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 REPLY BRIEF

BRADLEY S. SCHRAGER, ESQ. (NSB 10217)
JOHN SAMBERG, ESQ. (NSB 10828)
DANIEL BRAVO, ESQ. (NSB 13078)
ERIC LEVINRAD, ESQ. (*pro hac vice)*
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3773 Howard Hughes Parkway, Suite 590 South
Las Vegas, NV 89169

MARC E. ELIAS, ESQ. (*pro hac vice*)
SPENCER MCCANDLESS, ESQ. (*pro hac vice*)
ELISABETH C. FROST, ESQ.
(*pro hac vice forthcoming*)
ELIAS LAW GROUP LLP
10 G St. NE Suite 600
Washington, DC 20002

LINDSAY MCALEER, ESQ. (*pro hac vice*)
ELIAS LAW GROUP LLP
1700 Seventh Ave, Suite 2100
Seattle, WA 98101

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Throughout this litigation, Proponents have avoided squarely engaging with the merits of the challenges raised. Instead, they have resorted to personal attacks, misguided procedural tactics, and misrepresentation of this case's history and Appellant Nathaniel Helton's arguments. Their answering brief submitted to this Court is no different. Proponents' hesitancy to address Mr. Helton's actual arguments is understandable: neither the law nor the facts are on Proponents' side. The decision below should be reversed, and the Court should enjoin the Secretary of State from taking any further action on it. Mr. Helton briefly addresses Proponents' arguments in rebuttal below.

First, with regard to the single-subject challenge to the Petition, Proponents tussle with a straw man of their own creation. Mr. Helton's position has never been that reforms must depend on one another to the point that they could not stand alone to constitute a single subject. What Mr. Helton has argued from the start is that *this* Petition violates the single-subject rule because it encompasses multiple subjects that serve *distinct and unrelated purposes* that are not functionally related or germane to one another.

Proponents' argument that the Petition embraces only a single subject misunderstands the function of Nevada's partisan primaries. They are not—as Proponents contend—the means by which Nevadans choose public officeholders. They are a separate pre-election process by

which *members of major political parties* choose their *standard-bearers to represent the party*. The separate and distinct general election is where Nevada voters then choose among the candidates who will represent them in public office. Those candidates include those chosen by major party voters in primary elections, but they also include other candidates who may—under the current process—qualify for the ballot in other ways, including by signature gathering or minor party nomination. In other words, party primaries are only one method—*and not the only method*—by which candidates can access the general election ballot. Yet the Petition completely ignores these other processes, giving the lie to Proponents' claim that this is all one singular process by which Nevadans select public office holders.

The relationship between the current primary election system and the general election is quite different than what Proponents claim. Under the current processes, general election voters can be confident that if a candidate is listed as a "Democrat" or "Republican" they have been vetted and chosen by the voters of their party to promote the party's values and platform, should they be elected to public office. The Petition would do away with all of that by eliminating partisan primaries altogether. And separate and apart from eliminating partisan primaries, the Petition would impose an entirely different reform on the general election, requiring voters to use a new and complex system of ranked-choice voting to select among the candidates that all voters who choose to participate

in a new open primary select to advance to the general election. These are separate subjects that cannot and should not be logrolled together so that voters are forced to support them all together or not at all.

Second, it is not credibly debatable that the Petition's significant electoral reforms will cost money to implement. Because the Petition does not provide any means to raise that money, it is invalid under Article 19, Section 6 of the Nevada Constitution. Proponents first attempt to avoid this inevitable result by distracting from the issue, claiming that Mr. Helton failed to introduce sufficient evidence of those costs (failing to mention that *Proponents* agreed at the outset that the case could be resolved based on the legal argument alone and without presentation of evidence). But this Court's precedents are clear that an initiative must fund required appropriations or spending in *any* amount, and where the Petition raises no funds whatsoever, no evidence is needed to demonstrate that it fails this requirement.

Proponents carefully avoid taking the untenable position that the Petition absolutely will not require *some* expenditure of funds. Instead, Proponents assert for the first time on appeal that the reforms the Petition calls for *might* be able to be accomplished using existing election funding. That claim is implausible, but more importantly, it is irrelevant. This Court has squarely held that an initiative *cannot rely on existing funding* to offset the appropriations or expenditures it would mandate; Section 6 requires that any spending required by an initiative be funded

in its entirety. Because the Petition would require Nevada officials to spend money to comply with its provisions and would limit the Legislature's broad discretion to fund elections as it sees fit, Section 6 requires that the Petition pay for its reforms.

Finally, in what is likely an attempt to hide that the Petition's reforms lack any single unified purpose, Proponents do not even respond to the fact that the Petition's description of effect fails to include any discussion of the purpose or practical ramifications of the Petition's sweeping electoral changes, as this Court's precedents require. This is most glaring with respect to the Petition's effect on the party designations that would appear with candidates' names on the ballot, which would no longer reliably reflect that a candidate shares the parties policy preference or values—a consequence that Proponents deem important enough to *explicitly remind voters of on the ballot itself each and every election*, but not important enough to be included in the Petition's description of effect. Instead of properly detailing the Petition's purpose and significant consequences, the description includes only a perfunctory and misleading description of some of the mechanics of the changes it proposes. This is legally insufficient, and Proponents offer no reason to think differently.

For these reasons and those articulated in Mr. Helton's opening brief, 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.

ARGUMENT

I. The Petition Violates Nevada's Single-Subject Rule.

At the outset, Proponents fundamentally mischaracterize Mr. Helton's position, claiming he has argued that "the elements of an initiative" must be "'dependent' on each other or metaphysically inseparable to satisfy the single subject rule."[1] PAB at 4. That is not what Mr. Helton contends. Each part of an initiative need not be "metaphysically inseparable," but each must in fact be functionally related *and* germane to one sufficiently narrow subject. That is Nevada law. Multiple subjects and purposes cannot be combined under an "excessively general" heading to pass under the single subject rule. *See Las Vegas Taxpayer Accountability Comm. v. City Council of City of Las Vegas* (*"LVTAC"*), 125 Nev. 165, 181, 208 P.3d 429, 439 (2009). And that is exactly what this Petition proposes to do.

---

[1] In another example of Proponents' twisting the facts, they dispute Mr. Helton's description of the district court's adopting Proponents' proposed findings of facts and conclusions of law virtually verbatim. Proponents' Answering Brief ("PAB") at 7 n.2. Mr. Helton's statement is accurate. The district court deleted one sentence from Proponents' 13-page proposed order and adopted the rest without alteration or addition.

The Petition *first* seeks to fundamentally alter Nevada's nomination process for the selected offices, eliminating both the major-party primary election and the mechanisms by which other candidates are nominated or may appear on the general election ballot, while also making a *second*, entirely distinct change to the general election—eliminating plurality voting in favor of ranked-choice voting to decide how candidates are in fact elected to office. The first change, in essence, creates a right for anyone seeking candidacy to participate in the primary election and for any Nevada voter to cast a ballot in a new open primary election, regardless of party affiliation. The second change, by contrast, does not alter voter participation in the general election but instead abandons Nevada's extensive history of plurality voting in favor of ranked-choice voting for electing the winner.

Ignoring the distinct purposes served by the primary and general elections under Nevada law, Proponents contend that these are "two steps in the electoral-selection process." PAB at 4. But this overlooks that Nevada's primary election is the process by which major party voters *nominate* their standard bearer and is not a "step" that non-major party voters or candidates participate in prior to the general election.[2] If, as

---

[2] *Compare* NRS 293.175(2) (establishing that "[c]andidates for partisan office of a major political party . . . must be nominated at the primary election") *with* NRS 293.1715 and NRS 293.200 (explaining the separate processes for minor political party and independent candidate, respectively, to appear on the general election ballot).

Proponents contend, the purpose was to change how voters *elect* the selected officeholders, then the Petition would not have eliminated the nominating mechanisms, which do not bear on how voters choose from among the candidates.

Proponents' argument that Mr. Helton relies on a "failed math formulation" in explaining why the Petition violates the single-subject rule again misstates his position. PAB at 18. To be clear, Mr. Helton does not argue that a petition is prohibited from having "sub-parts" or that multiple changes cannot be encompassed in one initiative under the single-subject rule. Nor does he believe a Petition fails based on a numerical count of the changes it seeks to make. His position is that *this* Petition seeks to do two very separate things—by fundamentally revising two very different processes that, despite both being called "elections," actually serve two distinct purposes in Nevada. The fact that the Petition seeks to create two separate constitutional sections with no reference to one another is only further evidence of the proposed changes' distinct, and unrelated purposes. J. App. at 20-24 (proposing amending Article 15 to add Section 17 to address the primary election and Section 18 to address the general election, with neither new section cross-referencing the other).

The Nevada cases Proponents rely on do not undercut Mr. Helton's argument. *See* PAB at 17-20. Citing to *Prevent Sanctuary Cities v. Haley*, No. 74966, 2018 WL 2272955 (Nev. 2018) (unpublished disposition),

Proponents contend that the Court approved "sanctuary cities" as a single subject, which Proponents claim is broader than their proposed subject here. PAB at 18. But Proponents ignore the actual substance of that case and the petition at issue. In reality, the Court's holding was much narrower, finding that the *purpose* the petition sought to accomplish did not violate the single subject rule—i.e., to "prohibit Nevada and its counties and cities from enacting laws and policies that would interfere or discourage cooperation with the enforcement of federal immigration laws." *Prevent Sanctuary Cities v. Haley*, 2018 WL 2272955, at *3 (unpublished).[3] The Court then concluded that "each of the initiative's components are 'functionally related' and 'germane' to that purpose, as each component prohibits a different level of Nevada government (state, county, city) from enacting laws or adopting policies that interfere with the enforcement of federal immigration laws." *Id.* What Proponents steadfastly ignore is that the *Protect Sanctuary Cities* initiative sought to make the *same change* serving that *same purpose* at

---

[3] Proponents have repeatedly argued that Mr. Helton's position means that each elected office must also constitute its own subject. PAB at 28. Mr. Helton has never made this argument and agrees with the logic of this Court in *Prevent Sanctuary Cities*—that the *same* change with the *same* purpose may be made to multiple offices or levels of government to serve the *same* underlying goal. But the Petition does not seek to make the same change across the board, nor do the proposed changes to the primaries or the general (or the elections themselves) even serve the same purpose.

three levels of government. The Court's holding was not, as Proponents argue, that "sanctuary cities" was a sufficiently specific subject on its own—rather, it was tied to the sufficiently narrow (and unitary) purpose of the petition.[4]

By contrast, Proponents' own arguments before the district court about the purported "problems" the Petition seeks to address demonstrates the distinct nature—and function—of each proposed reform. *See generally* Appellant's Br. at 20-22 (noting that Proponents described two separate purposes of the initiative: (1) "enfranchising" nonpartisan voters, and (2) giving general election voters more "choices,"

---

[4] The other cases Proponents cite are also distinguishable. In *Education Initiative v. Committee to Protect Nevada Jobs*, the petition proposed two taxes, both of which served the "clear" purpose of "funding for public education" whereas the Petition here serves more than one purpose: at minimum, it serves to both eliminate the partisan primary election, and institute ranked-choice voting in the general election. 129 Nev. 35, 50, 293 P.3d 874, 884 (2013). And it does so under an excessively broad articulated subject of "choosing the selected office holders" to mask the multiple purposes it truly serves. In *Nevadans for the Protection of Property Rights, Inc. v. Heller*, the Court held that the subject of "eminent domain" was a single subject, but then severed two of the provisions, including one that made property rights fundamental rights. 122 Nev. 894, 908, 141 P.3d 1235, 1244 (2006) Similarly, the Petition here, in effect, creates new rights for non-major party voters and candidates to participate in a new open pre-election process, fundamentally different from the current primary nomination elections that the political parties utilize to choose their standard-bearers. And unlike the Petition in *Heller*, it cannot be saved by severance given that the "primary subject" is not "readily discern[i]ble." *Id.* at 910, 1245.

both of which are only served by an open primary election, not ranked-choice voting). Further, as noted in Mr. Helton's opening brief, the website for Final Five Voting also highlights the separate nature of the proposed changes, describing the process as a combination of *two* "innovations" and as making *two* separate fixes—(1) "to get rid of the primary," and (2) "to get rid of plurality voting." *Id.* at 20; *see also* The Institute for Political Innovation, Final Five Voting FAQ, https://political-innovation.org/final-five-voting/ (last visited Apr. 10, 2022). Again, voters may be in favor of one over the other, as each serves distinct policy goals, Appellant's Br. at 21-22, but the Petition would force them to make a choice to adopt all or none, a quintessential example of impermissible log rolling. *Heller*, 122 Nev. at 923, 141 P.3d at 1254 (describing log rolling as forcing voters to "choose between competing policy goals" (Hardesty, J., concurring)).

Allowing multi-faceted initiatives with such broad, umbrella "subjects" does nothing to advance the single-subject rule's function of "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). On the contrary, it undermines this purpose. Indeed, by Proponents' own definition, changing the method in which an officeholder is elected could also encompass a host of additional, competing reforms, including

changes to candidacy eligibility rules, voter registration requirements, and instituting a voter ID law. This Court's precedent, which has taken seriously the single-subject restriction, rejects such an approach.

Proponents next attempt to distinguish the Colorado Supreme Court's decision in *Matter of Title, #76* by arguing that it has been overruled. PAB at 23. This case, however, was cited by the Colorado Supreme Court in 2021 for the same proposition that Mr. Helton cites it for here: that "recall of government officers" is an "overly broad theme [the Court has] rejected" as unconstitutionally broad for a ballot initiative. *See Matter of Title, Ballot Title & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 22, 489 P.3d 1217, 1222 (quoting *In re 2013–2014 #76,* ¶ 10, 333 P.3d at 79). Nor is *Matter of Title, #76* distinguishable because the initiative, in Proponents' words, "proposed an entirely new election" and "created a new constitutional right to recall non-elected officers." PAB at 23-24. Here, too, the Petition would upend Nevada's current primary election, creating a new right for all candidates and voters to participate in the primary election, while separately eliminating plurality voting to *elect* a candidate in the general election, a change that is unrelated to the nomination process.

Proponents continue to rely heavily on the Alaska Supreme Court's decision in *Meyer v. Alaskans for Better Elections*, 465 P.3d 477, 485 (Alaska 2020), arguing (incorrectly) that Nevada and Alaska employ a similarly liberal approach to their single-subject rules for ballot

initiatives. PAB at 25. There is no basis for this claim. Quite to the contrary, in *Meyer*, the Alaska Supreme Court rejected the State's request to adopt a stricter single-subject test for initiatives (as Nevada has done), and instead adopted the same test for both the legislative and initiative single-subject rules, neither of which contains a limit similar to NRS 295.009(2). *Meyer*, 465 P.3d at 494. Nevada has not adopted this approach, as this Court has expressly recognized in its precedent. *See LVTAC*, 125 Nev. at 177 n.6, 208 P.3d at 437 n.6 (recognizing need for a limit on the initiative process as compared with the legislative process).

Proponents' reliance on the Alaska Supreme Court's decision in *Meyer* is further undercut by this Court's holding in *LVTAC*, in which it found that "'voter approval,' . . . is an excessively general subject that cannot meet NRS 295.009's requirement." *LVTAC*, 125 Nev. at 181, 208 P.3d at 440. There is no functional difference between the subject "voter approval" that this Court rejected in *LTVAC* and the subject of "election reform" approved by the Alaska Supreme Court in *Meyer*. In fact, the *Meyer* court allowed an even broader reform to fall under this heading that mandated new campaign finance disclosures. Finding "election reform" to be a sufficiently narrow subject would both permit logrolling and severely undermine the goals of Nevada's single-subject rule—to "promote informed decisions" and "prevent the enactment of unpopular provisions by attaching them to more attractive proposals." *LVTAC*, 125

Nev. at 176–77, 208 P.3d at 437.[5]

Finally, Proponents claim that Mr. Helton "abandoned" his argument that the Petition cannot be saved by severance and "makes no reference" to it in his brief. PAB at p. 27 n.9. This is simply false. Mr. Helton states in his opening brief that Proponents never contested his non-severability argument before the district court, *and*, once again, that severance cannot save the deficiencies in the Petition. *See* Appellant's Br. at 29 (citing J. App. 99 n.7). As the Court recognized in *LVTAC*, where the petition's proponents did not argue that the measure was severable, "[the Court does] not consider whether severance may have been possible" under *Heller* even though it contained a severance clause. *LVTAC*, 125 Nev. at 182 n.7, 208 P.3d at 440 n.7.

II. The Petition Unconstitutionally Mandates Unfunded Expenditures.

Proponents misrepresent the sequence of events before the district court, distracting from a simple and inescapable truth: the Petition's

---

[5] Proponents rely on the example of log rolling Justice Hardesty's described in *Heller*—of increasing penalties for sex offenders while also abolishing the death penalty—to argue that no logrolling has occurred here. PAB at 29. While obviously a more extreme example, Justice Hardesty's reasoning that such a combination would make voters "choose between competing policy goals" is what matters and supports a finding of log rolling here. That is, voters are faced with a Hobson's choice to: (1) eliminate the partisan primary in favor of a top five advance approach in an open primary, or (2) institute ranked-choice voting in the general election.

electoral overhaul would require Nevada to spend money that the Petition does not raise in violation of Article 19, Section 6 of the Nevada Constitution. Mr. Helton did not unilaterally stipulate that he did not intend to present any evidence on his claims. *Contra* PAB at 32-33. During a scheduling conference with the district court that was held before Proponents filed their response to Mr. Helton's challenge, the parties mutually agreed that no evidence was needed to evaluate Mr. Helton's claims and that the subsequent hearing need consist only of legal argument. *See* J. App. at 116-17 ("As the parties have agreed that this is a legal challenge not including evidence, there shall be no presentation of evidence by the parties at the hearing, which shall consist only of oral argument."). It was not until after the parties reached that agreement that Proponents pulled an about-face, arguing that Mr. Helton's unfunded mandate claim fails *because* he did not offer evidence to prove that the Petition's electoral reforms would cost money. *Id.* at 100-101.

Even then, Proponents stopped short of arguing affirmatively that the Petition would not cost money to implement. There is no precedent that requires Nevada courts to ignore what is obvious—that instituting entirely new, different voting mechanisms in two different types of elections for most offices across the state would cost at least *something*. At the time of the briefing below, the Secretary had not yet issued a fiscal impact statement for the bill, but Mr. Helton noted that other similar

reforms in other states cost hundreds of thousands, if not millions of dollars. *Id.* at 123. The Court should not indulge Proponents' attempt to use procedural gamesmanship to avoid judicial review of an obvious problem with the Petition.

To be sure, the precise *amount and type* of spending that the Petition would require can be "reasonably questioned" and is "subject to reasonable dispute," PAB at 33 (quoting NRS 47.130(2)), but that the Petition would necessitate that Nevada spend *some* amount of funds is not. And as Proponents themselves emphasize, "*any*" necessary expenditure "*that otherwise does not exist*" is sufficient to trigger Article 19, Section 6's funding requirement. PAB at 33 (quoting *Rogers v. Heller*, 117 Nev. 169, 176, 18 P.3d 1034, 1038 (2001)) (emphasis in original). Because the Petition does not raise any funds at all, the exact amount of spending the Petition would require is irrelevant—however much the reforms would ultimately cost, they would be unfunded. There is therefore no need for specific evidence on the precise expenditures that would be required.

Proponents put much stock in the unremarkable fact that Nevada is already required to hold elections for the offices in question under its current system, and these elections, too, cost money. But this does not render the Petition constitutional for several reasons. First, Proponents are wrong that the modified elections the Petition would institute "could be held 'using the exact same resources' as previous." PAB at 35.

Nevada's election infrastructure is presently set up to accommodate the current electoral systems, which includes closed partisan primaries for major party candidates and a general election in which voters vote for a single candidate and the top vote-getter necessarily wins. *See* Nev. Const. art. 15, § 14. These resources cannot be used with the new systems the Petition proposes—voters simply cannot rank candidates on a ballot or electronic voting machine that only records single votes, for example. Voter education materials geared towards the current system likewise could not be used to inform voters of how the entirely new, very different electoral systems work. The Petition would require Nevada to spend significant funds to convert its electoral infrastructure to handle the new systems it proposes, and these mandated upfront expenditures trigger Section 6's funding requirement.

Proponents are also incorrect that the Petition's reforms are like the expanded smoking ban that this Court held did not mandate any expenditures. *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 891, 141 P.3d 1224, 1233 (2006). The smoking ban did not place any affirmative enforcement obligations on Nevada officials, and it would not have been violated if those officials chose not to dedicate *any* resources to implementing and enforcing the expanded law. *See id.* ("It does not, for example, compel an increase or reallocation of police officers to enforce its provision."). By contrast, the Petition's provisions would necessarily be violated if Nevada officials did not spend money to enable the

implementation of its various, extensive, and complex reforms.

In arguing that the Petition does not mandate spending because its electoral reforms could be paid for with existing election appropriations, Proponents wrongfully conflate "appropriation[s]" with "expenditure[s]," though this Court's precedents are clear that the two are distinct. *See Rogers*, 117 Nev. at 173, 18 P.3d at 1036. Section 6 is not triggered only when an initiative would require a *new appropriation*—that is, "the setting aside of funds" that the Legislature would not otherwise set aside. *Id.* It is also implicated when an initiative requires *an expenditure*—that is, "the payment of funds" for a particular purpose. *Id.* It is therefore irrelevant whether the electoral reforms the Petition would mandate could be accomplished using currently appropriated funding. They would require Nevada officials to *spend* money for a particular purpose, and under Section 6, that *expenditure* must be funded. *See id.*

Last, even if the Court were to accept Proponents' dubious suggestion that the combined cost of converting Nevada's electoral system and administering elections under the new system could be equal to or less than what Nevada currently spends on elections, the Petition would still mandate an appropriation because it would remove officials' discretion to decrease appropriated funding if they saw fit. This Court considered a similar issue in *Rogers v. Heller*, which concerned an initiative that would have required Nevada to fund education at a given level and imposed a new tax to cover the difference between that level

and then-current education funding. 117 Nev. at 175-76, 18 P.3d at 1038. This Court rejected the supposition that the "appropriation" to be considered was only the difference between current funding levels and those that the initiative would mandate. *Id.* at 176, 18 P.3d at 1038. Because "the Legislature is under no continuing obligation to fund education in any particular amount" and has broad discretion to set funding at whatever level it deems appropriate, this Court ruled that "the *entire* amount is a new requirement" that must be considered when deciding whether the initiative complied with Section 6. *Id.* at 175-76 (emphasis added). The new tax would have been insufficient to cover the entirety of the required spending, and this Court ruled the initiative was void. *Id.* at 176-77, 18 P.3d at 1039.

The same is true here. Like with education, the Legislature currently has broad discretion to fund elections at whatever level it chooses, "decid[ing] what amount to appropriate for [elections] each biennium" subject only to base constitutional requirements. *Id.* at 176, 18 P.3d at 1038. Implementing the complex election systems mandated by the Petition would limit the Legislature's discretion significantly, "leav[ing] budgeting officials no discretion" to decline to appropriate or spend the money necessary to put the Petition's dictates into effect. *Herbst Gaming*, 122 Nev. at 890, 141 P.3d at 1233. Thus, the *entirety* of the cost of the Petition's reforms constitute mandated appropriations and expenditures that must be funded under Section 6, regardless of whether

they could be paid for in whole or in part with current election funding. *As* in *Rogers*, the Petition does not pay for itself, and as in *Rogers*, the Petition is therefore void.

III. The Petition's Description of Effect is Legally Insufficient.

The Petition's description of effect wholly omits the Petition's "significant practical ramifications," *Coal. for Nev.'s Future v. RIP Com. Tax, Inc.*, No. 69501, 2016 WL 2842925 at *4 (2016) (unpublished disposition)—including ramifications the Petition itself recognizes are important enough that voters need to be explicitly reminded of them every single election. In fact, in open violation of this Court's instruction that a description of effect must detail "what the initiative is designed to *achieve*," *Educ. Initiative v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 37, 293 P.3d 874, 876 (2013) (emphasis added), the Petition's description of effect says *nothing whatsoever* of the practical consequences of the electoral reforms it would enact. It instead includes only a misleading description of some of the mechanics of the proposed new systems without any mention of their purpose. Proponents do not even attempt to respond to this point because to do so would highlight the Petition's other legal infirmities. Were they forced to clearly articulate the goals that the disparate electoral changes the Petition would enact are "designed to achieve," *id.*, Proponents would have to admit that they serve multiple, non-overlapping purposes that do not constitute a single subject.

Instead, Proponents fall into familiar patterns, casting aspersions

on Mr. Helton's motives and misrepresenting his positions.[6] But none of these attacks can make the Petition's description of effect any less incomplete, confusing, deceptive, or misleading.

Proponents first dismiss the fact that the Petition would eliminate the ability of political parties to choose the candidates that represent them on the ballot and, concurrently, allow candidates to self-identify with the party affiliation of their choice, rendering such designations unreliable, calling these "secondary" or "knock-on effects" on "partisan political parties."[7] PAB at 39, 40, 43. They illogically claim that any

---

[6] Proponents again mischaracterize Mr. Helton's argument. Mr. Helton does not "disagree[] with this Court's acknowledgment that voters can read the petition to supplement the description," nor would his view require the entire initiative to be contained in the 200-word description of effect. PAB at 39 n.15. Mr. Helton's position is exactly what this Court has held—that the description of effect must include the initiative's "significant practical ramifications" so that voters *do not have to* read the entire initiative to understand its most important aspects. *RIP Com. Tax, Inc.*, 2016 WL 2842925 at *4.

[7] Proponents somewhat contradictorily also claim that these effects are "simply false," asserting that "nothing in the [Petition] stops any party from conducting their [sic] own nominating process and nothing in the [Petition] bars a political party from designating their nominated candidate." PAB at 6 n.1. The former statement is intentionally obtuse, and the latter is objectively incorrect. Though the description of effect makes no mention of it, the Petition itself is very clear that, under the new system, candidates would select their own party designations. J. App. at 21, 22. So clear, in fact, that the Petition requires that voters be warned of it in conspicuous print on their ballots whenever they go to vote. *Id.* ("Each candidate for partisan office may state a political party that he or she prefers. A candidate's preference does not imply that the

attempt to inform potential signatories of this crucial consequence is advocacy for "partisan political interests." PAB at 42. But it is *voters*, not political parties, who rely on partisan designations as useful indicators of candidates' policies and values when voting, and the Petition itself recognizes that the loss of these indicators is a major consequence of the proposed system that voters will want to know about and that is not immediately apparent simply from the existence of an open primary.[8]

Proponents acknowledge that the Petition would explicitly require

---

candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate."). As Mr. Helton already explained—and as the Petition itself recognizes in its text (but *not* its description of effect)—there would be no way for a voter to distinguish on the ballot between a candidate that a party has informally nominated and other candidates who have unilaterally chosen to claim affiliation with the party, making the informal nomination pointless. *See* Appellant's Br. at 41 n. 11. The idea that this is not a practical ramification that voters should be advised of in the description of effect before they sign the Petition defies commonsense.

[8] Proponents expand their personal attacks beyond Mr. Helton to baselessly accuse the Alaska government official who prepared the ballot summary of the similar initiative enacted there—which properly highlighted that, under the new system, political parties would no longer select their candidates and candidates would self-select the political party preference listed with their name—of partisan hackery. "The law is clear that there is a presumption that state officials act in good faith in the performance of their official duties." *Thomas v. Bible*, 694 F. Supp. 750, 761–62 (D. Nev. 1988), aff'd, 896 F.2d 555 (9th Cir. 1990). That the Alaska official reasonably but mistakenly believed the initiative in question violated Alaska's single-subject rule does nothing to rebut that presumption.

every single general election ballot to carry a "conspicuous disclaimer" explaining to voters that candidates may self-select their party affiliations and "**[a] candidate's preference does not imply that a candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate**." PAB at 42 (emphasis added). Bizarrely describing Mr. Helton's discussion of this disclaimer as both a "conce[ssion]" and "disingenuous," Proponents explain that it is a necessary measure to avoid "voter confusion." *Id.* at 42 & n.16. But this is exactly Mr. Helton's point. One need not "take a dim view of the voters' comprehension skills," *id.* at 44, 46, to think that voters should be informed in the description of effect that listed party designations do not reflect the party's endorsement in the new system. Proponents all but concede that such a clarification is needed to dispel voter confusion and would provide it themselves. They would simply wait until *after the Petition is enacted* to do so and address it with the conspicuous disclaimer on general election ballots, when voters' confusion about this potentially controversial effect has ceased to benefit Proponents and *their* political goals.

Proponents lean heavily on the United States Supreme Court decision in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 454 (2008), arguing that it somehow indicates voters should not be informed that the Petition would result in candidates' listed party affiliation no longer being reliable indicators of their policy

positions, values, or endorsement by the party. If anything, *Washington State Grange* counsels in favor of the opposite view. There, a political party challenged a similar open primary system *after* it had been enacted through a ballot initiative, arguing that the system violated the party's associational rights because voters were likely to be confused by candidate's self-selected designations and mistakenly believe the party had associated itself with the candidate. 552 U.S. at 454-55. The Supreme Court dismissed this concern in part precisely *because* the system had been enacted through an initiative process in which the electorate had made a fully informed choice to give up reliable partisan designations, and thus voters in that same electorate were likely to know that partisan designations did not reflect partisan endorsements when voting in the system they had knowingly adopted.[9] *Id.* Proponents get the sequence the Supreme Court endorsed in *Washington Grange* exactly backwards, denying the electorate an opportunity to make an informed choice at the initiative stage and informing voters of these significant consequences only later, when they finally vote in the system they

---

[9] The "Voter's Pamphlet description" of the Washington initiative, which was far shorter than the Petition's description of effect, still saw fit to inform voters of the crucial fact that "[b]allots would indicate candidates' party preference" under the new system. *Wash. State Republican Party v. Logan*, 377 F. Supp. 2d 907, 919 (W.D. Wash. 2005), aff'd sub nom. *Wash. State Republican Party v. Washington*, 460 F.3d 1108 (9th Cir. 2006), rev'd sub nom. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008).

adopted without being fully told of its consequences.

Proponents' responses to the description of effect's other shortcomings are likewise unconvincing. The description's statement that "as traditionally, a candidate receiving first-choice votes of more than 50% wins" remains misleading where, traditionally (and for as long as Nevada has been a state) a plurality of votes has been sufficient for a candidate to win. *See* Nev. Const. art. 15, § 14. Proponents' ipse dixit, citationless declaration that "the long-established" and "well-understood traditional rule" is that "a candidate with 50% plus 1 is necessarily the victor" does not make it so. PAB at 45. To be sure, a candidate receiving that number would be *a* winner, but so would a candidate receiving 45% or 60% or any other number so long as it constitutes more votes than any other candidate. "[T]raditionally," it is a candidate's share of the vote relative to other candidates that is determinative, not a candidate's clearing a specified threshold, and the description of effect's use of the term misleadingly minimizes the significant changes the Petition would enact to the general election.

Even more problematic is Proponents' claim that voters will somehow intuit how "ballot exhaustion" works simply from the term "ranked-choice voting." *Id.* at 46. Though Proponents have throughout this litigation suggested unfairly that Mr. Helton (himself, a Nevada voter) does not respect his fellow voters' intelligence, it is Proponents who assert that voters are "ignorant" and "stupid" if they cannot on their own

deduce how the complex ranked-choice tabulation method can result in the ballots of some voters who choose not to rank all candidates being excluded from the final count (but not others). But ballot exhaustion and its role in ranked-choice systems is a controversial, complicated topic that even academics who study the matter struggle to properly frame and address. *See, e.g.*, Craig M. Burnett & Vladimir Kogan, *Ballot (and voter) "exhaustion" under Instant Runoff Voting: An examination of four ranked choice elections*, 37 Electoral Studies 41 (2015), https://www.sciencedirect.com/science/article/abs/pii/S0261379414001395 (finding that ballot exhaustion resulted in a candidate who did not receive a majority of the votes cast prevailing in each of four examined ranked-choice elections, "challeng[ing] a key argument made by the system's proponents"). The average voter is unlikely to understand the intricacies of this important debate, not because they are ignorant or stupid, but because it is complex and unfamiliar. Yet the description does not even put voters on notice of this effect.

Finally, Proponents' only response to the description's failure to discuss the significant financial costs associated with overhauling Nevada's electoral system is to make token gesture to their unfunded mandate argument, claiming the "description does not need to include made up fiscal impacts."[10] PAB at 46. For the reasons discussed,

[10] In yet another misstatement of Mr. Helton's position, Proponents

Proponents' unfunded mandate arguments fail as a matter of law. Far from being "made up," the costs are *required* by the Petition, and this Court has already held that such significant financial impacts should be included in a proper description of effect. *See RIP Commerce Tax*, 2016 WL 2842925, at *3-4.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

---

conclude their arguments by falsely asserting that Mr. "Helton criticizes the district court for requiring him to even prepare a proposed alternative" description. PAB at 47. Mr. Helton raised no objection to his being required to submit an alternative description in his opening brief. If Proponents are referencing Mr. Helton's note that the unfounded criticisms of his proposed description that the district court adopted are irrelevant to the validity of the Petition's description of effect, they twist it far beyond the bounds of plausible misinterpretation.

CONCLUSION

For these reasons and those discussed in Mr. Helton's opening brief, the Petition is legally deficient and the Court reverse the district court's decision and hold the Petition invalid.

DATED this 15th day of April, 2022.

WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP

By: */s/ Bradley S. Schrager*

BRADLEY S. SCHRAGER, ESQ. (NSB 10217)
JOHN SAMBERG, ESQ. (NSB 10828)
DANIEL BRAVO, ESQ. (NSB 13078)
ERIC LEVINRAD, ESQ. (*pro hac vice)*
3773 Howard Hughes Parkway, Suite 590 South
Las Vegas, NV 89169

MARC E. ELIAS, ESQ. (*pro hac vice*)
SPENCER MCCANDLESS, ESQ. (*pro hac vice*)
ELISABETH C. FROST, ESQ.
(*pro hac vice forthcoming*)
ELIAS LAW GROUP LLP
10 G St. NE Suite 600
Washington, DC 20002

LINDSAY MCALEER, ESQ. (*pro hac vice*)
ELIAS LAW GROUP LLP
1700 Seventh Ave, Suite 2100
Seattle, WA 98101

Attorneys for Appellant

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 6,496 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 sanctions in the event that the accompanying Brief is not in conformity

with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15th day of April, 2022.

WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP

By: */s/ Bradley S. Schrager*

BRADLEY S. SCHRAGER, ESQ. (NSB 10217)
JOHN SAMBERG, ESQ. (NSB 10828)
DANIEL BRAVO, ESQ. (NSB 13078)
ERIC LEVINRAD, ESQ. (*pro hac vice)*
3773 Howard Hughes Parkway, Suite 590 South
Las Vegas, NV 89169

MARC E. ELIAS, ESQ. (*pro hac vice*)
SPENCER MCCANDLESS, ESQ. (*pro hac vice*)
ELISABETH C. FROST, ESQ.
(*pro hac vice forthcoming*)
ELIAS LAW GROUP LLP
10 G St. NE Suite 600
Washington, DC 20002

LINDSAY MCALEER, ESQ. (*pro hac vice*)
ELIAS LAW GROUP LLP
1700 Seventh Ave, Suite 2100
Seattle, WA 98101

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 2022, a true and correct copy of the **APPELLANT'S REPLY BRIEF** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system:

Craig A. Newby, Esq.
OFFICE OF THE ATTORNEY GENERAL
555 E. Washington Avenue, Suite #3900
Las Vegas, NV 89101
CNewby@ag.nv.gov

Attorney for Barbara Cegavske

Todd Bice, Esq.
Jordan T. Smith, Esq.
John A. Fortin, Esq.
PISANELLI BICE, PLLC
400 S. 7th Street, Suite 300
Las Vegas, NV 89101
tlb@pisanellibice.com
JTS@pisanellibice.com
JAF@pisanellibice.com

Attorneys for Nevada Voters First PAC and Todd L. Bice

By: */s/ Dannielle Fresquez*
Dannielle Fresquez, an Employee of
WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP