# In the
# Supreme Court of the State of Nevada



EDUCATION FREEDOM PAC, a Nevada committee for political action,

Appellant,

vs.

BEVERLY ROGERS, an individual; RORY REID, an individual, and BARBARA CEGAVSKE, in her official capacity as NEVADA SECRETARY OF STATE,

Respondents.

Case No.: 84735

First Judicial District Court
Case No.: 22 OC 00027 1B

**RESPONDENTS' ANSWERING BRIEF**

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

*Attorneys for Respondents,*
*Beverly Rogers and Rory Reid*

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## I. INTRODUCTION

The district court, again, had it exactly correct in this matter. For multiple reasons, Appellant's ("Education Freedom PAC," or "EFP") initiative petition S-02-2022 (the "Petition") falls short of legal requirements, and cannot go forward. The Petition's description of effect is invalid because it is confusing, misleading, and omits discussion of many of its most significant ramifications, in violation of NRS 295.009(1)(b) and this Court's jurisprudence interpreting the same. Secondly, the Petition is invalid because it mandates legislative appropriations without providing reciprocal revenues, in violation of Article 19, Section 6 of the Nevada Constitution. Lastly, the Petition improperly seeks to dictate a host of administrative details—22 pages worth—rendering the Petition invalid. For all these reasons, as described and ordered by the district court, the decision below should be affirmed.

## II. ARGUMENT

EFP's legal arguments are mere legal conclusions, and should not affect the ruling of the district court in this matter. The substance of the district court's decision was correct and its rulings were proper.

### A. There Is No Presumption of The Petition's Validity

EFP has the strange notion that there is some presumption at law that the Petition (and its description of effect) is valid. No such presumption exists. Standards for whether a particular initiative petition is legally sufficient—whether its description is lawful, or whether it impermissibly treats more than one subject—exist, but no Nevada case establishes some pre-existing presumption of validity of a petition prior to its challenge by opponents or evaluation by the judiciary. Any plaintiff has the burden of making its case, which Respondents met below, but the ultimate decision on the merits stems from elements and standards for evaluating initiative petitions developed by the Legislature and this Court over many years. The district court agreed with Respondents that, in multiple ways, EFP's Petition did not meet the mandates of law, but the court below did not fail to apply some presumption urged by Appellants, as none exists.

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

This Court has repeatedly held that "a description of effect must be straightforward, succinct, and non-argumentative, and it must not be deceptive or misleading." *Educ. Initiative PAC v. Comm. to Protect Nev.*

*Jobs*, 129 Nev. 35, 37, 293 P.3d 874, 876 (2013). But this is not all the description must be. 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). Any description of a proposed statutory amendment should fulfill that purpose. 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." *Coalition for Nevada's Future v. RIP Commerce Tax, Inc.*, 132 Nev. 956 (2016) (unpublished disposition) (citing *Educ. Initiative PAC*, 129 Nev. at 37).

The description must also "explain the[] ramifications of the proposed amendment" in order to allow voters to make an informed decision. *Nev. Judges Ass'n v. Lau*, 112 Nev. 51, 59, 910 P.2d 898, 903 (1996). In other words, this valuable real estate on the signature pages of every single petition page does not require simple recitation of the measure's provisions, but rather a useful explanation of the likely consequences of its enactment. This is, perhaps, difficult to achieve in only 200 words of text, as this Court has also recognized, but it is incumbent upon any petition's proponents to describe effects, to be accurate, and to write in good faith. The description is not merely the

first installment in a political campaign; it is a test of a proponent's seriousness in pursuing lawmaking through the people's legislative capacity.

Although a description need not "explain hypothetical effects" or "mention every possible effect" of the initiative, *Educ. Initiative PAC*, 129 Nev. at 37, it must at very least fairly present enough information for a potential signer to make an informed decision about whether to support the initiative. *See Nev. Judges Ass'n v. Lau*, 112 Nev. at 59 (rejecting initiative's description of effect for "failure to explain [certain] ramifications of the proposed amendment," which "renders the initiative and its explanation potentially misleading").

Here, the Petition's description of effect is deceptive, confusing, *and* misleading, and thus violates each of these requirements.

### 1. The description fails to explain the impact of the Petition on public education funding, rendering it misleading

Most crucially, as the district court correctly found, the description misleadingly fails to inform potential signatories that any funding appropriated for this program will inevitably reduce the funding otherwise available to public schools. This follows from the provisions of

the Petition, which bases the amount of the grants on "the statewide base per pupil funding amount. *See* Appellant's Appendix ("AA") at 0049, § 3. Given that these grants are required to be used for educational expenses, it is far from hypothetical to conclude that if funds were to be appropriated by the Legislature for this purpose, they would inevitably result in a reduction of public school funding (as was the case with the Petition's predecessor, SB 320, which resulted in its invalidation by the Nevada Supreme Court in *Schwartz v. Lopez*, 132 Nev. 732, 382 P.3d 886 (2016)). Certainly, many potential signatories might choose to refrain from signing the Petition if the description informed them of its severe and inevitable impact on Nevada's public school system; such explanation is fundamental to Nevadans' abilities to make informed choices. The district court correctly found the description of effect deficient for its "insufficient explanation of the effect of the initiative on the budgets of all the school districts in the State and/or the need to draw revenues from the General Fund." AA0171.

EFP fails to address the substance of this defect in the description. Instead, EFP asserts, without any supporting citation to the record, that in finding the description to be deficient for this reason, the district court

was demanding that the "Petition include a description that explained the district judge's policy preference." Op. Brf., at 13. EFP misses the mark. Far from demanding an explanation of his own policy preferences (whatever those may be), in finding that the description failed to sufficiently inform signatories of the effect of the Petition on the budgets of all Nevada school districts or the need to draw revenues from the general fund, the district court properly found the description to be improperly misleading and legally deficient.

**2. The description is misleading in numerous other respects**

That is not the only deficiency of the description. It also fails to alert potential signatories of an important lack of flexibility in the terms of the measure: Under section 4 of the Petition, when a parent terminates an EFA agreement before the end of a school year, that parent's child "may not receive instruction from a public school in this state until the end of the period for which the last deposit was made into the EFA. *Id*., at 3, § 4. Nowhere does the Description inform potential signatories that if passed, Nevada children would be ***barred from attending public school*** under certain circumstances. The rights of school-age children to receive public education in Nevada is inviolate, and the notion that this

Petition would—under circumstance of financial stress or calamity, for example—deny that right to a child and his or her family is, one would think, a crucial aspect of its proposed operation. This omission is highly misleading, and, if disclosed, would likely assist a number of potential signatories in making an informed decision regarding signing the petition.

EFP contends that "the Petition does not bar any Nevada child from enrolling in a public school, [but] … merely delays enrollment for children whose parents established EFAs for their benefit and are receiving funds under the program." Op. Brf., at 7. This is rank misdirection; such children are indeed barred from attending public school during the period of such "delay." Under applicable Nevada law, this important effect must be explained to a potential signatory in the description of effect. Its exclusion renders the description legally deficient, as the district court properly held. While this may well be a "common-sense policy approach to prevent recipients from both receiving funding while taking advantage of public funded education" as EFP argues (Op. Brf., at 17), that does not make the description of effect any less misleading for failing to inform

Nevadans about.[1] By failing to do so, the proponents are denying potential signatories information that is crucial to their decision whether or not to sign the Petition and support its placement on the ballot.

The description further misleadingly informs potential signatories that "Money in the accounts may be used to pay certain educational expenses including, but not limited to, tuition and fees at participating entities." AA067. This makes it seem that if passed, parents would be able to establish an EFA to supplement their child's public education, by, for example, signing their child up for after-school tutoring, when, in fact, under the proposed statute, an EFA cannot be established for any child "who will remain enrolled full-time in a public school." AA049, § 10. In arguing that this portion of the description is not misleading, EFP points to the language of the proposed statute itself. *See* Op. Brf., at 18. But that just makes even clearer why the description is impermissibly misleading. It promises that EFA funds can be used "to pay certain educational expenses including, but not limited to, tuition and fees at participating

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[1] In a tacit admission of the misleading nature of this omission, EFP submitted an "alternative" description with its brief in district court which added language stating that "[i]f a parent received funds then terminates their account agreement early, their child may not enroll in public school until the next quarter." AA0129.

entities," without limitation, while the language of the proposed statute which EFP points to makes clear that this is not the case. A potential signer reading just the description might be misled into signing the petition based on a misunderstanding fostered by this language, which is contradicted by the text of the proposed statute itself.[2]

While stating that "nothing in the initiative requires the Legislature to appropriate money to fund the accounts[, and] [i]f no money is appropriated, no funding will be available for the accounts," the description fails to inform potential signatories that ***none*** of the provisions of the Petition come into effect unless the Legislature makes an appropriation to fund the EFA. *See* AA0066, § 37. This is a clear bait-and-switch, also not appropriate for a description.

The description of effect is misleading and confusing in numerous respects, and is legally insufficient as a result. The district court was correct in not permitting the petition to proceed for this reason, and this ruling should be affirmed.

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[2] Again, in a tacit admission of the misleading nature of this statement in the description, the "alternative description of effect" submitted by EFP below explained that EFA funds cannot be used if a parent's child is in public school full time. AA0129.

### C. The Petition Violates The Nevada Constitution's Prohibition On Initiatives That Mandate Unfunded Expenditures

The Petition is also invalid because it mandates numerous expenditures without providing reciprocal revenues in violation of Article 19, Section 6 of the Nevada Constitution. That provision 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). "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. *Id.* at 173, 177-78. 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. *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 884, 890 n.38, 141 P.3d 1224, 1229 (2006) (quoting *Rogers*, 117 Nev. at 173).

The Petition fails to impose any taxes or otherwise provide for funding to pay for the grants to be used to fund the EFAs on which the entire contemplated statutory amendment is premised. "Nevada Constitution article 19, section 6 states that the initiative must impose 'a sufficient tax ... or otherwise constitutionally provide[ ] for raising the necessary revenue.' We must give this provision its plain meaning unless the language is ambiguous." *Rogers*, *supra* at 176. Under a plain reading of this constitutional prohibition, the Petition's failure to raise moneys for the grants on which the entire statutory scheme contemplated by the initiative is premised is a fatal flaw, rendering the Petition void in its entirety.

EFP's argument that the Petition does not create an unfunded mandate, because it only comes into effect if the Legislature appropriates funding for the grants fails for several reasons. First, under the plain reading of Article 19, section 6, the same statute that requires the expenditure of moneys must also appropriate the necessary moneys to fund such expenses. As the district court correctly noted, Article 19, Section 6 provides that "This Section … does not permit a proposal of any statute or statutory amendment which ... recognizes the expenditure of

money, unless **SUCH** statute … imposes a sufficient tax … or … otherwise … provides for raising the necessary revenues." AA0174 (emphasis added by district court). As the district court further correctly noted, Article 19, section 6 "says nothing about the right or latitude to postpone funding to a date out in the future, which will require forging yet another statute." *Id.* (emphasis added by district court). Given this plain constitutional mandate, the necessary appropriation cannot be severed from the statutory provision requiring the expenses and foisted on the Legislature, as the Petition attempts to do. The Petition is defective for this additional reason, as the district court properly held.

And it is important to note that the grants contemplated by the Petition are not the only expenditures required by the initiative. If passed, the Petition would obligate the State Treasurer to essentially set up, administer, run the program, and monitor the use of the EFAs and the performance of the financial institutions managing such EFAs. *See* § II.D, *infra*. The Petition does not impose any taxes or otherwise raise any revenue to pay for the substantial expenses that will necessarily be incurred in carrying out these foregoing numerous and burdensome tasks.

### D. The Petition Improperly Includes Administrative Details

"[R]egardless whether an initiative proposes enactment of a new statute or ordinance, or a new provision in the constitution or city charter, or an amendment to any of these types of laws, it must propose policy—it may not dictate administrative details." *Nevadans for the Prot. of Prop. Rts., Inc. v. Heller*, 122 Nev. 894, 913, 141 P.3d 1235, 1248 (2006). This is because "[t]he people's initiative power is 'coequal, coextensive, and concurrent' with that of the Legislature; thus, the people have power that is legislative in nature," (*id.* at 914), and administrative details are determined not by the Legislature, "but by [other] entities with rule-making authority, which fill in administrative details pertaining to the policy articulated in legislation." *Id*. EFP's argument that the prohibition against administrative details only applies to constitutional amendments and does not extend to statutory initiatives has thus been resoundingly rejected by this Court.

Even a cursory review of the Petition here makes clear that it goes far beyond the articulation of policy and imposes a host of administrative duties on the State Treasurer and Department of Education.

For example, if enacted, the State Treasurer would be required to

develop an application process for parents to enter into EFA agreements with the State Treasurer and make the applications available online (AA049, § 9.8), and provide parents with "a written explanation of the authorized uses … of the money in an [EFA] and the responsibilities of the parent and the State Treasurer." *Id.*, § 9.9. Additionally:

- The State Treasurer would be required to "qualify one or more private financial management firms to manage EFAs," and establish fees for the management of EFAs education freedom accounts." AA0051, § 12.1. These EFAs would be required to be "audited randomly each year by a certified or licensed public accountant," and may be subject to additional audits, as determined by the State Treasurer. *Id.*, §12.2.

- The State Treasurer would be required to receive and evaluate applications for institutions to become "participating entities" under the program and to "approve an application … or request additional information to demonstrate that the person meets the criteria to serve as a participating entity." AA0051, §§ 13.1, 13.2. The State Treasurer would also be required to "annually make available a list of participating entities, other than any parent of a child." AA0053, § 15.1.

- The State Treasurer would also be required to prescribe

regulations for participating entities that are "reasonably expected … [to] receive, from payments made from [EFAs], more than $50,000 during any school year" to post surety bonds in the amounts expected to be received, or to "[p]rovide evidence satisfactory to the State Treasurer that the participating entity otherwise has unencumbered assets sufficient to pay to the State Treasurer such amounts. AA0051-52, § 13.3.

- The State Treasurer would be required to police the participating entities to ensure that they do not engage in improper conduct, and, if they do, may refuse them to continue to participate in the program. AA0052, § 13.5. The State Treasurer would be required to "provide immediate notice" of any participating entities not permitted to continue participating in the program "to each parent of a child receiving instruction from" such entities. *Id.*, § 13.6.

- The State Treasurer would be required to "administer an annual survey of parents who enter into or renew an agreement," to determine their relative satisfaction with and opinions regarding the program. *Id.*, § 14.3. Separately, the Department of Education would be required to aggregate the results of examinations taken by children participating in the program and make such aggregated data available on the internet.

*Id*., § 14.2.

Certainly, in imposing such granular requirements, the proposed Petition goes far beyond a proposal of policy, and improperly dictates administrative details, which it is an impermissible aggrandizement of executive power. The district court was therefore correct in finding the "[t]he 22-page bill under scrutiny is replete with administrative criteria, which will have to be culled before going to the ballot." AA0176.

EFP's contention that "the Petition is focused solely on policy" (AOB at 23) does not comport with a review of the detailed dictates set forth in the Petition itself. Certainly, the Petition could have articulated statements of policy, by, for example, endorsing the EFA program which it seeks to enact, and could have provided that "the program contemplated by this statute shall be administrated by the State Treasure and the Department of Education." That may well be a proper proposal of policy, but that is not what the Petition does. Instead, the Petition goes far beyond such proposal of policy, and instead imposes upon the State Treasurer and other government agencies pages and pages of administrative details, which fall well outside the scope of the People's initiative power, rendering the Petition invalid.

## III. CONCLUSION

For the reasons described herein, the Court should affirm the decision of the district court.

DATED this 18th day of July, 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)
3773 Howard Hughes Parkway, Suite 590 South
Las Vegas, Nevada 89169

*Attorneys for Respondents,*
*Beverly Rogers and Rory Reid*

## 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 **3,945 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 18th day of July, 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)
3773 Howard Hughes Parkway, Suite 590 South
Las Vegas, Nevada 89169

*Attorneys for Respondents,*
*Rory Reid and Beverly Rogers*

## CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2022, a true and correct copy of the **RESPONDENTS' ANSWERING BRIEF** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system:

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