IN THE SUPREME COURT OF THE STATE OF NEVADA

EDUCATION FREEDOM PAC,

Appellant,

vs.

RORY REID, AN INDIVIDUAL; BEVERLY ROGERS, AN INDIVIDUAL; AND BARBARA K. CEGAVSKE, IN HER OFFICIAL CAPACTY AS NEVADA SECRETARY OF STATE,

Respondents.

Supreme Court Case No. 84735
District Court Case No. 22OC000271B

APPEAL FROM ORDER OF THE FIRST JUDICIAL DISTRICT COURT CARSON CITY, NV

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The arguments raised by Respondents in their Answering Brief miss the main points supporting Appellant's appeal. First, the Description of Effect explains that the initiative is designed to achieve the establishment of an education freedom account program that allows parents to pay certain education expenses for their children if the Legislature funds the program. It also explains that it intends to achieve those goals through grants established by the legislature, which may be through a tax increase or a reduction of government services. It does all of this in under 200 words, in a "straightforward, succinct and nonargumentative" manner that advises the average petition signer what the initiative is designed to achieve and how it intends to achieve those goals.

Second, Article 19, Section 6 of the Nevada Constitution does not apply because the Initiative expressly does not allocate funds. Instead, it preserves the authority of the Legislature to fund the education freedom accounts if it so chooses and maintains Legislative discretion.

Finally, the Initiative does not overreach by taking administrative action. It prescribes policy and enacts laws that are administrative floors. Further, even if the Initiative overreaches, it contains a severability clause that allows those

portions of the Initiative to be challenged later and allows this Court to potentially strike invalid sections as the appropriate action.

For the reasons further set forth below, Appellant respectfully request that this Court reverse the decision of the District Court and give force and effect to the initiative petition process so that the Appellant may continue to gather signatures.

II. ARGUMENT

A. The Petition's Description of Effect is sufficient as a matter of law.

Respondents makes three claims regarding the legal deficiency of the Description of Effect. First, Respondent states there is no presumption of validity for a description of effect. Second, Respondent states the Description is misleading because it fails to advise the people of its impacts on public education funding, and it fails to advise parents that children would be barred from public school participation. Finally, Respondents argue the Description fails to provide that none of the provisions go into effect until the legislature makes an appropriation.

B. There is a high burden to overcome to prevent a petition from reaching the ballot.

The right to petition the government for a statutory amendment has long been protected in Nevada. Accordingly, the heavy burden is placed on the challenger to "ensure that the 'power of initiative is liberally construed to promote the democratic process.'" Prevent Sanctuary Cities v. Hayley, 2018 WL 22272955 (unpublished disposition), at *2. As such, it's not that there is clear presumption in the case law; rather, this Court should look harshly on attempts to attack petitions that are largely in disagreement with a proposed policy. Many of Respondents' arguments are merely outcome driven objections to the proposed policy solution, which shouldn't impede Appellants from gathering signatures in support of this petition.

C. The Description of Effect is succinct, nonargumentative, and not misleading.

In evaluating the sufficiency of the Description of Effect, the Court must look to whether the description provides an "expansive view of the initiative." *Educ Init v. Comm. to Protect Nev. Jobs,* 129 Nev. 35, 49, 293 P.3d 874, 884 (2013). The Court is not to undertake "a hyper-technical examination of whether the description covers each and every aspect of the initiative," yet, it is exactly what the Respondents are requesting the Court to do. *Id.* Further, explained at

length in the Opening Brief, "the description cannot constitutionally be required to delineate every effect that the initiative will have; to conclude otherwise could obstruct, rather than facilitate the people's right to the initiative process." *Educ Init v.,* 129 Nev. at 37-38, 293 P.3d at 876.

Respondents improperly ask the Court to apply a rigid standard to the proposed Petition because they dislike the policy. Respondents' main argument is that the Description is legally inadequate because it fails to explain the impact on public education funding and fails to properly inform the signatories of the effect the Petition will have on school budgets or the general fund. RAB 4-6. Respondent also claims that the Description fails to advise signers that children would be "barred from attending public school." RAB 6.

1. *The Description adequately advises the people of potential financial impacts.*

The Petition will have no effect on funding for public education. The Petition creates a program that *could* be funded. That funding, however, is not a mandate to the legislation. And, the funding could come from several sources. Tax revenue could increase, and the Legislature could decide to allocate additional revenue to the education freedom accounts. The Legislature could decide to cut funding one place and allocate it elsewhere. Either of these are possible. Neither of these are required. It would be inappropriate for Appellant to hypothesize and

include this analysis in the Description because it clearly says "if no money is appropriated, no funding will be available in the accounts"—which mirrors the language in the statute. *Compare* 1 AA 67 and Section 37 of the proposed statute.

Here, the Description clearly states that the Legislature is not required to appropriate money for the accounts but advises the people that if funding is available it may result in "a tax increase or reduction of government services." Thus, providing the potential signors an expansive view of the initiative and advising them there may be a financial impact on taxes or government services.

Respondents choose to mislead the Court with its own holding in *Schwartz v. Lopez,* where the Court analyzed the constitutionality of an ESA program passed by the Nevada Legislature. 132 Nev. 732, 738, 382 P. 3d 886, 891 (2016). The Court did not analyze whether an ESA program was unconstitutional, rather the gravamen of the case was whether the ESA program specifically required appropriated funding from public schools which could not be taken from the money already appropriated to K-12 public education. *Id.* The Court specifically noted that the "the merit and efficacy of the ESA program is not before [the Court], for those considerations involve public policy choices left to the sound wisdom and discretion of our state Legislature." *Id.*

In contrast, the Petition before the Court is not the merit and efficacy of the proposed education accounts—that is a question the people must consider when determining whether to sign the Petition allowing it to move forward in the process. The question presented to this court is whether Before the Description of Effect is legally sufficient. Appellant respectfully submits that the answer to this question is clearly yes.

2. *Children would not be barred from public education.*

The Petition does not bar children from public education, rather it prevents parents from taking funds away from public schools—an issue, which as noted above, Respondents were concerned about. The Petition proposes that if a parent elects to establish an EFA, the child may not then receive instruction from a public school until the end of the period during which the last deposit for the EFA was made. *See* AA0103 at Section 9(4). This would prevent a recipient from double dipping on the funding and taking advantage of a publicly funded education.

The Petition does not mandate any funding be spent; it merely creates a program. It will require legislative action to fund the program and there are many mechanisms the Legislature may have to ensure the program operates effectively and not to anyone's disadvantage.

D. The Description does not violate Article 19, Section 6.

The Initiative does not contain an appropriation or expenditure of money. Article 19, Section 6 of the Nevada Constitution requires that an "appropriation" in an initiative must be offset, in the initiative, by "a sufficient tax" or other provision "for raising the necessary revenue." As is explained in AOB 21-22, the Initiative does not spend money. It expressly states that it does not allocate money and that funding is dependent on future Legislative action, which may never occur. The Initiative does not compel an appropriation or require revenue be spent. The only way funding could be required is future Legislative action, which may include a tax increase, or another mechanism required under Article 19, Section 6 of the Nevada Constitution.

E. The Initiative does not overreach, nor does it take administrative action.

The Initiative does not dictate administrative details; it dictates policy. Each instance of claimed administrative action in Respondents' Answering Brief are instances of Legislative floors for administrators to follow, which is not inconsistent with how other laws are passed. And in so far as there are administrative requirements, they are policy focused which makes them constitutional. *Nevadans for the Prot. of Prop. Rts., Inc. v. Heller,* 122 Nev. 894, 913, 141 P.3d 1235, 1249.

F. Administrative details do not render a petition invalid if it contains a severability clause.

At worst, the provisions Respondents claim are unconstitutional overreach can be severed. Because the Petition contains a severability clause, the district court improperly found that the Petition was invalid. *Nevadans for the Prot. of Prop. Rts., Inc.,* 122 Nev. at 916, 141 P.3d at 1250 (given the severability clause on the Petition, the Court declined to remove the entire imitative from the ballot and struck the sections declared invalid as administrative details).

Here, the Petition contains a severability clause in section 36 which allows for clauses to be stricken. Rather than declare the Petition invalid, the district court should have stricken the "invalid administrative details" and allowed the petition to move forward in the process. Therefore, the Respondent fails to meet its burden that the Petition is invalid, and the Court should allow for the petition to move forward in the initiative process.

G. The challenge to administrative overreach is not ripe.

Respondents' arguments are not ripe for consideration. "[C]hallenges to an initiative's substantive validity will not be considered as part of this Court's preelection review of an initiative" and are unripe "until an initiative becomes law." *Id*. Any challenges to the portions of the Petition that infringe on administrative rights are not timely because the Court can consider them in the

future and sever those portions if needed. Therefore, this Court should reject the argument.

III. CONCLUSION

For all the foregoing reasons, Appellant respectfully requests that this Court reverse the decision of the District Court and give force and effect to the initiative petition process so that the Appellant may continue to gather signatures.

AFFIRMATION

The undersigned does hereby affirm that **APPELLANT'S REPLY BRIEF** filed under Supreme Court Case No. 84735 does not contain the social security number of any person.

DATED this 25th day of July, 2022.

By: */s/ Jason D. Guinasso*

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2020 in 14 Point Times New Roman Font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

a. Proportionately spaced, has a typeface of 14 points or more and contains 1,817 words; and

3. Finally, I hereby certify that I have read this reply 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 NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be

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

DATED this 25th day of July 2022.

By: */s/ Jason D. Guinasso*

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I certify that I am an employee of Hutchison & Steffen, PLLC and that on this date I caused to be served a true and correct copy of **APPELLANT'S REPLY BRIEF** on the following as indicated below:

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(Via Electronic service through the Nevada Supreme Court's Eflex system)

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 25, 2022, at Reno, Nevada.

/s/ Bernadette Francis-Neimeyer
An Employee of Hutchison & Steffen, PLLC