IN THE SUPREME COURT OF THE STATE OF NEVADA

DAILYPAY, INC., a Delaware Corporation; NEVADANS FOR FINANCIAL CHOICE, a Nevada Political Action Committee; CHRISTINA BAUER, an individual; ACTIVEHOURS, INC, a Delaware corporation; STACY PRESS, an individual; PREFERRED CAPITAL FUNDING - NEVADA, LLC, a Nevada Limited Liability Company; AND ALLIANCE FOR RESPONSIBLE CONSUMER LEGAL FUNDING, an Illinois Nonprofit Corporation

Appellants,

vs.

FRANCISCO V. AGUILAR, in his official capacity as Nevada Secretary of State; KATE FELDMAN, an individual; AND STOP PREDATORY LENDING NV, a Nevada nonprofit corporation,

Respondents.

Case No. 88557

District Court Case No.:
Lead Case No.: 24 OC 00018 1B

Consolidated with:
Case No.: 24 OC 00021 1B
Case No.: 24 OC 00023 1B
Case No.: 24 OC 00029 1B

On appeal from the First Judicial District Court of the State of Nevada
The Honorable WILLIAM A. MADDOX, Senior Judge
District Court Lead Case No. 24 OC 00018 1B

APPELLANTS PREFERRED CAPITAL FUNDING – NEVADA, LLC'S AND ALLIANCE FOR RESPONSIBLE CONSUMER LEGAL FUNDING'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Preferred Capital Funding - Nevada, LLC, a Nevada limited liability company, is not a publicly traded company, and does not have 10% or more of its membership interests owned by a publicly traded company. Preferred Capital Funding - Nevada, LLC's parent company is Preferred Capital Funding of Illinois, LLC, an Illinois limited liability company, which is not a publicly traded company and does not have 10% or more of its membership interests owned by a publicly traded company.

Alliance for Responsible Consumer Legal Funding, an Illinois nonprofit corporation, is not a publicly traded company, does not have 10% or more of its stock owned by a publicly traded company, nor does it have any parent corporations.

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Preferred Capital Funding - Nevada, LLC and Alliance for Responsible Consumer Legal Funding were represented in the District Court by Reisman Sorokac. They are currently represented in this Court by Reisman Sorokac.

DATED this 1st day of October, 2024.

REISMAN SOROKAC

By: */s/ Joshua H. Reisman, Esq.*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENT

A. Respondents fail to meaningfully challenge Appellants' single-subject rule argument.

Under Nevada law, "[e]ach petition for initiative [] must . . . embrace but one subject and matters necessarily connected therewith and pertaining thereto." NRS 295.009(1). "A subject is the overall thing being discussed[.]" *Helton v. Nev. Voters First Pac*, 512 P.3d 309, 315 n.5, 138 Nev. Adv. Rep. 45 (2022) (en banc). A petition meets the single-subject requirement if its provisions "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." NRS 295.009(2). In their Opening Brief, Appellants[1] argue that the Initiative violates NRS 295.009's single-subject requirement because "consumer litigation funding transactions are *not loans*; thus, the Initiative's 36% rate cap on litigation funding is not functionally related and germane to the Initiative's purpose of limiting interest rates on consumer *loan* transactions." (Appellants' Opening Br. ("AOB") at 15.)

In their Omnibus Answering Brief, Respondents concur that the Initiative's "primary purpose is to limit interest rates on consumer loan transactions[.]" (Respondents' Omnibus Answering Br. ("RAB") at 18); *see also id.* at 15-16 ("Here, the district court determined that the Petition's purpose is to 'limit interest rates on

[1] Capitalized terms that are not defined herein are defined in the Opening Brief.

consumer loan transactions.' . . . The district court [] had it precisely correct." (emphasis added)); *id.* at 24 ("The subject here, stated once again, is specifically limiting interest rates on consumer loans." (emphasis added)). In addition, Respondents hardly challenge Appellants' position that consumer litigation funding transactions do not constitute loans under current Nevada law. (*See* AOB at 9 ("A consumer litigation funding transaction is not a loan under NRS Chapter 604C; it is not a loan under this Court's definition in *Kline v. Robinson*; and it is not a loan under the plain meaning of the term.").)

Respondents ignore NRS 604C.220(2), *Kline*, *Black's Law Dictionary*, and a plethora of persuasive authority, and simply assert that litigation funding is *akin to a loan* because it "indisputably[] involve[s] the giving out of money to those in need of it, with the expectation of profit in return[.]" (RAB at 11); *see also id.* at 13 ("[A]ll of them provide money to people in need, and they expect a profitable return on their transaction from the people who take their money.").

But a long-standing, well-developed body of law tells us that the mere "expectation of a profitable return" does not create a loan. (*See* AOB at 15-21.) Rather, the primary characteristic of a "loan" is an obligation to repay the principal or its equivalent. A transaction in which the repayment obligation is subject to a contingency is not a "loan" because the terms of the transaction do not necessarily require the "replacement of the sum borrowed" or that the borrower "return . . . an

equivalent amount[.]" *Kline v. Robinson*, 83 Nev. 244, 249-50, 428 P.2d 190, 194 (1967); *see also, e.g.*, *Novoselsky v. Comm'r*, Docket No. 22400-13, T.C. Memo 2020-68, 2020 Tax Ct. Memo LEXIS 67, at **13 (T.C. May 28, 2020); *Briscoe v. State*, 541 S.W.3d 867, 873 (Tex. App. 2018). Chapter 604C consumer litigation funding transactions <u>*are not loans*</u> because, to the extent there is an obligation to repay, the obligation is conditional. (*See* AOB at 18-21.)[2]

Respondents suggest that litigation funding may still be a loan because, "[a]t the very least, it is clear from recent actions by the federal government that the nature of these financial products is contestable and in flux." (RAB at 12.) However, the CFPB interpretive ruling that Respondents cite pertains only to earned wage products; it in no way addresses consumer litigation funding transactions. Respondents proffer *zero* authority even suggesting that the nature of litigation funding is "contestable and in flux." And they fail to engage with Appellants'

[2] Respondents stand up a *strawman*, arguing that Appellants rely "on the supposed non-recourse nature of its profitability model to claim its product is not and (one supposes it would insist) cannot be a 'loan.'" (RAB at 13.) Incorrect. Appellants rely on the *contingent* nature of their business model in asserting that consumer litigation funding transactions are not loans. The non-recourse aspect of a Chapter 604C funding transaction is only relevant because this factor contributes to the lack of an obligation to *repay the principal*—which is the primary characteristic of a loan. The assignment of a "*contingent* right to receive an amount of *potential* proceeds[,]" NRS 604C.100 (emphasis added), is another factor contributing to the lack of an obligation to repay. Respondents have *no response* to the plethora of law holding that obligations subject to a contingency—like consumer litigation funding—are not loans.

multitude of cited cases—which specifically consider litigation funding and conclude that it does not constitute a loan.[3]

B. To avoid Appellants' argument, Respondents would eviscerate the single-subject rule.

Respondents seek to avoid Appellants' argument: that imposing a 36% rate cap on *non-loan transactions* is not functionally related and germane to the Initiative's purpose of limiting interest rates on consumer *loan transactions*. Respondents' tactic is to obscure that loan transactions and non-loan transactions are substantively distinct things—by advocating an astonishing position that would eviscerate NRS 295.009's single-subject rule. Respondents contend that an initiative can embrace multifarious and distinct subjects as long as the proposed legislation redefines those subjects under one, new label. According to Respondents, they are "free to define [non-loan] transactions as loans for the purpose of an interest rate cap,

[3] *See Obermayer Rebmann Maxwell & Hippel LLP v. West*, Civil Action No. 15-81, 2015 U.S. Dist. LEXIS 172922, at **9-12 (W.D. Penn. Dec. 30, 2015), *aff'd*, 725 Fed. Appx. 153, 2018 U.S. App. LEXIS 4861 (3d Cir. Pa. Feb. 27, 2018) (unpublished); *MoneyForLawsuits V LP v. Rowe*, CASE NO. 4:10-CV-11537, 2012 U.S. Dist. LEXIS 43558, at *33 (E.D. Mich. Jan. 23, 2012) (Komives, Mag. J), *adopted by* 2012 U.S. Dist. LEXIS 43633 (E.D. Mich. Mar. 29, 2012), *objection overruled by* 2013 U.S. Dist. LEXIS 16533 (E.D. Mich. Feb. 7, 2013), *aff'd*, 2014 U.S. App. LEXIS 11706 (6th Cir.), 2014 FED App. 449N (6th Cir. Mich. 2014); *Cash4Cases, Inc. v. Brunetti*, 167 A.D.3d 448, 449, 90 N.Y.S.3d 154, 155 (App. Div. 1st Dept. 2018); *Odell v. Legal Bucks, LLC*, 192 N.C. App. 298, 312-13, 665 S.E.2d 767, 776-77 (2008); *Novoselsky*, 2020 Tax Ct. Memo LEXIS 67, at **22.

and are also free to do so in this single initiative, as long as the components of the Petition are germane to the primary subject and to one another." (RAB at 14 n.5.)

In other words, because the Initiative *redefines* current *non-loan transactions* as "consumer loans"—and puts them in the same category as existing consumer-loan types—and it imposes the same rate cap on these newly defined "consumer loans," this somehow satisfies the single-subject requirement. *See, e.g., id.* at 1 ("The initiative petition . . . defines as 'loans' the transactions it seeks to regulate, [and] sets an upper limit of 36 percent on interest annually for them[.]"); *id.* at 2 ("[T]he district court approved a fairly straightforward initiative measure that seeks to enact interest rate caps upon *defined loan transactions* in Nevada" (emphasis added)).

Apparently, for purposes of this Court's single-subject-rule analysis, it should simply ignore that litigation funding and earned wage access transactions are not currently loans under existing Nevada law. It should ignore that, based on unique public-policy considerations, Nevada regulates these industries and transactions differently from lenders and lending. It should also ignore that these industries have their own unique business models and interested participants. The Court should disregard the developed body of law, and years and years of legal precedents, distinguishing loans from non-loan transactions. It is further irrelevant that loan and non-loan transactions often have different accounting and tax implications.

This Court should just ignore that loan transactions and non-loan transactions are separate and distinct things in our society. These distinctions are now meaningless because Respondents' Initiative waived its magic wand and declared that these separate things are all now "consumer loans"—poof, they are one subject!

Ridiculous. As George Orwell said, "It's a beautiful thing, the destruction of words." George Orwell, *1984* 51 (75th Anniversary ed. 2023).[4]

The following scenario illustrates the absurdity of Respondents' position. Imagine that an initiative petition seeks to regulate the health and welfare of livestock by imposing feeding, living-condition and medical-care requirements on livestock owners. The term "livestock" is commonly understood to include "domesticated animals raised in an agricultural setting in order to provide labour and produce diversified products for consumption such as meat, eggs, milk, fur, leather, and wool." *https://en.wikipedia.org/wiki/Livestock#cite_note-auto-1*. Accordingly, a suburban housecat would not normally be considered livestock.

No one would reasonably contest that regulation of the care of housecats and that of farm animals involves different subjects. They are distinctly different types of animals that are used differently, are raised under different circumstances, and

[4] It is irrelevant that "the Nevada Legislature could choose to define certain transactions as 'loans,' and could limit interest rates on those transactions, and could, if it desired, define transactions as 'loans' for the purpose of limiting rates of interest." (RAB at 11.) The Nevada Legislature is not limited by the single-subject rule. *See* NRS 295.009. Respondents' Initiative is.

have different needs. Accordingly, if one initiative sought to regulate the care of both cattle *and* kitties, it would undoubtedly violate the single-subject rule. Yet, under Respondents' theory, the initiative's proponents could easily get around the rule by simply redefining the term "livestock" to include domestic housecats along with cattle, sheep, goats, pigs, and chickens. And the same legislation would permissibly regulate both farmers and suburban households.

Adopting Respondents' Orwellian position would eviscerate NRS 295.009's single-subject requirement.[5] It must be rejected.

The Initiative's purpose—limiting interest rates on consumer *loan* transactions—is uncontested, here. Appellants have also demonstrated that litigation funding is *not a loan* under Nevada law. Accordingly, imposing a rate cap on litigation funding—a non-loan transaction—is not functionally related and germane to the subject of limiting interest rates on consumer loan transactions.[6] Respondents

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[5] Indeed, the tactic of redefining disparate subjects so they are covered under the same broad, legislative definition is really just a different spin on "excessive generality." *See Prevent Sanctuary Cities v. Haley*, No. 74966, 2018 Nev. Unpub. LEXIS 442, at *7, 421 P.3d 281, 134 Nev. 998 (May 16, 2018) (unpublished disposition) ("Excessive generality can lead to a violation of NRS 295.009(1)(a), when it masks the multifarious and distinct subjects an initiative impermissibly covers."); *Las Vegas Taxpayer Accountability Comm. v. City Council of Las Vegas*, 125 Nev. 165, 181, 208 P.3d 429, 439 (2009) ("[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.'").

[6] Respondents contend that "all components of the measure are *necessary* to the appropriate functioning of the Petition's project." (RAB at 18-19.) The "Petition

cannot redefine the meaning of "consumer loan" to encompass the separate and distinct subject of non-loan transactions. The Initiative violates NRS 295.009's single-subject rule.

C. The Description of Effect's exclusive focus on consumer loans confuses and misleads voters.

A description of effect "must 'not be deceptive or misleading.'" *Educ. Freedom Pac v. Reid*, 512 P.3d 296, 304, 138 Nev. Adv. Rep. 47 (2022) (en banc) (quotation omitted). The description "'must be a straightforward, succinct, and nonargumentative summary of what the initiative is designed to achieve and how it intends to reach those goals.'" *Nevadans for Reprod. Freedom v. Washington*, 546 P.3d 801, 808, 140 Nev. Adv. Rep. 28 (2024) (en banc) (quoting *Helton*, 512 P.3d at 316). A description that fails to inform signers "of the nature and effect" of that which is proposed "is deceptive and misleading[.]" *Coalition for Nev.'s Future v. RIP Commerce Tax, Inc.*, No. 69501, 2016 Nev. Unpub. LEXIS 153, at *5-6, 132 Nev. 956 (May 11, 2016) (published in table format) (quotation omitted). A deceptive

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simply would not function without all of its provisions, all of which actively further the goals the measure purports to achieve." *Id.* at 21. However, if the goal of the measure is to limit interest rates on consumer loan transactions, then why is it necessary to redefine non-loan transactions to put a rate cap on them, too? The Initiative can easily limit interest rates on the numerous existing consumer loan transactions (payday loans, title loans, etc.) without expanding the definition of consumer loans to also include non-loan transactions. Contrary to Respondents' assertions, the effectiveness of the Initiative would *not* be "almost entirely destroyed" without "all its parts[.]" *Id.* at 23. The Initiative could effectively limit interest rates on consumer loan transactions without including non-loan transactions.

and misleading description of effect fails to satisfy NRS 295.009(1)(b) and renders the initiative petition void. *See Educ. Freedom Pac*, 512 P.3d at 304.

Here, the Description of Effect is deceptive and misleading and not a straightforward summary of what the Initiative proposes. Simply put, the Description says the Initiative regulates consumer *loans* when, unbeknownst to the voters, the Initiative also regulates *non-loan* consumer transactions—including litigation funding and earned wage access, which are distinct industries that the Description fails to mention.

The Description of Effect tells us that the Initiative "addresses high-interest *lending* practices by establishing maximum interest rates charged to consumers." (*See* AA Vol. 1 at 197 (emphasis added).) The Description states that the proposed rate cap "*would apply to* consumer *loans*; deferred-deposit transactions ('payday *loans*'); title *loans*; and other *loan* types dependent on future earnings and income." *Id.* (emphasis added). The language used throughout the Description of Effect is applicable, and exclusive, to *loans*: "lending" (1x); "loans" (5x); "loan" (1x); and "lenders" (1x). *Id.*[7] The Description omits that the Initiative's rate cap also applies to non-loan transactions.

[7] These words have legal meaning and significance. As Respondents themselves emphasize, "[i]n Nevada, 'everyone is presumed to know the law, and this presumption is not even rebuttable.'" (RAB at 30 (quoting *Smith v. State*, 38 Nev. 477, 481, 151 P.2d 512, 512 (1915)).) Even a colloquial understanding of the term "loan" would distinguish loan transactions from litigation funding. *See*

The Description of Effect is materially misleading and not straightforward because—by suggesting that the rate cap "would apply" only to the specified consumer loan types—the Description fails to inform voters that specific non-loan consumer transactions (like litigation funding and earned wage access) will also be affected.[8] *See Las Vegas Taxpayer*, 125 Nev. at 184, 208 P.3d at 441 (concluding that "the description of effect materially fail[ed] to accurately identify the consequences of the referendum's passage[,]" where it stated that passage would halt only new, additional development projects and did not inform voters passage would also affect existing redevelopment projects). By misleading voters to believe that the rate cap only applies to consumer *loans*, the Description materially fails to

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https://dictionary.cambridge.org/dictionary/english/loan#google_vignettean (defining "loan" as "amount of money that is borrowed, often from a bank, and *has to be paid back*, usually together with an extra amount of money that you have to pay as a charge for borrowing" (emphasis added)).

[8] Respondents argue that the Description of Effect "very simply and directly describes the interest-rate cap, the *types of transactions* regulated by the cap, and the mechanisms in place to prevent the evasion of the cap." (RAB at 29 (emphasis added).) Appellants agree. The Description *does* simply and *directly* describe the types of regulated transactions—and the listed transactions are *all consumer loans*. The term "litigation funding" does not exist in the Description. Voters will reasonably assume that the Initiative does not apply to non-loan transactions such as litigation funding. While the canon "expression unius est exclusio alterius" may not apply here as a rule of construction, the maxim "the expression of one thing is the exclusion of another" simply makes common sense. *See Canarelli v. Eighth Judicial Dist. Court of Nev.*, 136 Nev. 247, 254, 464 P.3d 114, 121 (2020) (describing the doctrine).

accurately identify the consequences, the nature and effect, of the Initiative's passage: non-loan transactions will also be affected.

Respondents insist they "cannot constitutionally be required to delineate every effect that an initiative will have[.]" (RAB at 28.) That's true. But they *are required* to delineate the *material consequences* of the Initiative. *See Las Vegas Taxpayer*, 125 Nev. at 183-84, 208 P.3d at 441; *Sch. Over Stadiums v. Thompson*, No. 87613, 2024 Nev. Unpub. LEXIS 393, at *6, 548 P.3d 775 (May 13, 2024) (published in table format); *Prevent Sanctuary Cities*, 2018 Nev. Unpub. LEXIS 442, at *10-11. It can hardly be said that the Initiative's regulatory impact on multiple undisclosed, unique industries is immaterial. Voters deserve to be informed that the public's access to litigation funding and earned wage access services is on the ballot.

Respondents note "this Court has 'previously rejected the notion that a description of effect must explain "hypothetical" effects.'" (RAB at 31 (quotations omitted).) The Initiative's rate cap on litigation funding and earned wage access, however, is in no way hypothetical—it is directly decreed under the Initiative. (*See* AA Vol. I at 9-12, 14.)

The Description of Effect's exclusive focus on consumer loans confuses voters. The Description fails to inform signatories that the Initiative also impacts the consumer litigation funding industry and proposes to regulate these transactions differently in Nevada—to regulate them as loans and to reduce the rate that currently

can be charged under Nevada statutes. The Description is deceptive and misleading and thus fails to satisfy NRS 295.009(1)(b).

CERTIFICATE OF COMPLIANCE

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 for Microsoft 365 MSO (Version 2403 Build 16.0.17425.20176) 64-bit in 14 point font size and Times New Roman.

I further certify that this brief complies with the type-volume limitations stated in NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 12 pages.

Finally, I hereby certify that I have read this Appellants Preferred Capital Funding – Nevada, LLC's and Alliance For Responsible Consumer Legal Funding's 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 1st day of October, 2024.

By: */s/ Joshua H. Reisman, Esq.*

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of October, 2024, I have caused a true and correct copy of the foregoing APPELLANTS PREFERRED CAPITAL FUNDING – NEVADA, LLC'S AND ALLIANCE FOR RESPONSIBLE CONSUMER LEGAL FUNDING'S REPLY BRIEF to be served upon all counsel of record by electronically filing the document using the Supreme Court of Nevada's electronic filing system.

By: */s/ Cynthia Grinzivich*
an Employee of REISMAN SOROKAC