contrary to Fair Map’s argument, the “purpose” behind a petition is immaterial. The best intentions or the noblest purpose are not an excuse for drafting an inaccurate and misleading description of effect.

Fair Maps next argues that the district court erred because “whether various types of unfairness *could* affect the commission’s processes such that the electoral maps it draws do not meet [Jackson’s] definition of fair and competitive... that argument fails because it is a critique of the Petition and not the description of effect.” Opening Brief on Cross-Appeal, p. 35. This argument conflates two separate things: (1) the court’s evaluation of what the petition is actually proposing to do, with (2) an evaluation of whether the policy being proposed is good or bad, wise or unwise.

Every challenge to a description of effect necessarily requires the court to make some inquiry into *what* policy the petition is proposing, i.e., what the petition would actually do. It is not possible to determine whether the description of effect is accurate without evaluating the petition in that respect. The court does not weigh the *wisdom* of the policy being proposed, but the court must determine whether the description of effect correctly informs voters of the “true effect” of the petition. *Las Vegas Taxpayer*, 125 Nev. at 183-84, 208 P.3d at 441.

Accordingly, the Court must reject Fair Maps’ argument. This challenge is not a critique of the policy proposed; it is a critique of the description of effect because

the description tells voters that the Commission will create “fair and competitive” maps, even though the Petition does not actually require that it to do so.

Like in *Las Vegas Taxpayer* and *RIP Commerce Tax*, petitioners are free to propose whatever policy they wish. But they are obligated by NRS 295.009(1)(b) to *accurately* describe that policy to voters. Here, the Description of Effect fails to accurately describe what the Commission will do. Therefore the district court correctly ruled that it violates NRS 295.009(1)(b).

**5. The district court correctly required the Description of Effect to inform voters that the Petition would increase the cost of redistricting.**

The Petition states that the Commission “shall” adopt a redistricting plan no later than July 1, 2023. JA 50. The Description of Effect fails to inform voters that the Commission will “undo” whatever maps are drawn by the Legislature in 2021. The Description of Effect states that the Commission will begin drawing maps in 2023, but fails to describe the practical consequence: that the Legislature will have just drawn new districts 2021, which will only be operative for the 2022 election, and then the Commission will immediately start redrawing the maps. Thus the State will likely spend twice the resources (or more) as it would normally on redistricting efforts in the three-year period following the 2020 census.

The district court correctly concluded that having a do-over of redistricting shortly after the Legislature redistricts will very likely increase the cost of

redistricting and will undoubtedly require taxpayer funds to fund the Commission.  
JA 130-31.

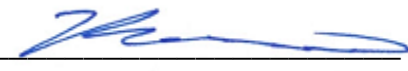
Fair Maps argues that this conclusion is based merely on speculation and Jackson’s unsupported assertions. Opening Brief on Cross-Appeal, p. 35-37. However, it does not explain how it is logical or plausible that the costs will *not* be increased when, if the Petition becomes law, the State will go through redistricting twice in a matter of three years, instead of once in a decade. Accordingly, these costs are not hypothetical or arguable – they are a direct effect of the Petition and must be disclosed to voters.

## V. CONCLUSION

For the foregoing reasons, Appellant Jackson respectfully requests that this Court affirm, in part, the ruling of the district court that the proposed commission: (1) is not “independent”; (2) is not required to draw “fair and competitive” electoral maps; and, (3) will increase the cost of redistricting for the 2020 census.

Dated this 22nd day of April, 2020.

BENSON LAW NEVADA

By:   
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## VI. ATTORNEY CERTIFICATE

Pursuant to NRAP 28.2, undersigned counsel certifies that:

1. This Combined Reply Brief and Answering Brief on Cross-Appeal complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman in size 14 point font.

2. I further certify that this Combined Reply Brief and Answering Brief on Cross-Appeal complies with the type-volume limitations of NRAP 28.1(e)(2)(A)(i) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains approximately 10,488 words, which is less than the 14,000 word count available for a combined reply brief and answering brief on cross-appeal.

3. Finally, I certify that I have read this Combined Reply Brief and Answering Brief on Cross-Appeal 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 Combined Reply Brief and Answering Brief on Cross-Appeal complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion regarding matters in the record to

be supported by a reference to the page of the record on appeal where the matter relied upon is to be found.

I understand that I may be subject to sanctions in the event that the accompanying Opening Brief is not in compliance.

DATED this 22nd day of April, 2020.

By:



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## VII. CERTIFICATE OF SERVICE

Pursuant to NRCPC Rule 5(b), I hereby certify that I am an employee of Benson Law Nevada, and that on this date, I caused the foregoing document to be served to all parties to this action by electronically filing it with the Court's e-filing system, which will electronically serve the following:

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Dated: April 22, 2020.



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Kevin Benson