# In the
# Supreme Court of the State of Nevada



NATHANIEL HELTON, an individual,

Appellant,

vs.

NEVADA VOTERS FIRST PAC, a Nevada Committee for Political Action; TODD L. BICE, in his capacity as the President of NEVADA VOTERS FIRST PAC; and BARBARA CEGAVSKE, in her official capacity as NEVADA SECRETARY OF STATE,

Respondents.

Case No.: 84110

First Judicial District Court
Case No.: 21 OC 00172 1B

## APPELLANT'S OPENING BRIEF

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## N.R.A.P. 26.1 DISCLOSURE

Pursuant to Nevada Rule of Appellate Procedure ("N.R.A.P.") 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in N.R.A.P. 26.1(a) that must be disclosed.

DATED this 1st day of March, 2022.

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## JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to N.R.A.P. 3A(b)(1) because it is an appeal from a final order resolving all claims presented to the district court, and pursuant to N.R.A.P. 3A(b)(3) because it an appeal from an order refusing to grant an injunction.

The final order was entered on January 6, 2022. Notice of entry of the order was served on January 12, 2022. The notice of appeal was filed on January 14, 2022. This appeal is timely because it was filed within 30 days after the entry of the final judgment as N.R.A.P. 4(a)(1) requires.

## ROUTING STATEMENT

This is case is presumptively retained by the Supreme Court pursuant to N.R.A.P. 17(a)(3) because it is a case involving a ballot or election issue.

## ISSUES PRESENTED FOR REVIEW

I. Does the Petition, which would implement multiple reforms that target entirely different processes and serve different, nonoverlapping purposes, including (1) replacing partisan primaries and other existing nominating processes with a mandatory open primary election in which the top five finishers advance to the general election, and (2) separately instituting a complex ranked-choice voting system and tabulation method in the general election, violate NRS 295.009(1)(a)'s single-subject requirement for initiatives?

II. Does the Petition, which would mandate a massive overhaul of Nevada's primary and (in a quite different way) general election processes, including numerous alterations that would require significant changes to Nevada's election infrastructure, all without providing any means of funding the required changes, constitute an unfunded mandate in violation of Article 19, Section 6 of the Nevada Constitution?

III. Is the Petition's description of effect—which, among other deficiencies, fails to inform voters that the Petition would effectively eliminate political parties' ability to nominate candidates and independent candidates' ability to access the general election ballot via signature gathering, or that it would allow candidates for the first time to self-select the party

affiliations that appear with their names on not just the primary ballot but also the general election ballot—misleading, confusing, or deceptive in violation of NRS 295.009(1)(b)?

## STATEMENT OF THE CASE

On November 12, 2021, defendant Todd L. Bice, on behalf of defendant Nevada Voters First PAC (collectively, "Proponents"), filed the "Better Voting Nevada Initiative" (the "Petition") with the Secretary of State. (Joint Appendix ("J. App.") 19.) The Petition seeks to amend the Nevada Constitution to make two significant—and distinct—changes: (1) eliminating the ability of political parties to select their nominee to appear on the ballot for most state offices by doing away with Nevada's current partisan primary system, as well as eliminating the ability of independent candidates to access the general election ballot via signature gathering for the same offices, replacing those long-standing processes with a non-partisan open primary in which the top-five vote getters advance to the general election; and (2) replacing Nevada's traditional general election system for most state offices, under which the candidate who gets the most votes wins, with a complicated ranked-choice voting system in which candidates are eliminated one by one and votes of eliminated candidates (to the extent the voter chooses to "rank" other candidates in order of preference) redistributed until a candidate obtains an outright majority of over 50%.

On December 6, 2021, plaintiff Nathaniel Helton initiated a challenge to the Petition by filing a Complaint for Declaratory and Injunctive Relief pursuant to NRS 295.061 in the First Judicial District Court. (J. App. 1.) The Complaint asserted that the Petition was invalid

because (1) its changes serve separate and distinct purposes, and thus the Petition embraces at least two distinct subjects in violation of NRS 295.009(1)(a)'s single-subject requirement for initiatives; (2) it would mandate that Nevada expend significant funds overhauling its primary and general election systems without providing any source of revenue in violation of the unfunded mandate prohibition in Article 19, Section 6 of the Nevada Constitution; and (3) its description of effect omits or misstates many of the Petition's most significant effects, including that, under the new system, the party affiliation that would appear next to a candidate's name on the general election ballot would no longer reflect a party's endorsement or even be a reliable indicator of the candidate's values or policy preferences—a fact that the Petition itself recognizes is so significant to voters that it would require a conspicuous disclaimer on the general election ballot itself, but which does not appear anywhere in the description of effect—rendering the description misleading, confusing, or deceptive in violation of NRS 295.009(1)(b). (J. App. 1-12.)

The parties agreed that Mr. Helton's challenge presented purely legal questions for which no evidence need be taken, (J. App. 116-17), and the district court ordered Mr. Helton to submit an alternative description of effect for the Petition to assist with its resolution of the case, (J. App. 115-16). Mr. Helton filed his proposed alternative description on December 20, 2021, (J. App. 79-81), and, after taking briefing and proposed orders from the parties, the district court held a hearing on

January 5, 2022, in which the court asked no questions of the parties during oral argument. The following day, the district court adopted Proponent's fourteen-page proposed findings of fact, conclusions of law, and order denying all relief virtually verbatim. (J. App. 131-45.)

In the adopted order, the district court found that, though the Petition would do away with political parties' ability to select their standard bearer by eliminating partisan primaries and separately change the method by which votes are cast and tabulated in the general election, it addressed only a single subject. The court reasoned that the changes were "functionally relate[d] and . . . germane, to how the specified officeholders . . . are chosen by voters," which it characterized as "the primary purpose of" the Petition. (J. App. 137.) In so holding, the district court ignored that Mr. Helton's argument focused on the fundamentally different ways in which the primary and general election processes would be changed (and how neither was remotely functionally related or germane to the other), instead erroneously stating that Mr. Helton was "insisting that no one initiative can simultaneously address both" the primary and general election. (J. App. 137.) The district court then proceeded to reject this claim that Mr. Helton never made, reasoning that, "[t]he primary election and general election are intertwined steps in the process," and pointing to a 1996 amendment (*pre*-dating Nevada's single-subject rule for initiatives) in which voters approved campaign contribution limits that applied in both primary and

general elections. (J. App. 137.)

Second, the district court concluded that the Petition would not enact an unconstitutional unfunded mandate. (J. App. 139.) In doing so, the district court did not deny that Nevada would be required to spend money if the Petition were enacted, or that the Petition does not provide any means for raising any revenue to offset that required spending. Instead, the district court held that the "common burdens" associated with changes in law "are not what Article 19, Section 6 concerns." (J. App. 140.) The court also stated that the Petition was not an unfunded mandate because it would "vest[] the implementation" of its provisions "with the Legislature and likewise the Secretary of State and local officials." (J. App. 141.)

Finally, the order adopted by the district court stated that the Petition's description of effect was "straightforward, succinct, and non-argumentative" and contained "nothing misleading." (J. App. 141, 143.) It stated that, by informing voters that the Petition would "eliminat[e] partisan primaries" and establish a non-partisan open primary, the description put voters on notice "about the reduced role of party control and party affiliation under the new process." (J. App. 143.) The district court found that, "[t]he specifics about how party designation appears on the printed ballot form"—which Mr. Helton never contended should be included in the description—"are, at best, secondary effects that do not need to be included in the limited space of the description." (J. App. 143-

44.) And because Mr. Helton's proposed alternative description included potentially negative or controversial facts regarding the proposed system, the court stated that it was "argumentative" and "advocate[d] partisan interests" and thus did "not comply with Nevada law." (J. App. 141-42.)

## STATEMENT OF FACTS

The Petition seeks to amend the Nevada Constitution to effect at least two drastic—and distinct—changes to the state's electoral system. (J. App. 20-24.)

The first would effectuate a sea change in how Nevada operates, voters participate in, and candidates are chosen in the state's primary elections. The Petition would eliminate partisan primary elections as nominating contests for federal, state constitutional, and state legislative offices. (J. App. 20-22 (proposing to amend Article 15 of the Nevada Constitution by adding "Section 17 – Top-five primary elections for primary office").) It would replace these contests with open, non-partisan primaries in which the top-five finishers for each office, regardless of party, qualify to participate in the succeeding general election. (J. App. 21.) Candidates would only be able to advance to the general election by placing in the new open primary, so this change would also eliminate the current processes by which minor political parties nominate their respective candidates and independent candidates petition to appear on the general election ballot. *See* NRS 293.200, 293.1715.

In other words, the Petition would do away with the ability of

political parties and their voters to choose a single standard-bearer to represent them in the general election, it would cap the currently unlimited number of candidates who can participate in the general election at five, and it would allow those five advancing candidates to consist of any combination of partisan affiliations, including multiple candidates purporting to affiliate with the same party. This is an extraordinary and fundamental shift from the way primaries have historically operated and the way in which Nevadans have chosen candidates to run for public office.

Second, in the general election, the Petition would establish and impose a whole new voting system known as "ranked-choice voting" for federal, state constitutional, and state legislative offices. (J. App. 22-24.) This would entirely replace the system used by Nevada voters since statehood to elect candidates to public office. *See* Nev. Const. art. 15, § 14 ("A plurality of votes given at an election by the people, shall constitute a choice, where not otherwise provided by this Constitution.") (enacted as part of original Nevada Constitution in 1864). Under Nevada's long-standing plurality rule, the candidate who wins the most votes in the general election wins the election—even if the winner's vote share of the vote distribution falls short of 50%. *See id.*

Ranked-choice voting bears little similarity to Nevada's plurality voting system. While Nevada voters have traditionally filled out their general election ballots by marking one choice for each office (with the

rare exception *e.g.*, multi-seat at large positions), ranked-choice voting is a complex system in which voters are directed to indicate their preferences by ordering up to five candidates from most to least preferred. (J. App. 22-24 (proposing to amend Article 15 of the Nevada Constitution by adding "Section 18 – Ranked-choice voting for general elections for partisan offices").) If no candidate receives over 50% of first-choice votes, the election proceeds through consecutive rounds of elimination, with the candidate receiving the least votes removed from the contest in each round. Voters who listed that candidate as their first choice would then have their votes redistributed to their next-preferred choice until a victor attains a statistically assigned outright majority. (J. App. 22-23.) Voters are not required to rank all candidates, however, and those who choose not to are excluded from the final tally if their preferred candidates are eliminated. (J. App. 23.)

Ranked-choice voting does not require that there be five candidates to work, and it is fully compatible with partisan primaries generally and Nevada's current general election ballot qualification system specifically. Other jurisdictions have adopted ranked-choice voting without open primaries and vice versa. *See, e.g.*, Cal. Const., art. II, § 5(a); Me. Rev. Stat. Ann. tit. 21-A, § 723-A. In other words, neither is in any way dependent upon the other.

Moreover, using ranked-choice voting does not allow more nonpartisan voters to participate in primary elections or expand the

number of choices available to voters in the general election, which were the two purposes Proponents offered for the Petition below. (J. App. 90-91.) Instead, advocates for ranked-choice voting contend its principal benefit is that it eliminates the so-called "spoiler effect," in which two or more candidates with similar policy positions split the vote of a majority of the electorate, resulting in a candidate that most voters least prefer winning the election.[1] *See* National Conference of State Legislatures, *Ranked Choice Voting* (Aug. 24, 2021), https://www.ncsl.org/research/elections-and-campaigns/ranked-choice-voting636934215.aspx.

The Petition provides that, during both the new open primary and the modified, ranked-choice general election, ballots would list a political party following each candidate's name. (J. App. 21, 22.) However, because candidates can register at will with the party of their choice and the Petition would do away with the parties' ability to select their candidates with the implementation of the open primary, these denotations would no longer indicate that the party had affiliated itself with the candidate, or even that the candidate necessarily shares the values and policy preferences reflected in the party's platform.

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[1] Proponents have never argued that addressing the "spoiler" effect is the purpose of the Petition, nor do they explain that this is generally understood to be the purpose and effect of ranked-choice voting in the description of effect.

The consequences for Nevada general election voters, who have long been able to rely on a candidate's stated political affiliation on the ballot as an endorsement by the party itself is significant. Incredibly, while the Petition *itself* recognizes this, the statement of effect makes absolutely no mention whatsoever of this significant effect. Specifically, the text of the Petition would require general election ballots to carry a conspicuous disclaimer stating, **"Each candidate for partisan office may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate."** (J. App. 22 (proposed Section 18(5)).) But because the statement of effect does not mention this consequence, a voter may very well endorse the Petition, and even vote for it, only to learn of this consequence for the first time in the voting booth when they are first presented with the disclaimer.

To make these changes, the Petition seeks to amend or establish four discrete sections of the Nevada Constitution and 50 separate constitutional provisions. (J. App. 20-24.)

The Petition's description of effect, required by NRS 295.009(1)(b) to inform potential signatories of its impact, reads, in full:

> If enacted, this initiative changes Articles 5 and 15 of Nevada's Constitution for Congressional, Governor, Lieutenant Governor, Attorney General, Secretary of State, Treasurer, Controller, and State Legislator elections, eliminating partisan primaries and establishing

an open top-five primary election and a rank-choice voting general election.

For these offices, all candidates and voters participate in a single primary election regardless of party affiliation or non-affiliation. The top five finishers advance to the general election, and the general election winner is determined by rank-choice voting:

- General election voters rank the candidates in order of preference from first to last, if they wish to rank more than their first preference.

- As traditionally, a candidate receiving first-choice votes of more than 50% wins.

- If no candidate is the first choice of more than 50%, the candidate with the fewest votes is eliminated. And each voter who had ranked the now-eliminated candidate as their first choice, has their single vote transferred to their next highest choice candidate.

- This tabulation process repeats until the one candidate with more than 50% support is determined as the winner.

The Legislature must adopt implementing legislation by July 1, 2025.

(J. App. 25, 26, 27, 28.)

## SUMMARY OF ARGUMENT

The Petition combines two very different measures into a single initiative—(1) the elimination of Nevada's current partisan primary and nomination systems, in favor of a single, non-partisan open primary in which the top-five vote getters advance to the general election, and (2) the replacement of Nevada's traditional plurality-winner general election

for most state offices with a complex ranked-choice voting and tabulation system. In doing so, the Petition would radically change Nevada's election systems in multiple unrelated ways, for multiple unrelated reasons, and with multiple unrelated consequences. This in itself is sufficient to render the Petition invalid under Nevada's single subject rule for initiative petitions, which prohibits bundling disparate proposals together and then telling voters to take it or leave it. Moreover, the Petition does not adequately inform voters of the sweeping practical and financial effects of *either* of the unrelated changes it would enact.

To provide one example, in replacing the partisan nominating processes with a top-five open primary, the Petition would fundamentally change what it means for a candidate to be designated with a party affiliation on the general election ballot. In the new system, candidates would be allowed to self-select the partisan designation that would appear with their names, and voters will no longer be able to trust that candidates who purport to affiliate with a political party do in fact ascribe to that party's platform and will advance the party's values. As a result, Nevada voters will no longer be able to confidently rely on party designation when they vote in a general election. The Petition itself recognizes this major effect by requiring that ballots to carry a "conspicuous disclaimer" warning voters that a candidate may self-select his or her party and the designation does not reflect the party's nomination or endorsement. This sweeping change is not only totally

unrelated to the ranked-choice voting system that the Petition has bundled it with so that Nevada's voters must either enact both or neither, but it is also totally unmentioned in the description of effect that is meant to inform supporters of what they are signing. This is just one reason that the Petition is invalid.

The district court erred in overlooking this effect, and by finding that the Petition does not violate (1) Nevada's long-standing and strictly enforced single-subject rule for initiative petitions; (2) the Nevada Constitution's prohibition on initiatives that mandate expenditures without funding them; and (3) the requirement that an initiative's description of effect be sufficient to enable voters to make an informed decision as to whether to support it. This Court should reverse the district court's determination on each of these issues.

First, the Petition impermissibly encompasses more than one subject in violation of Nevada law. The revisions to present law that the Petition proposes are sweeping in scope, altering or adding no less than 50 provisions across four distinct sections of the Nevada Constitution, and invalidating or amending untold numbers of statutes and regulations. Moreover, the two overarching changes it seeks to make—first, by eliminating the partisan nomination system, and second, by imposing a ranked-choice voting system in the general election—are discrete, independent revisions of present law that neither depend upon each other for their operation nor even reference each other in their

voluminous text. The two reforms further serve different, nonoverlapping purposes.

This is aptly illustrated by the fact that Proponents themselves have been unable to articulate a single unified primary purpose for the Petition throughout this litigation. Below, Proponents claimed that the Petition was principally intended to enfranchise nonpartisan voters to participate in primary elections and to expand the number of choices available to voters in the general election. (J. App. 90-91.) Setting aside that this is in fact two purposes, only *one* of the two changes the Petition would enact serves either of them. Instituting ranked-choice voting in the general election does nothing to expand participation in the primary, nor to increase the number of candidates that appear on the general election ballot. It instead addresses entirely different perceived problems, including so-called "spoiler" candidates' splitting the majority vote so that a least preferred option prevails. In sum, the two changes share no common link beyond a general connection to voting, albeit in different elections and through different mechanisms, and this Court has already held that "voting" is too excessively general a theme to comply with the single-subject rule.

Second, the Petition unconstitutionally seeks to enact reforms that would mandate public expenditures without providing for revenues to offset the cost. The massive electoral overhaul it proposes would come at considerable public expense, necessitating the purchase of new

specialized voting equipment, significant revisions in ballot design, the purchase or modification of tabulation software to ensure those ballots are accurately counted, the development of revised voting procedures, a public education campaign, and countless hours of compensated work. The Nevada Constitution permits initiatives to mandate such appropriations and expenditures only when they are balanced by reciprocal revenues. The Petition does not raise any funds at all to cover the new spending it calls for, and the Nevada Supreme Court has made clear such an imbalance renders an initiative *void ab initio*.

Last, the Petition's description of effect is confusing, deceptive, and misleading because it omits any discussion the Petition's purpose, mischaracterizes and inaccurately minimizes how it would alter Nevada's current election processes, and omits discussion of many of the Petition's most significant ramifications. As discussed, the Petition's description of effect makes no mention of the fact that the Petition would fully eliminate political parties' prerogative to select their nominees for major offices, or that it would permit candidates to freely choose the party affiliation that appears on the ballot, meaning that party affiliation would no longer be a reliable indicator of a candidate's values and policy preferences to guide and inform a voter's decision in the general election.

The Petition itself recognizes as much and, in two detailed subsections, directs that ballots must include a conspicuous disclaimer that advises voters that party affiliation on the ballot does "not imply

that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate." (J. App. 21.) But the description of effect is entirely silent on this significant—and for many voters, highly consequential—impact.

Additionally, in describing the new ranked-choice voting system the Petition would impose in Nevada's general elections, the description of effect states that "as traditionally, a candidate receiving first-choice votes of more than 50% wins." (J. App. 25, 26, 27, 28.) But "traditionally," candidates in Nevada need receive only a plurality of the votes cast to win, not more than 50%. And, of course, "first-choice votes" is a concept unique to ranked-choice voting that does not exist in the current electoral system.

The description's comparison of ranked-choice voting also fails to inform voters that their general election votes may not be counted in subsequent tallies if they fail to rank all candidates. Finally, the description of effect does not so much as mention that implementing both of the new voting systems that the Petition mandates would require substantial expenditures of public funds. These gaps render the description incapable of facilitating a fully informed decision on the part of signatories and eventual voters, should the petition advance past the signature gathering stage.

For these reasons, the Petition does not comply with the requirements of state law, and the Court should enjoin the Defendant

Secretary of State from taking any further action on it.

## STANDARD OF REVIEW

This case turns on the proper interpretation of NRS 295.009; Article 19, Section 6 of the Nevada Constitution; and the Petition. "Questions of law, including questions of constitutional interpretation and statutory construction, are reviewed de novo." *Peck v. Zipf*, 133 Nev. 890, 892, 407 P.3d 775, 778 (2017) (citation, alteration, and internal quotes omitted).

## ARGUMENT

### I. The Petition is Invalid Because it Violates Nevada's Single-Subject Rule for Initiatives.

#### A. The Single-Subject Rule Prohibits "Logrolling" Multiple Subjects into a Single Initiative, and it Cannot be Evaded by Subjects Stated with "Excessive Generality."

Nevada law requires that any initiative petition "[e]mbrace but one subject and matters necessarily connected therewith and pertaining thereto." NRS 295.009(1)(a). A petition "embraces but one subject and matters necessarily connected therewith and pertaining thereto, if the parts of the proposed initiative or referendum are functionally related and germane to each other in a way that provides sufficient notice of the general subject of, and of the interests likely to be affected by, the proposed initiative or referendum." NRS 295.009(2). "By limiting petitions to a single subject, NRS 295.009 facilitates the initiative process by preventing petition drafters from circulating confusing petitions that

address multiple subjects." *Nevadans for the Prot. Of Prop. Rights, Inc. v. Heller*, 122 Nev. 894, 902, 141 P.3d 1235, 1240 (2006). The rule "helps both in promoting informed decisions and in preventing the enactment of unpopular provisions by attaching them to more attractive proposals or concealing them in lengthy, complex initiatives (*i.e.,* logrolling)." *Las Vegas Taxpayer Accountability Comm. v. City Council of City of Las Vegas* (*"LVTAC"*), 125 Nev. 165, 176–77, 208 P.3d 429, 437 (2009).

"Logrolling," in ballot initiative parlance, "is the practice of combining dissimilar propositions into one voter initiative." *State ex rel. Wagner v. Evnen*, 307 Neb. 142, 151, 948 N.W.2d 244, 253 (2020). "[U]nlike other means of enacting law, the initiative process typically does not allow for input in drafting proposed laws," *LVTAC*, 125 Nev. at 177 n.6, 208 P.3d at 437 n.6, and thus citizens do not have an opportunity to advocate for tailoring the measure to their preferences. "The single-subject requirement, then, is useful in focusing the petition signers' and voters' attention on the one subject to be advanced, without creating confusion over what that subject is, and without making them choose between competing policy goals." *Heller*, 122 Nev. at 923, 141 P.3d at 1254 (Hardesty, J., concurring). The single-subject requirement guards against voters being placed in a position where they "must vote for or against the whole package even though they only support certain of the initiative's propositions." *Evnen*, 307 Neb. at 151, 948 N.W.2d at 253.

In a single-subject analysis, the Court's "preliminary inquiry . . . is

whether the initiative's parts are 'functionally related' and 'germane' to each other." *Heller*, 122 Nev. at 907, 141 P.3d at 1243. "[I]n considering the arguments made by the proponents' counsel and examining the text of the initiative on its face, we may determine what the initiative's overall subject is." *Id.* If no single subject is ascertainable, the initiative petition violates NRS 295.009(2) and is invalid. *See LVTAC*, 125 Nev. at 181-82, 208 P.3d at 439-440. "[A]n initiative proponent may not circumvent the single-subject rule by phrasing the proposed law's purpose or object in terms of 'excessive generality,'" grouping largely unrelated provisions into a vague overarching category. *Id.* at 181, 208 P.3d at 439 (citing *Harbor v. Deukmejian*, 43 Cal.3d 1078, 742 P.2d 1290, 1303 (1987)).

Yet this is precisely what the Petition does: by packaging a nonpartisan open primary with general election ranked-choice voting (through the addition of over 50 constitutional provisions), it combines two very different reforms (each addressing different issues) in a single proposal, forcing voters to endorse—or reject—both, as one. Neither Proponents nor the district court have succeeded in identifying a single "purpose or object" of the proposed reforms. *Id.* And their attempts to classify these unrelated electoral reforms together under a single subject–"how the specified officeholders . . . are chosen by voters"—has resulted in a category that is too excessively general to comply with Nevada law and that does not even fully encapsulate the changes the

Petition would enact in any event.[2] (J. App. 137.)

### B. The Petition Violates the Single-Subject Rule Because It Would Enact Two Wholly Independent Constitutional Changes with Distinct Purposes

The Petition violates the single-subject rule by logrolling two separate but equally-dramatic changes to Nevada's election processes into a single ballot measure—(1) the end of partisan primaries and the other processes by which parties select nominate their candidates for the state's most significant elected offices, to be replaced with a mandatory open primary under a novel top-five system; and (2) the implementation of a ranked-choice, multi-round voting system for the general election, replacing Nevada's longstanding plurality voting method. These two changes are discrete and independent of one another, and they cannot be validly linked by the excessively general topics pushed by Proponents—namely, "how the specified officeholders . . . are chosen by voters" or the Petition's even broader title of "Better Voting Nevada." The proposed changes clearly serve two distinct purposes and thus are separate

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[2] The Petition would not merely establish a top-five election as the first phase of a two-phase general election, but also eliminate the current processes by which major party, minor party, and independent candidates qualify for and access the general election ballot in the first place. How candidates get their names on the ballot is a different question than "how the specified officeholders . . . are chosen by voters" once they are on the ballot. *Cf. LVTAC*, 125 Nev. at 181, 208 P.3d at 440 (rejecting proposed single subject that did not accurately encapsulate the changes the initiative proposed).

subjects.

As an initial matter, the two separate subjects are separate policy changes that do not depend upon one another, either textually, within the terms of the Petition, or generally, as a matter of logic. The Petition's text separates the two, enacting the primary election reforms in a new Section 17 and the general election reforms in a new Section 18 within the Nevada Constitution. Neither new section contains any cross-reference to the other. Moreover, the two changes function wholly independently of one another. The top-five open primary system the Petition proposes does not depend on the use of ranked voting in the general election; Louisiana has long used something much like the former system, for example, but never adopted the latter.[3] *See* La. Stat. § 18:401. Conversely, the ranked-choice voting system the Petition seeks to impose on the general election can be conducted with any number of candidates and with candidates selected through partisan primaries and with non-major party candidates petitioning for placement on the ballot. The two measures are wholly independent, as even the Petition's

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[3] That an open primary and a ranked-choice general election are not logically linked and serve different purposes is further evidenced by California, which likewise has an open primary system but no ranked-choice voting. *See* Cal. Const., art. II, § 5(a) (providing for an open primary, where "[t]he candidates who are the top two vote-getters at a voter-nominated primary election for a congressional or state elective office shall, regardless of party preference, compete in the ensuing general election.").

strongest supporters acknowledge. *See* The Institute for Political Innovation, Final Five Voting FAQ, https://political-innovation.org/final-five-voting/ (last visited Feb. 28, 2022) ("Final-Five Voting is the combination of *two* innovations: 1. Top-five primaries in which we don't use ranked-choice voting (RCV) and; 2. RCV general elections." (emphasis altered)).

What is more, the proposed changes serve distinct purposes. Proponents contended in their briefing below that the Petition's primary purpose is to address the perceived problem that more Nevada voters are identifying as nonpartisan and are "disenfranchise[d]" because they "cannot participate in the closed primary" and have "limited choices" in the general election. (J. App. 90-91.) First, this describes two different purposes—(1) to "enfranchise" nonpartisan voters in the (now partisan) primary elections process, and (2) to give general election voters more "choices." But more fundamentally, only one of the reforms the Petition would enact—the institution of an open primary from which five candidates advance to the general election—even arguably serves these purposes.[4] Instituting ranked-choice voting in the general election does

[4] It is not a forgone conclusion that the new primary *would* result in more candidates appearing on the general election ballot, as it would cap the number at five, whereas an unlimited number of minor party and independent candidates who satisfy the eligibility standards can qualify under the current system. *See* NRS 293.200, 293.1715.

not allow more nonpartisan voters to participate in the primary, nor does it increase the number of candidates that will appear on the general election ballot. Instead, proponents of ranked-choice voting argue that it solves a range of wholly different electoral "problems," including limiting the possibility of "spoiler" candidates and encouraging compromise and coalition building in order for candidates to obtain second-choice votes. Proponents have utterly failed to articulate a single, overarching purpose of the multiple reforms the Petition would bring about at any stage of this litigation. *Cf. LVTAC*, 125 Nev. at 181, 208 P.3d at 440 (rejecting proposed subject of "voter approval of use of taxpayer funds to finance large new development projects" because initiative's provisions were not actually limited to that purpose).

It is immediately apparent that a Nevada voter could be in favor of open primaries but oppose ranked-choice voting or vice-versa. A voter might wish to expand primary participation but oppose a voting system in which the candidate who is the top choice of the most people is not guaranteed victory. Or a voter could favor the way ranked-choice voting protects against wasted votes but be loathe to give up reliable partisan designations on the ballot. But Proponents would force these voters to accept the two unrelated proposals together or not at all, a classic instance of logrolling in contravention of Nevada's single-subject rule. Both proposals may have individual merit, but they are quite obviously different in their natures and impacts. Simply stated, they are not

"functionally related" and "germane" to one another. *Heller*, 122 Nev. at 907, 141 P.3d at 1243. Combining these issues under the very broad heading of "[h]ow voters elect the specified officeholders" does not alter this fact. (J. App. 94.)

The multi-subject nature of the Petition is further confirmed when it is compared with previous initiative petitions that this Court has invalidated as violating the single-subject rule. In *LVTAC*, for instance, the initiative sought to require voter approval for Las Vegas to enter public lease-purchase agreements costing more than $2 million a year and for other key redevelopment decisions, including the adoption of a redevelopment plan, the amendment of and material deviation from that plan, and the authorization for various redevelopment projects. *LVTAC*, 125 Nev. at 170, 208 P.3d at 432. The initiative's proponents argued that "the measure's purpose [was] to provide the voters of Las Vegas with greater input into the City's redevelopment decisions by requiring voter approval for major redevelopment decisions." *Id.* This Court concluded, however, that "'voter approval,' . . . is an excessively general subject that cannot meet NRS 295.009's requirement." *Id.* at 181, 208 P.3d at 440 (citing *Senate of the State of Cal. v. Jones*, 21 Cal.4th 1142, 1162, 988 P.2d 1089, 1101–02 (1999)). Because the court could not ascertain the single subject of the initiative from its textual language or description, and because the claimed purpose provided by the initiative's proponents was too general, the court ruled the initiative violated the single-subject

requirement and declared it invalid. *Id.* at 182, 208 P.3d at 440.

This Petition, the "Better Voting Nevada Initiative," violates the single-subject rule in much the same manner. The single subject rule "obviously forbids joining disparate provisions which appear germane only to topics of excessive generality such as 'government' or 'public welfare.'" *Id.* at 181, 208 P.3d at 439 (citing *Deukmejian*, 43 Cal.3d at 1078, 742 P.2d at 1303). And just as "voter approval" is too general a purpose to comply with the single-subject requirement, so too is "better voting" or "how officeholders are chosen," both of which attempt to link the Petition's disparate provisions through only a vague, over-generalized theme. *Cf. Chem. Specialties Mfrs. Assn., Inc. v. Deukmejian*, 227 Cal. App. 3d 663, 671, 278 Cal. Rptr. 128, 133 (Ct. App. 1991) ("[T]he object of providing the public with accurate information in advertising is so broad that a virtually unlimited array of provisions could be considered germane thereto and joined in this proposition, essentially obliterating the [single-subject] requirement."). Indeed, "better voting" and "how officeholders are chosen" could encompass countless other distinct topics, such as implementing voter registration measures, any number of different ballot access rules, campaign finance measures, or even just upgrading voting equipment and other election infrastructure. The initiative enacts two widely divergent provisions, whose only common overlap is that they both involve "voting," but in altogether different types of elections and through altogether different mechanisms.

This Court has already ruled that such a tenuous link is insufficient. *See LVTAC*, 125 Nev. at 181, 208 P.3d at 439.

### C. The District Court Erred in Finding that the Petition's Distinct Proposals Embrace a Single Subject

The district court wrongly concluded that the changes were "functionally relate[d] and . . . germane, to how the specified officeholders . . . are chosen by voters," which it characterized as "the primary purpose of" the Petition. (J. App. 137.) On this issue, the district court also mischaracterized Mr. Helton's position, claiming he "assert[ed] that the 'primary' election is separate and distinct subject from the 'general'" and "that no one initiative can simultaneously address both."[5] (J. App. 137.)

That was not and is not Mr. Helton's argument. Mr. Helton's position is that the Petition's reformation of the two different types of elections—primary and general—in two *very different ways*—to make one "open" and impose ranked-choice voting on the other—addresses more than a single purpose or subject. An initiative that imposed a uniform change across both elections or that modified an ancillary law applicable

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[5] In disapproving this argument (which Mr. Helton never made), the district court reasoned that "[t]he primary election and general election are intertwined steps in the process," pointing to a 1996 amendment in which voters approved campaign contribution limits that applied in both primary and general elections and was not subject to the single subject rule for initiatives outlined in NRS 295.009(2), because that statute had not yet been enacted. (J. App. 137 (citing Nev. Const. art. 2, § 10).)

in both might comply with the single subject requirement. But that is not the issue that is presently before this Court. At issue here is not just the fact that the primary and general elections serve distinct purposes (though they do, and the distinction is relevant here), but that *the changes the Petition seeks to make* are both markedly different in substance and also serve distinct and unrelated purposes. This is a very different argument that the district court did not address in its order.

The Colorado Supreme Court reached a contrary conclusion to the district court when it considered whether a similar petition that (1) changed the process of conducting recall elections, and (2) made additional officials subject to the recall process, were two different subjects. *Matter of Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶ 2, 333 P.3d 76, 78 (2014), *disapproved of on other grounds by Matter of Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 57, 442 P.3d 867 (2019). The court concluded that, like here, the two changes had "distinct and separate purpose[s]," and thus held that the petition violated Colorado's very similar single-subject rule. *Id.* at ¶ 6, 333 P.3d at 78. Just as two separate reforms that both had a general connect to the *recall* of public officers violates the rule, so too do two different, unrelated aspects of how officeholders are elected. After all, electing officers is simply the inverse of recalling them. If anything, the Petition here, which would eliminate several different aspects of the current electoral systems and institute two very different voting

mechanisms in two very different types of elections, is even more obviously problematic than the recall initiative, which involved different aspects of a single process. *See also id.* at ¶ 7, 333 P.3d at 78-79 (noting "[a] proposed initiative contains multiple subjects not only when it proposes *new* provisions constituting multiple subjects, but also when it proposes to *repeal* multiple subjects" (citation omitted)).

In finding that the changes proposed in the Petition are sufficiently connected, the district court relied heavily on the Alaska Supreme Court's single-subject analysis in *Meyer v. Alaskans for Better Elections*, 465 P.3d 477, 485 (Alaska 2020). In doing so, the district court ignored a critical fundamental difference between Nevada and Alaska law: Alaska follows a *much different* single-subject standard than Nevada—one that is "very liberal," "should be construed with considerable breadth," and explicitly does *not* consider the functional relationship between an initiative's contents and its purpose. *Id.* at 484, 496. Indeed, Alaska employs the same test for initiatives as it does for its legislative single-subject analysis. *Id.* at 494-97.

*This* Court, by contrast, has been clear that when it comes to *Nevada's* initiative petitions, all matters must be germane *and* "functionally related" to a single-subject and uses the rule as a backstop to "assist voters in determining whether to change the laws of Nevada and the structure of government and ultimately protect[] the sanctity of Nevada's election process." *Heller*, 122 Nev. at 906, 141 P.3d at 1243.

Nevada does not impose that same limitation when analyzing whether legislation contains a single subject. Nev. Const. art. 4, § 17. Indeed, the initiative single-subject test is stricter because "unlike other means of enacting law, the initiative process typically does not allow for input in drafting proposed laws." *LVTAC*, 125 Nev. at 177 n.6, 208 P.3d at 437 n.6. Thus, in *Meyer*, the Alaska Supreme Court did not even consider whether the subject of "election reform"—like "voter approval," which this Court has already rejected, was framed with "excessive generality." *See id.* at 180-81, 208 P.3d at 439 (making clear Nevada law requires the "excessive generality" inquiry).

The other cases the district court relied on also do not support its finding that the Petition embraces only a single subject. (J. App. 135-37.) Neither *Prevent Sanctuary Cities v. Haley*, No. 74966, 2018 WL 2272955 (Nev. 2018) (unpublished disposition), nor *Education Initiative v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 293 P.3d 874 (2013), involved a petition that sought to solve two very distinct problems. *See Prevent Sanctuary Cities*, 2018 WL 2272955, at *5 (seeking to address perceived problem that officials were not cooperating with federal immigration enforcement); *Educ. Init.*, 129 Nev. at 50, 293 P.3d at 884 (seeking to address perceived problem of insufficient education funding).

In *Heller*, this Court actually held that the petition at issue *violated* the single-subject rule. 122 Nev. at 907, 141 P.3d at 1243-44. While it is true that the ultimate result was that some of that petition survived, that

was because it was clear that the primary purpose of that petition was altering the single process applicable when the State exercises its power of "eminent domain." *Id.* Thus, the Court severed the parts that were not functionally related or germane to that subject—i.e., the declaration that property rights are fundamental rights, and the requirement of just compensation for government taking of property. *Id.* at 909-10, 141 P.3d at 1245. Here, however, it is not clear which of the subjects at issue—the elimination of the partisan primary, or the imposition of ranked-choice voting in the general—is the Petition's "primary" purpose. And, indeed, not even Proponents argued that part of their Petition can be saved by severance. (J. App. 99 n.7.)

In sum, the Petition lacks a unified, central purpose and would instead enact massive, unrelated changes across Nevada's electoral system in one fell swoop, forcing voters to choose to accept them in bulk or not at all. It is precisely the type of disjointed, multi-subject initiative NRS 295.009(1)(a) guards against. Nor can the Petition be severed to rectify its violation of the single subject rule. Because the Petition fails to meet the single-subject requirement of NRS 295.009, cannot be severed to create compliance, and it is wholly invalid.

## II. The Petition Violates the Nevada Constitution's Prohibition on Initiatives that Mandate Unfunded Expenditures

The Petition is separately invalid because it mandates expenditures without providing reciprocal revenues in violation of Article 19, Section

6 of the Nevada Constitution. Section 6 prohibits any initiative that "makes an appropriation or otherwise requires the expenditure of money, unless such statute or amendment also imposes a sufficient tax, not prohibited by the Constitution, or otherwise constitutionally provides for raising the necessary revenue." Nev. Const. art. 19, § 6. "Section 6 applies to *all* proposed initiatives, without exception, and *does not permit* any initiative that fails to comply with the stated conditions." *Rogers v. Heller*, 117 Nev. 169, 173, 18 P.3d 1034, 1036 (2001) (emphasis in original). "If the Initiative does not comply with section 6, then the Initiative is void" in its entirety, and the offending provision cannot be severed to render it constitutional.[6] *Id.* at 173, 18 P.3d at 1036.

"Simply stated, an appropriation is the setting aside of funds, and an expenditure of money is the payment of funds." *Id.* "[A]n initiative makes an appropriation or expenditure when it leaves budgeting officials no discretion in appropriating or expending the money mandated by the initiative—the budgeting official must approve the appropriation or expenditure, regardless of any other financial considerations." *Herbst*

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[6] Although the substantive constitutionality of a ballot initiative is often not ripe for review until the initiative is enacted, *see Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 884, 141 P.3d 1224, 1229 (2006), Nevada courts have held that compliance with Article 19, Section 6's appropriation or expenditure provision is a "threshold content restriction" that may be raised in a pre-election challenge, *id.* at 890 n.38, 141 P.3d at 1233 (quoting *Rogers*, 117 Nev. at 173, 18 P.3d at 1036).

*Gaming*, 122 Nev. at 890, 141 P.3d at 1233.

Here, the Petition mandates expenditures because it would leave Nevada officials no choice but to spend significant funds on a massive overhaul of the state's electoral systems. To institute the changes it envisions, voting machines and paper ballots would need to be converted and new special voting equipment purchased to permit voters to rank candidates in order of preference. Poll workers and other officials would need to be trained on administering the new systems. The Petition would also require general election votes to be tallied using a complex algorithm in which candidates are eliminated and votes redistributed in a series of successive calculations. In the modern age, it is difficult to imagine such an operation being performed without the aid of specialized software, which the state would also have to purchase because all of the elections at issue are currently decided with a simple plurality vote. But even assuming *arguendo* that the state could perform the tabulations by hand, the training and staff hours needed for the task would come with their own associated cost, for the state must pay its employees and contractors. Nevada would also need to educate voters regarding how to cast their votes and how the votes are counted under the complicated new systems, necessitating a public relations campaign with its own significant price tag. Each of these expenditures is inherently required by the Petition, whose measures cannot be achieved without them. But the Petition does not raise any revenue to pay for these expenses, and it therefore violates

Section 6.

None of the district court's reasons for reaching a contrary conclusion are supportable. First, in a perfunctory aside, the district court asserted that Mr. Helton's claim that that the changes called for by the Petition "would cost money" was "unsupported speculation." (J. App. 139.) But it is self-evident that overhauling Nevada's primary and general election systems will not be free,[7] and courts are not required to suspend their common sense when they evaluate an initiative petition. This is not a case involving a factually intensive evaluation of whether the revenue that the Petition would raise is sufficient to cover its costs; the Petition does not raise any revenue at all, and so *any* spending it would require is unfunded. *Cf. Rogers*, 117 Nev. at 176, 18 P.3d at 1039 ("Although proposed taxes and revenues are subject to projections and may not be calculable to a certainty, the proposed tax here is clearly insufficient . . ."). And it is not reasonably debatable that the changes the Petition would mandate would require Nevada officials to procure goods and services to implement them, which cost money. Even if this were not

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[7] The Secretary has not yet issued a financial impact statement regarding the Petition, perhaps requiring additional time to analyze the large number of diverse investments the Petition would require. *See* Nevada Secretary of State, Legislative Counsel Bureau, *Financial Impact of the Statewide Constitutional Initiative Petition – Identifier: C-01-2021* (Dec. 2, 2021), https://www.nvsos.gov/sos/home/showpublisheddocument?id=9959.

a fundamental rule of basic economics, it would be amply demonstrated by other jurisdictions who have implemented ranked-choice voting for the first time.[8]

Indeed, the district court's ultimate reasoning did not rely on any finding that the Petition would not require new spending, and for good reason: it would likely be an abuse of discretion for a court to deny such a rudimentary, incontrovertible fact.[9] *See* NRS 47.150(2). Instead, the

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[8] Other jurisdictions have concluded that the implementation expenses for reforms like just some of those the Petition would enact measure in the hundreds of thousands—if not millions—of dollars. *See, e.g.*, Alaska Div. of Elections, *19AKBE - Statement of Costs*, https://www.elections.alaska.gov/petitions/19AKBE/19AKBEStatementOfCosts.pdf (estimating that similar changes to only some of those the Petition proposes would cost approximately $906,943 in Alaska, a state with less than a quarter of Nevada's population); New York City Office of the Mayor, *New York City to Launch $15 Million Ranked Choice Voting Education Campaign* (April 28, 2021) https://www1.nyc.gov/office-of-the-mayor/news/315-21/new-york-city-launch-15-million-ranked-choice-voting-education-campaign.

[9] Perhaps sensing that it was untenable to claim that the Petition's reforms would be free, Proponents below offered an alternative position: that the Petition *might eventually* reduce the cost of elections. (J. App. 101.) This is a highly dubious assertion, but it also misses the point. Article 19, Section 6 is not concerned with the speculative, long-term economic effects of an initiative, but with whether the initiative would *right now* unbalance the budgets carefully crafted by Nevada's Legislature and executive officials. *See Rogers*, 117 Nev. at 173-76, 18 P.3d at 1036-38 (holding that initiative that sought to increase funding to public schools violated Section 6 without considering whether long-term economic benefits of investing in public education would offset costs).

district court ruled that it *does not matter* that the Petition would force the State to spend money converting the state's primary and general electoral systems because the "common burdens" associated with changes in law "are not what Article 19, Section 6 concerns." (J. App. 140.) But Section 6 requires that an initiative fund *any* "new [spending] requirement that otherwise does not exist," *Rogers*, 117 Nev. at 176, 18 P.3d at 1038, and there is no "common burdens" exception.

No meaningful distinction can be drawn between expenditures that would trigger Section 6 and so-called common burdens that would be consistent with this Court's caselaw. If the district court believed that only laws that expressly direct officials to spend money for a given purpose mandate an expenditure, that reasoning is belied by this Court's clear statement that an initiative need not "by its terms appropriate money" to violate Section 6's prohibition. *Herbst Gaming*, 122 Nev. at 890 n.40, 141 P.3d at 1233 n.40 (citing *State ex rel. Card v. Kaufman*, 517 S.W.2d 78, 80 (Mo. 1974)). Instead, this Court has been clear that, "an initiative makes an appropriation or expenditure" any time it removes an official's "discretion" *not* to spend or set aside the money, regardless of whether the direction is explicit. *Id.* at 890, 141 P.3d at 1233. This is precisely what the Petition would do by enacting new constitutional provisions that officials would violate if they did not pay for electoral reforms.

If the district court instead simply considered "common burdens" to

be expenses that are too *de minimis* to implicate Section 6, the court's underlying assumption that the cost of the reforms at issue in this case would be slight is likely false. *See supra*, note 8. But much more importantly, this Court has held that "[a] necessary appropriation or expenditure in *any* set amount or percentage," *no matter how small*, is sufficient to trigger Section 6. *Rogers*, 117 Nev. at 176, 18 P.3d at 1038 (emphasis in original). If an initiative would require officials to spend even a dollar that they otherwise would not, Section 6 mandates that the initiative raise that dollar. *See id.*

The district court compared the reforms the Petition would enact to the those considered in *Herbst Gaming*, 122 Nev. at 890, 141 P.3d at 1233, in which this Court ruled that an initiative to expand Nevada's then-existing anti-smoking law to cover additional public accommodations did not mandate an appropriation or expenditure, but that comparison is inapt. In holding that the anti-smoking proposal complied with Section 6 in *Herbst Gaming*, the Court relied on the fact that expanding the locations where the smoking ban *could* be enforced did not inherently require an increase in the overall amount of enforcement or the costs associated therewith. *See id.* at 891, 141 P.3d at 1233 ("[The initiative] merely expands the statutorily delineated areas within which one *may* be subject to criminal and civil penalties for smoking. . . . It does not, for example, compel an increase or reallocation of police officers to enforce its provisions." (emphasis added)). If Nevada

officials chose, the expanded law could have been enforced using the exact same resources as the previous, more limited smoking ban—with existing officers responding to as many calls as were within their capacity during the same hours they had worked before. Nevada's officials maintained their discretion to decide whether to dedicate additional funds to enforcing the expanded law, and they would not have violated the new law if they chose not to spend any money on it at all.

This case presents a strong contrast. Here, the reforms mandated by the Petition leave Nevada's officials *no choice* but to spend the money needed to convert the state's electoral system to handle the sweeping changes it contemplates. If the Petition were passed and Nevada spent *no* money to convert its systems, the result would be elections held according to the old systems, no elections at all, or absolute chaos that would ultimately not adhere to system the Petition envisions—and each of these possibilities would violate the new constitutional amendments. Unlike the expanded smoking ban in *Herbst Gaming*, it is simply not possible for officials to comply with the laws the Petition would enact without spending funds they otherwise would not spend, and the district court failed to even consider, let alone account for, this distinction. Because the Petition therefore mandates an expenditure that must be funded under Section 6. *See Rogers*, 117 Nev. at 176, 18 P.3d at 1038.

Finally, the district court's reasoning that the Petition would not enact an unfunded mandate because "it vests the implementation with

the Legislature and likewise the Secretary of State and local officials," (J. App. 141), is, with respect, nonsensical. The test for whether an initiative imposes an expenditure is not whether it takes away budgeting officials' discretion to decide *where* or *how* to spend money to accomplish the initiative's aims, but whether it takes away their discretion to decide *whether* to spend the money in the first place—whether, if the initiative is passed, "the budgeting official must approve the appropriation or expenditure regardless of any other financial considerations." *Herbst Gaming*, 122 Nev. at 890, 141 P.3d at 1233.

The Petition clearly qualifies under this standard because, again, is impossible for the Legislature, the Secretary of State, or local election officials to comply with its provisions without spending additional money. Thus, the district court's statement that the Petition "does not disturb th[e] discretion" that NRS 293.442-460 grants the Secretary of State and local election officials to incur election implementation expenses, (J. App. 141), is flatly incorrect. The discretion to incur expenses is by its nature also the discretion *not* to incur expenses, and the Petition would wholly eliminate that latter option. Officials would be forced to make the various expenditures required to implement the Petition, and it does not matter that the Petition does not spell out the specific purchases they would be required to make.

Because no portion of the Petition "provides for raising the necessary revenue," as Article 19, Section 6 requires, it is *void ab initio*.

*Rogers*, 117 Nev. at 173, 18 P.3d at 1036. The district court erred by concluding otherwise.

## III. The Petition's Description of Effect Is Legally Insufficient

Even setting aside the issues with the Petition itself, Proponents should not be permitted to solicit signatures because the Petition's description of effect is deficient. Nevada law 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." NRS 295.009(1)(b). The purpose of the description is to "prevent voter confusion and promote informed decisions." *Nevadans for Nev. v. Beers*, 122 Nev. 930, 939, 142 P.3d 339, 345 (2006). 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 Com. Tax, Inc.*, No. 69501, 2016 WL 2842925 at *2 (2016) (unpublished disposition) (citing *Educ. Init.*, 129 Nev. at 41, 293 P.3d at 879; *LVTAC*, 125 Nev. at 177, 208 P.3d at 437).

In keeping with this important role, this Court has consistently enforced several requirements to ensure a description of effect provides sufficient objective, accurate information to allow potential signatories to make an informed decision. "[A] description of effect must be straightforward, succinct, and non-argumentative, and it must not be deceptive or misleading." *Educ. Init.*, 129 Nev. at 42, 293 P.3d at 879. It should detail "what the initiative is designed to achieve and how it

intends to reach those goals." *Id.* at 37, 293 P.3d at 876. And, though a description need not "explain hypothetical effects" or "mention every possible effect," *id.* at 42, 293 P.3d at 879, it must "reveal the significant practical ramifications of the measure[]" in order to be valid. *RIP Com. Tax*, 2016 WL 2842925 at *3; *see also Nev. Judges Ass'n v. Lau*, 112 Nev. 51, 59, 910 P.2d 898, 903 (1996) (rejecting initiative description for "failure to explain [certain] ramifications of the proposed amendment," which "renders the initiative and its explanation potentially misleading").

As an initial matter, the district court dismissed many of Mr. Helton's arguments regarding information that should have been included in the Petition's description as "partisan advocacy" not suitable for a description of effect.[10] (J. App. 143-44.) But this Court's precedents are clear that there is nothing partisan about requiring that a description contain an accurate accounting of an initiative's most significant ramifications, and a description may not leave out "material effects of what is proposed" merely because they are controversial or negative. *RIP*

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[10] Much of the district court's order also focused on what it perceived to be shortcomings in the alternative description of effect Mr. Helton submitted at the court's request. These criticisms were largely ill-founded, but they were also irrelevant to the actual question before the court. Any deficiencies in Mr. Helton's alternative description, which was submitted to facilitate negotiations and aid the court in crafting relief, have no bearing on whether the Petition's *current* description of effect is legally adequate.

*Com. Tax*, 2016 WL 2842925 at *4 (Saitta, J., concurring).

In *Coalition for Nevada's Future v. RIP Commerce Tax, Inc.*, for example, a referendum sought to repeal a business tax that was a significant source of state revenue. *Id.* at *3-4. Though the Nevada Constitution required that the Legislature maintain a balanced budget, and eliminating the tax was likely to throw off this calculus, "causing financial uncertainty for the government, and thus the people," the referendum's description of effect made no mention of this fact. *Id.* (citing Nev. Const. art. 9, § 2(1)). This Court held that description was "deceptive for failing to accurately identify the practical ramification of the commerce tax's disapproval . . . . including that the disapproval of the tax will unbalance the state budget." *Id.* at *4. In a concurrence, Justice Saitta explained that "by ignoring the significant effect the referendum would have on the balanced budget mandate, the description of effect suggest[ed] that no such effect exist[ed] and [wa]s thus materially misleading." *Id.* (Saitta, J., concurring); *see also Taxpayers for Prot. of Nev. Jobs v. Arena Init. Comm.*, Nos. 57157, 58350, 2012 WL 2345226 at *3 (2012) (holding description of initiative that would establish special tax district to build specific sporting arena was invalid where it failed to disclose that it "would effectively prohibit all competing arena proposals"). Here, the Petition's description of effect is similarly deceptive, confusing, and misleading because it misstates or totally fails to mention many of the most significant ramifications of the Petition's

enactment.

### A. The Description of Effect Fails to Inform Signatories that the Petition Would Permit Candidates to Self-Select Their Listed Party Affiliations

As to its first subject—the wholesale alteration of Nevada's primary election process—the description does not explain that by eliminating the party primary system and instituting a mandatory open primary that all candidates must participate in, political parties would effectively no longer be capable of selecting their candidates for the general election, nor even of controlling which candidates identify as members of their respective party on the ballot.[11]

Instead, the Petition would allow candidates to freely self-select which partisan affiliation will be listed beneath their names simply by changing their personal voter registration, meaning any candidate could claim an affiliation with a party for strategic reasons regardless of the candidate's actual platform. As a result, the party designation that appears on a ballot would no longer be a reliable indicator of a candidate's

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[11] Below, Proponents argued that the Petition would not stop parties from nominating candidates, seemingly suggesting that a party could informally endorse a candidate who would then participate in the open primary. (J. App. 92 n4.) But this misses the point—even if a party instituted internal processes to select a particular candidate as its informal nominee, there would still be no way for a voter to distinguish from the ballot between that candidate and other candidates who have unilaterally chosen to affiliate with the party.

values or policy positions, and Nevada voters who historically have been able to rely on the listed affiliations when they vote in a general election will no longer be able to confidently do so without conducting independent research. But the description of effect says nothing of this, leaving a potential signatory unaware of the true implications of what they are being asked to support.

The district court did not find these omissions to be significant, reasoning that, because the description states that it would eliminate partisan primaries and that voters would participate in a single primary election regardless of party affiliation or non-affiliation, "voters are informed about the reduced role of party control and party affiliation under the new process."[12] (J. App. 143.) The court also reasoned that,

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[12] The district court also reasoned that the any inexactitude in a description of effect is "mitigat[ed]" by the fact that prospective signatories can read the actual Petition before signing. (J. App. 142 (quoting *Educ. Init.*, 129 Nev. at 43, 293 P.3d at 880).) But if that were enough to ameliorate any flaws in the description, it would swallow the description of effect requirement entirely. NRS 295.009(1)(b) recognizes that reading the full text of the initiative—particularly a long and complex one like the Petition, which would add or modify over 50 constitutional provisions—takes more time and effort than a voter is generally able to dedicate to the task during the brief interaction with a circulator, and it thus requires that the description itself provide enough complete and accurate information for signatories to "know[] what they are signing." *Stumpf v. Lau*, 108 Nev. 826, 832, 839 P.2d 120, 124 (1992), *overruled on other grounds by Herbst Gaming,* 122 Nev. at 887, 141 P.3d at 1224.

"[t]he specifics about how party designation appears on the printed ballot form are, at best, secondary effects that do not need to be included in the limited space of the description." (J. App. 143.) But Mr. Helton's objection is not that the description does not describe how party affiliations will appear on the printed ballot form, but rather that it totally fails to inform potential signatories of Petition of the seismic shift in what a printed party affiliation will *mean* if the Petition is enacted. And the Petition *itself* recognizes that the mere existence of a nonpartisan primary is not enough to put voters on notice that the partisan affiliations appearing on ballots will not reflect party endorsement in the new systems.

In an implicit acknowledgement of the hefty significance voters attribute to these listed party designations when casting their votes, the Petition would require that every ballot carry a "conspicuously placed disclaimer" stating, "Each candidate for partisan office may state a political party that he or she prefers. ***A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate***." (J. App. 22 (proposed Section 18(5)) (emphasis added)). But while Proponents think this effect is important enough to be included in Nevada's Constitution and on every ballot that is printed, "the description of effect makes no mention whatsoever of this critical consequence." *RIP Com. Tax*, 2016 WL 2842925 at *4.

That these consequences are material and highly likely to influence

potential signatories' decision to support the Petition is further reinforced by the prominent role they played during the initiative campaign that led to Alaska enacting similar reforms. Alaska mandates that the Lieutenant Governor prepare a "ballot summary" to be circulated with an initiative and eventually placed on the ballot should the initiative garner enough support. *Alaska v. Vote Yes for Alaska's Fair Share*, 478 P.3d 679, 682 n.1 (Alaska 2021). And, like Nevada, Alaska requires that this summary be "a fair, concise, true and impartial statement of the intent of the proposed measure, free from any misleading tendency." *Id.* at 687 (internal quotes and citation omitted). In the summary for the initiative that ultimately brought about reforms very much like those the Petition would institute, *the very first paragraph* was dedicated almost entirely to informing voters of these important points:

> This act would get rid of the party primary system, ***and political parties would no longer select their candidates to appear on the general election ballot***. Instead, this act would create an open nonpartisan primary where all candidates would appear on one ballot. ***Candidates could choose to have a political party preference listed next to their name*** or be listed as "undeclared" or "nonpartisan." The four candidates with the most votes in the primary election would have their names placed on the general election ballot.

Alaska Div. of Elections, Ballot Measure No. 2 – 19AKBE (2019), http://www.elections.alaska.gov/petitions/19AKBE/19AKBE%20-%20Ballot%20Language%20Summary.pdf (emphasis added). Far from

being "advocacy for the role of partisan political parties," (J. App. 143), these crucially important facts took centerstage when the summary was prepared by an impartial government official rather than a proponent invested in the initiative's enactment.

Candidates' listed party affiliations serve as a useful heuristic that many voters rely upon when casting their ballots, and voters should be informed that the Petition would render these affiliations unreliable when they are deciding whether to support it. *Cf. Tex. All. for Retired Ams. v. Hughs*, 489 F. Supp. 3d 667, 686–87 (S.D. Tex. 2020) (noting timesaving effect of allowing voters to vote a straight ticket in support of all of a party's candidates if they so choose); *Mich. State A. Philip Randolph Inst. v. Johnson*, 209 F. Supp. 3d 935, 948 (E.D. Mich. 2016) (same). Nevada law does not allow Proponents to instead wait until after the Petition is enacted, when voters first see their new ballots, to finally inform them of this material consequence. *See Stumpf,* 108 Nev. at 833, 839 P.2d at 124 (stating signers "must be informed *at the time of signing* of the nature and effect of that which is proposed" (emphasis added)).

### B. The Description of Effect Misleadingly Minimizes the Changes the Petition Would Make to the General Election System

As for its second subject, the novel ranked-choice voting system the Petition would institute for general elections, the Petition's description again fails to include important information about the changes and their "significant practical ramifications," *RIP Com. Tax*, 2016 WL 2842925 at

*3, and the information that the description does include is confusing and misleading. For example, it states that, "*as traditionally*, a candidate receiving first-choice votes of more than 50% wins" under its proposed ranked-choice system. (J. App. 25, 26, 27 ,28 (emphasis added).) The implication that the requirements for winning under the new system would be the same "as traditionally" is false.

Since the Nevada Constitution was ratified in 1864, before Nevada was even a state, it has explicitly provided that "[a] plurality of votes given at an election by the people, shall constitute a choice." Nev. Const. art. 15, § 14. Thus, "traditionally" a candidate is not required to receive over 50% of votes to win, but only a plurality—more votes than any other candidate. And, of course, the concept of "first-choice votes" does not exist in the current electoral system, in which voters get to vote for only one candidate.

The district court discounted this misleading statement by reasoning that, "50% plus one vote is the winner under the current tabulation method as well as what the Initiative proposes" and, somewhat incongruously, pointing to NRS 293.260(5) as an example of the "long-established" and "well-understood traditional rule." (J. App. 144 & n.4.) But NRS 293.260(5), which states that a candidate who receives an outright majority of the vote in a *primary* election for a *nonpartisan* office is immediately elected without needing to advance to the general election, represents a totally different rule than the "current

tabulation method" in *general* elections for *partisan* offices that the ranked-choice system would replace. By its very terms, NRS 293.260(5) has never applied in these elections, in which a plurality has always been sufficient for a candidate to be declared elected, and it thus greatly differs from the "well-understood traditional rule" applicable in those contests. By mischaracterizing the current system and the delta between it and the system the Petition proposes, the description and the district court both wrongly minimized the seriousness and import of the changes the Petition would enact, misleading the voter into believing that the change in mechanics would be far smaller than it would actually be.

Indeed, the Petition's description of effect never even expressly informs a prospective signatory that, *unlike* in the traditional system, the candidate who is the top-choice of the most voters would not be guaranteed victory in the new ranked-choice general election system—a controversial aspect of the proposed system that is highly likely to influence a potential signatory's decision to support the Petition. Nor does it explain that voters who do not wish to rank all candidates may not have their votes included in the final tally. In a phenomenon known as "exhaustion," voters who rank only some of the candidates on their ballots are excluded from subsequent rounds if their preferred candidates are eliminated, but the description of effect does not mention this. (J. App. 25, 26, 27, 28 (describing that "each voter who had ranked the now-eliminated candidate as their first choice, has their single vote

transferred to the next highest choice candidate" but failing to clarify what happens if the voter has not ranked any other candidates).) Again, these are "fatal omission[s] that effectively prevent[] the signers from knowing what they are signing." *Stumpf*, 108 Nev. at 832, 839 P.2d at 124.

### C. The Description is Deficient in Several Additional Ways.

The description of effect likewise makes no mention of the financial implications of the Petition and thus fails to advise voters that the new voting system will undoubtedly require significant government funding to implement. The Petition, therefore, misleads signatories into thinking that there are no, or minimal, implementation costs for the proposal. But, as discussed, the reality is that Nevada's current voting system is not set up to process ranked-choice ballots, nor has this process ever been used for major elections in Nevada before. Updating voting systems and ballot counting procedures for the ten major statewide elections covered by the Petition would be a massive undertaking. Implementing ranked-choice voting, which is inherently confusing to voters, would also require voter outreach to educate voters on this completely new process to avoid confusion and voting errors on election day. Training on how to administer the ballot counting process for both the primary and general election under these new systems would also be necessary. Who would be responsible for creating training materials and implementing these new

changes and where that funding would come from are not contemplated—let alone described—in the Petition. By omitting these effects, "the description of effect suggests that no such effect[s] exist[] and is thus materially misleading."[13] *RIP Com. Tax*, 2016 WL 2842925 at *4 (Saitta, J., concurring).

Finally, in what is perhaps an effort to conceal that the Petition serves multiple disconnected purposes in violation of the single-subject rule, the description of effect says nothing regarding "what the initiative is designed to achieve." *Educ. Init.*, 129 Nev. at 37, 293 P.3d at 876. The description at most simply explains some of the mechanics of the new system—albeit in ways that are incomplete and materially misleading for the reasons discussed—and it leaves potential signatories to rely on the word of circulators regarding the actual purpose of the separate changes. Without any concrete indication of the Petition's goals in its description of effect, different circulators may explain the Petition's purposes differently, even slanting or misrepresenting the expected effect

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[13] The district court also stated that cost information and other "fiscal impact[s]" are "partisan advocacy [that] is not allowed" in a description of effect because, "[u]nder Nevada law, such arguments are matters for the ballot committees to make once the Initiative is put before the voters." (J. App. 144 (citing *Educ. Init.*, 129 Nev. at 39, 293 P.3d at 878)). This claim is squarely contradicted by *RIP Commerce Tax*, 2016 WL 2842925 at *3-4, which held that a description of effect was invalid precisely because it failed to include any mention of the significant impact the referendum would have had on the state's balanced budget.

of the reforms to suit potential signatories' perceived political preferences. This is yet another omission that undermines voters' ability to make a fully informed decision on whether to support the Petition.

Because the description of effect is materially deceptive, confusing, and misleading, it is legally insufficient, and the district court erred by concluding that it complies with Nevada law.

## CONCLUSION

For the reasons discussed, the Petition is legally deficient and Mr. Helton ask that the Court reverse the district court's decision and find the Petition invalid.

DATED this 1st dav of March. 2022.

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## CERTIFICATE OF COMPLIANCE

1. I certify that this Brief complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface, size 14, Century Schoolbook.

2. I further certify that this Brief complies with the type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the Brief exempted by N.R.A.P. 32(a)(7)(C), it contains 13,350 words.

3. Finally, I hereby certify that I have read this Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 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

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sanctions in the event that the accompanying Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 1st day March, 2022.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2022, a true and correct copy of the **APPELLANT'S OPENING BRIEF** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system:

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