

IN THE SUPREME COURT OF THE STATE OF NEVADA

\* \* \* \* \*

REV. LEONARD JACKSON,  Appellant,  vs.  FAIR MAPS NEVADA PAC; AND BARBARA K. CEGAVSKE, IN HER OFFICIAL CAPACITY AS NEVADA SECRETARY OF STATE,  Respondents.	Case No.: 80563  District Court Case No. 19OC002091B	Electronically Filed Mar 03 2020 04:12 p.m. Elizabeth A. Brown Clerk of Supreme Court
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**REPLY IN SUPPORT OF**

**MOTION TO DISMISS AND FOR SANCTIONS**

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*Attorneys for Respondent Fair Maps Nevada PAC*

## I. INTRODUCTION

This appeal is an outrageous misuse of the appellate process, for no other purpose but delay. Appellant obtained all of the relief requested at the district court, but still filed this frivolous appeal claiming to be aggrieved by his own victory. Appellant's Opposition<sup>1</sup> attempts to justify and normalize his prevailing-party appeal, but only highlights its lack of ultimate merit. Dismissal is required at this procedural stage because Appellant cannot establish standing to appeal.

Appellant sought injunctive and declaratory relief against the Petition's description of effect and successfully prevented the Petition from being placed on the ballot. Pursuant to NRS 295.061(3), Respondent filed an Amended Petition, Exhibit 1, in full compliance with the district court's findings and Order. Appellant can obtain no further relief through this appeal, but improperly seeks to gild the lily

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<sup>1</sup> Appellant's Opposition is untimely, and this Court would be justified in disregarding it. Appellant's responsive deadline was February 25, 2020 and Appellant's initial Opposition, filed on that last possible day, was rejected on February 26, 2020 as "in excess of pages" and commanding that it "must be accompanied by a motion for excess pages." *Notice*, Feb. 26, 2020. Rather than comply with the Court's Notice by filing a motion for excess pages, Appellant filed a modified Opposition on February 26, 2020 without permission or explanation. This document is untimely and unauthorized by the Court.

by adding superfluous findings of fact to the Order and to interminably delay the democratic process by challenging, on new grounds, the revised description of effect in the Amended Petition.

## **II. ARGUMENT**

### **A. Appellant is a Prevailing, Not an Aggrieved Party.**

Appellant raises three defenses to dismissal, claiming that the district court: (1) “exceeded its jurisdiction by rewriting the description of effect,” (2) failed “to make findings of fact,” and (3) wrote “a description that is inaccurate and misleading.” Opp’n 1. Appellants’ first position is devoid of any legal support and falters based on the plain language of the statute, which states that after a successful challenge to the description of effect, the description can be “amended in compliance with the order of the court.” NRS 295.061(3). The applicable statutes *do not prohibit* the district court from rewriting a description of effect; rather, they explicitly contemplate that a description may be amended “in compliance” with the court’s order. It makes no difference whether the revised description of effect is contained within the court’s order or merely based on it. Respondent, not the district court, drafted and submitted the Amended Petition with a revised description of effect

to the Secretary of State. Exhibit 1. Furthermore, the district court found in Appellant's favor on every issue, took out every objectionable word, and added in everything that Appellant claimed was missing.

Second, Appellant is plainly wrong to claim that the district court failed to make findings of fact as those findings are clearly contained within the district court's order and are entirely favorable to Appellant. Mot. Ex. 3. Appellant cannot be aggrieved because he was and remains the prevailing party such that any absent findings are presumed to support him. *Fenkell v. Fenkell*, 86 Nev. 397 (1970) ("Any fact necessary to support the order is presumed to have been proven in the absence of an affirmative showing to the contrary.") The district court found that the Petition's description was misleading, in a decision no different than one cited favorably by Appellant from *Las Vegas Taxpayer Accountability v. City Council of Las Vegas*, 125 Nev. 165 (2009). Exhibit 2. Any omitted findings are presumed to support Appellant, who did not present any actual affidavits or evidence below.

Third, Appellant was required to include all challenges to the Petition with his first complaint. NRS 295.061(1). Appellant may not endlessly challenge each iteration of the description of effect. NRS

295.061(3) compels finality as the “amended description may not be challenged” after Appellant’s successful lawsuit. *See Washoe Cty. v. Otto*, 128 Nev. 424, 431, 282 P.3d 719, 724 (2012) (quoting 73A C.J.S. Public Administrative Law and Procedure § 338 (2004) (“Since jurisdiction is dependent on statutory provisions, the extent of the jurisdiction is limited to that conferred by statute, and courts may lack jurisdiction under, or in the absence of, statutory provisions.”)). The Court, however, need not interpret the statutory scheme or reach hypothetical standing questions as Appellant is not, in any sense, a party aggrieved by the Order at issue.

**B. This Appeal is Frivolous and Warrants Sanctions.**

Appellant states that the purportedly omitted findings of fact are important “for both the description of effect and the Petition itself” as the use of the term independent in the former would be “likewise false and misleading in the Petition itself.” Opp’n 6. By this admission, Appellant, who has not and cannot yet challenge the “Petition itself,” confirms that the appeal was filed for ulterior purposes by seeking a ruling to score political points in the future, not to resolve existing legal disputes about the description of effect. The Ninth Circuit has noted the

existence of “evidence tending to show that challenges by opponents have tied initiative petitions up in litigation for extended periods of time or that, in some cases, they have left the proponents without sufficient time to gather signatures in advance of the filing deadlines for a particular election cycle.” *Pest Comm. v. Miller*, 626 F.3d 1097, 1109 (9th Cir. 2010). The description of effect requirement was upheld as it did not prevent “reasonably diligent ballot initiative and referenda proponents from gaining a place on the ballot.” *Id.* Despite Respondent’s unquestioned diligence, Appellant may functionally succeed in tying up the Petition in litigation by challenging the description of effect and then appealing from his successful challenge. Authorizing this appeal would impede Respondent’s participation in the democratic process, but it would also call NRS 295.061’s validity into question if a party can challenge every proposed description and can also indefinitely challenge descriptions revised in compliance with a court order.

### **III. CONCLUSION**

For all of the reasons expressed herein and in the initial Motion, this Court should dismiss the appeal and impose appropriate sanctions.

**Affirmation:** Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: March 3, 2020.

McDONALD CARANO LLP

By /s/ Adam Hosmer-Henner  
Adam Hosmer-Henner (NSBN 12779)  
Lucas Foletta (NSBN 12154)  
100 West Liberty Street, 10th Floor  
Reno, Nevada 89501  
*Attorneys for Respondent Fair Maps  
Nevada PAC*

## **CERTIFICATE OF COMPLIANCE**

Pursuant to NRAP 27(d), I hereby certify that this Reply 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 Reply has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font, Century Schoolbook style. I further certify that this Reply complies with the page limits of NRAP 27(d)(2) does not exceed 5 pages, calculated in accordance with the exclusions of NRAP 32(a)(7)(C).

Pursuant to NRAP 28.2, I hereby certify that I have read this Reply, 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 Reply complies with all applicable Nevada Rules of Appellate Procedure.

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I understand that I may be subject to sanctions in the event that this Reply is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: March 3, 2020.

McDONALD CARANO LLP

By /s/ Adam Hosmer-Henner  
Adam Hosmer-Henner (NSBN 12779)  
Lucas Foletta (NSBN 12154)  
100 West Liberty Street, 10th Floor  
Reno, Nevada 89501  
*Attorneys for Respondent Fair Maps  
Nevada PAC*

## **CERTIFICATE OF SERVICE**

Pursuant to NRAP 25, I hereby certify that I am an employee of McDONALD CARANO LLP and that on March 3, 2020, I served the foregoing document on the parties in said case by electronically filing via the Court's e-filing system, as follows:

Kevin Benson, Esq.  
Benson Law, LLC  
123 Nye Lane, Suite #487  
Carson City, NV 89706

Greg Zunino, Esq.  
State of Nevada, Office of the Attorney General  
100 N. Carson Street  
Carson City, NV 89701

DATED: March 3, 2020.

By /s/ Jill Nelson  
Jill Nelson

### **INDEX OF EXHIBITS**

<b>EXHIBIT #</b>	<b>DESCRIPTION</b>	<b>NUMBER OF PAGES</b>
1	State of Nevada – Initiative Petition – Constitutional Amendment – Amended	9
2	Findings of Fact, Conclusions of Law and Order	12

# **EXHIBIT 1**

# **EXHIBIT 1**

# State of Nevada - Initiative Petition – Constitutional Amendment

C-02-2019

\* Amended

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JS

EXPLANATION: Matter in ***bolded italics*** is new language to be added to the Nevada Constitution by this Amendment. Matter in strikethrough is existing language in the Nevada Constitution to be deleted by this Amendment.

The People of the State of Nevada do enact as follows:

**Section 1:** Article 4, Section 5 of the Nevada Constitution is hereby amended to read as follows:

**Section 5. Number of Senators and members of Assembly; ~~apportionment~~.** Senators and members of the Assembly shall be duly qualified electors in the respective counties and districts which they represent, and the number of Senators shall not be less than one-third nor more than one-half of that of the members of the Assembly.

It shall be the mandatory duty of the Legislature at its first session after the taking of the decennial census of the United States in the year 1950, and after each subsequent decennial census, to fix by law the number of Senators and Assemblymen, ~~and apportion them among the several counties of the State, or among legislative districts which may be established by law, according to the number of inhabitants in them, respectively.~~

**Section 2:** Article 4 of the Nevada Constitution is hereby amended by adding thereto new sections to be designated as Sections 5A, 5B and 5C, to read as follows:

**Section 5A. Apportionment; Creation of Independent Redistricting Commission.**

***1. There is created within the legislative branch of state government the Independent Redistricting Commission. It shall be the duty of the Commission in the year 2023, and after each subsequent decennial census of the United States, to apportion the number of Senators and Assemblymen among legislative districts established by the Commission and to apportion the number of representatives in the United States House of Representatives among districts established by the Commission.***

***2. The Commission shall be composed of seven members who are registered and eligible to vote in Nevada, and who satisfy the qualification standards in subsection 3. The Senate Majority Leader, Senate Minority Leader, Speaker of the Assembly, and Assembly Minority Leader shall each appoint one Commissioner. The four Commissioners appointed in this manner shall appoint three additional Commissioners, each of whom, for at least four years immediately preceding their appointment, has not been registered or affiliated with the largest political party or the second largest political party, according to voter registration data published by the Secretary of State as of the earliest day in January of the redistricting year, and none of whom, if registered or affiliated with a political party, is affiliated or registered with the same political party as another Commissioner.***

***3. Within four years preceding appointment and during their term, no Commissioner may be a registered lobbyist; a candidate for a federal, state, or partisan local office; an elected official to a federal, state, or partisan local office; an officer or member of the governing body of a national, state, or local political party; a paid consultant or employee of a federal, state, or partisan local elected official or candidate, or of a political action committee, or of a committee sponsored by a political party, or of a committee that seeks to influence elections to federal, state, or partisan local offices; an employee of the Legislature; an employee of the State of Nevada, except for employees in the judicial branch, the armed forces, or a state institution of higher education; or related within the third degree of consanguinity or affinity to any individual disqualified under this subsection.***

***4. The term of office of each Commissioner shall expire once the Commission has completed its obligations for a census cycle but not before any judicial review of the redistricting plan is complete and shall expire no later than the release of the following decennial census of the United States.***

5. All meetings of the Commission shall be open to the public. The Commission shall ensure that the public has opportunities to view, present testimony, and participate in hearings before the Commission. All Commission materials shall be public records.
6. The Commission shall adopt rules to govern its administration and operation.
7. The powers granted to the Commission are legislative functions not subject to the control or approval of the Legislature and are exclusively reserved to the Commission.

#### **Section 5B. Criteria for Determination of Districts; Approval of Final Plans.**

1. In adopting a redistricting plan, the Independent Redistricting Commission shall use the following criteria, in the order listed, to draw districts: Ensure that districts comply with the United States Constitution and applicable federal law; Ensure that districts have an approximately equal number of inhabitants; Ensure that districts are geographically contiguous; Ensure that districts are not drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or elect representatives of their choice, whether by themselves or voting in concert with other persons; Ensure that districts, when considered on a statewide basis, do not unduly advantage or disadvantage a political party; Ensure that districts reflect, to the extent possible, county, city, and township boundaries; Minimize, to the extent practicable, the division of communities of interest, meaning an area with recognized similarities of interests, including but not limited to racial, ethnic, economic, social, cultural, geographic, or historic identities, but not including common relationships with political parties or political candidates; Ensure that districts are reasonably compact; and to the extent practicable, after complying with the requirements above, consider the number of politically competitive districts, measured by creating a reasonable potential for the party affiliation of the district's representative to change at least once between federal decennial censuses.
2. Not later than July 1, 2023, and thereafter not later than 180 days from the release of the decennial census of the United States, the Commission shall approve a redistricting plan for the Nevada State Senate, the Nevada State Assembly, and Nevada's Congressional Districts, after providing public notice of each proposed final plan and allowing sufficient time for public review and comment. A final plan may be approved by the Commission only upon at least five affirmative votes, including at least one Commissioner registered with the largest political party, one Commissioner registered with the second largest political party, and one Commissioner not registered or affiliated with the largest or second largest political party, according to voter registration data published by the Secretary of State as of the earliest day in January of the redistricting year.

#### **Section 5C. Severability.**

Should any part of this Amendment be declared invalid, or the application thereof to any person, thing, or circumstance be held invalid, such invalidity shall not affect the remaining provisions or application of this Amendment which can be given effect without the invalid provision or application, and to this end the provisions of this Amendment are declared to be severable. This Section shall be construed broadly to preserve and effectuate the purpose of this Amendment.

[The remainder of this page is blank.]

## DESCRIPTION OF EFFECT

This measure will amend the Nevada Constitution to establish a redistricting commission to map electoral districts for the Nevada Senate, Assembly, and U.S. House of Representatives.

The Commission will have seven members, four who will be appointed by the leadership of the Legislature, and three who are unaffiliated with the two largest political parties who will be appointed by the other four commissioners. Commissioners may not be partisan candidates, lobbyists, or certain relatives of such individuals. Commission meetings shall be open to the public who shall have opportunities to participate in hearings.

The Commission will ensure, to the extent possible, that the districts comply with the U.S. Constitution, have an approximately equal number of inhabitants, are geographically compact and contiguous, provide equal opportunities for racial and language minorities to participate in the political process, respect areas with recognized similarities of interests, including racial, ethnic, economic, social, cultural, geographic, or historic identities, do not unduly advantage or disadvantage a political party, and are politically competitive.

This amendment requires redistricting after each federal census, beginning in 2023, which could replace maps drawn by the Legislature after the 2020 census, and will result in the expenditure of state funds to fund the Commission.

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## AFFIDAVIT OF CIRCULATOR

(TO BE SIGNED BY CIRCULATOR)

STATE OF NEVADA )

)

COUNTY OF \_\_\_\_\_ )

I, \_\_\_\_\_, (print name), being first duly sworn under penalty of perjury, depose and say: (1)

that I reside at \_\_\_\_\_

(print street, city and state); (2) that I am 18 years of age or older; (3) that I personally circulated this document; (4) that all

signatures were affixed in my presence; (5) that the number of signatures affixed thereon is \_\_\_\_\_; and (6)

that each person who signed had an opportunity before signing to read the full text of the act or resolution on which the

initiative or referendum is demanded.

\_\_\_\_\_  
Signature of Circulator

Subscribed and sworn to or affirmed before me this

\_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by \_\_\_\_\_.

\_\_\_\_\_  
Notary Public or person authorized to administer oath

# **EXHIBIT 2**

# **EXHIBIT 2**

FILED

2008 APR 16 P 4:11

*E. Barker*

DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS TAXPAYER ACCOUNTABILITY  
COMMITTEE; LAS VEGAS  
REDEVELOPMENT REFORM COMMITTEE;  
D. TAYLOR; CHRISTOPHER BOHNER; KEN  
LIU,

Petitioners,

vs.

CASE NO. A587389  
DEPT NO. XVIII

CITY COUNCIL OF LAS VEGAS, NEVADA;  
BEVERLY K. BRIDGES, in her official  
Capacity as City Clerk of the City of Las Vegas,

Respondents.

Hearing: April 15, 2009  
April 16, 2009

LIVEWORK, LLC, a Delaware limited liability  
Company; FC VEGAS 20, LLC, a Nevada limited  
Liability company; FC VEGAS 39, a New York  
Limited liability company; and DOWNTOWN LAS  
VEGAS ALLIANCE, a Nevada non-profit corporation,

Respondents-in-Intervention.

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

This matter having come before the Court on April 15, 2009 and again on April 16,  
2009 on Petitioners' Petition for Writ of Mandamus and Complaint for Declaratory and

DAVID B. BARKER  
DISTRICT JUDGE

1 Injunctive Relief Pursuant to NRS 295.210(4) and NRS 30.030. Petitioners appearing  
2 through counsel Richard G. McCracken, Esq.; Respondents appearing through counsel Daniel  
3 F. Polsenberg, Esq. and Brad Jerbic, Esq; and Respondents-in-Intervention appearing through  
4 counsel Mark E. Ferrario, Esq. The Court, having reviewed the pleadings and papers on file  
5 herein, reviewed testimony before the Supreme Court on this matter, heard testimony of  
6 witness and arguments of counsel, finds as follows:  
7

8  
9 **I**  
**OVERVIEW**

10 This is an action pursuant to NRS 295.210(4) for declaratory and injunctive relief and  
11 pursuant to NRS 34.150 through 34.350 for a writ of mandate ordering the Las Vegas City  
12 Clerk and City Council to submit initiative and referendum measures, more specifically  
13 identified as the "Taxpayer Initiative" and the "Redevelopment Referendum" in the City of  
14 Las Vegas. The individual petitioners are registered voters and taxpayers of the City.  
15

16 Petitioners presented the form of their petitions to the City on December 8, 2008, and  
17 then presented signed petitions on January 22, 2009. No later than January 29, 2009, the  
18 Clark County Clerk determined that a sufficient number of signatures had been submitted to  
19 qualify each measure for the June 2, 2009 general election ballot. On February 10, 2009, the  
20 Las Vegas City Clerk certified that the petitions had received more than the required number  
21 of signatures. On March 4, 2009, Respondent City Council voted to refuse to put the  
22 measures on the ballot, contending that the measures proposed were "legally insufficient."  
23

24 The Taxpayer Initiative provides, in pertinent part:

25 Section 1: Voter Approval for Certain City Development Projects.

26 A new Section 2.340 is added to the City of Las Vegas Charter:  
27 Section 2.340. Voter Approval for Certain City Development Projects.  
28



1  
2 (1) Notwithstanding any other provision of the Charter or Municipal Code, the  
3 following provisions shall apply to any lease-purchase agreement for the construction  
4 or remodeling of a building or facility entered into pursuant to Section 2.145 of the  
5 City of Las Vegas Charter:

6 (a) Annual appropriations of \$2 million or more to satisfy an obligation under  
7 any lease-purchase agreement for the construction or remodeling of a city  
8 building or facility shall be subject to voter approval.

9 (b) The question of whether to make such an appropriation shall be presented  
10 to voters at the general municipal election proximately prior to the beginning  
11 of the fiscal year in which the obligation under the lease purchase agreement is  
12 due. At such general municipal election, registered voters shall be presented  
13 with all proposed appropriations for the ensuing two fiscal years.

14 (c) If a majority of the registered voters voting on the question is in favor of  
15 the proposed appropriation, the proposal is carried and otherwise the proposal  
16 is defeated and the proposed appropriation shall not be made.

17 (d) The ballot question for proposed appropriations submitted to the registered  
18 voters must contain the amount and due date of the obligation for which each  
19 appropriation is proposed and the purpose of the lease purchase agreement  
20 under which the payment is due.

21 (2) Notwithstanding any other provision of the Charter or Municipal Code, the  
22 registered voters of the City of Las Vegas, Nevada are deemed to be the "legislative  
23 body" within the meaning of Nevada Revised Statutes Sections 279.586, 279.604, and  
24 279.608 to the exclusion of the City Council of Las Vegas and all other legislative  
25 bodies. Any and all redevelopment plans, and material deviations therefrom and  
26 amendments thereto, and contracts for redevelopment projects within the meaning of  
27 NRS 279.412, must be approved by the registered voters of the City of Las Vegas,  
28 Nevada. A vote of the registered voters on any matter subject to this subsection may  
take place at any general municipal election, general statewide election or special  
election called for such purpose.

The Redevelopment Referendum would repeal Las Vegas Ordinance No. 5830. That  
Ordinance adopted the current Amended and Restated Redevelopment Plan for the downtown  
in 2006.

On March 10, 2009, Petitioners filed an original Petition for Writ of Mandate with the  
Nevada Supreme Court, which ruled on April 8, 2009 that the matters contained therein

1 should be raised first before this District Court under the procedures set forth in NRS  
2 295.210(4).

3       Petitioners filed the instant Complaint for Declaratory and Injunctive Relief and  
4 Petition for Writ of Mandamus on April 10, 2009. Pursuant to NRS 295.210(4) and in light of  
5 the April 22, 2009 deadline for printing ballots for the June general election, the Court set this  
6 matter for hearing on April 15 and 16, 2009. The parties appeared and had an opportunity to  
7 present evidence and argument.  
8

9       The petitioner argues that the responsibility of the City to place this matter on the  
10 ballot is absolute. Petitioner further argues that the responsibilities of the City are ministerial  
11 and leave no discretion to consider the issues in this case in a pre-election context. Petitioners  
12 assert that the use of the word "shall" indicates the requirement is mandatory.  
13

14       The City counters that it recognizes its responsibilities, but there are pre-election  
15 issues that can and must be addressed. The City further argues that before this Court issues a  
16 Writ of Mandamus ordering the measure be placed on the ballot, this Court has the authority  
17 and discretion to address the City's position that the measures are legally sufficient as to  
18 subject matter, violate the single subject rule, and improperly describe the results of the  
19 measure and whether it is unconstitutional.  
20

21       The Court agrees that the analysis is not as simple as petitioners suggest. An Initiative  
22 or Referendum must meet certain threshold standards before it can be placed on a ballot. If  
23 those standards are not met, the ballot measure is void. *Glover v. Concerned Citizens for Fuji*  
24 *Park*, 118 Nev. 488, 498-499 (2002). A void ballot measure cannot trigger the otherwise  
25 mandatory action required by NRS 295.215.  
26

27 ///  
28

1 Even the pre-existing common law, against which the statute must be construed,  
2 plainly rejected the notion that a City has a non-discretionary duty to place invalid measures  
3 on the ballot, moreover.

4 The proposition that a writ of mandate will not issue to compel respondents to submit  
5 to the electors of the city a proposed ordinance that would be void even if approved by  
6 a majority of the electors is too clear for discussion or the citation of authorities. *State*  
7 *ex rel. Davies v. White*, 36 Nev. 334, 336 (1913).

8 Just before this Petition was filed, the Nevada Supreme Court rejected a similar  
9 Petition involving the same parties, in which petitioners also asserted that the City had a non-  
10 discretionary duty.

11 If Petitioners' contentions in regard to this being ministerial were an accurate  
12 statement of the Supreme Court's position then there would be no need for the District Court  
13 to hold a hearing. The Nevada Supreme Court, which denied this same Petition, cited to *State*  
14 *v. County of Douglas*, 90 Nev. 272, 276-77 (1974) when finding that "Ordinarily, application  
15 should be made in the first instance to the district court so that factual and legal issues are  
16 fully developed, giving this court an adequate record on which to make a reasoned decision."  
17 *Las Vegas Taxpayer Accountability Committee v. City Council of Las Vegas, Nevada*  
18 Supreme Court, Case No. 53388 (order dated 04/08/09).

19 This Court also looks to the *Herbst Gaming, Inc. v. Heller*, 141 P.3d 1224 (Nev. 2006)  
20 for direction. As cited by *Herbst*,

21 "This article argues that it is generally improper for courts to adjudicate pre-election  
22 challenges to a measure's substantive validity. Such pre-election review involves  
23 issuing an advisory opinion, violates ripeness requirements, undermines the policy of  
24 avoiding unnecessary constitutional questions, and constitutes unwarranted judicial  
25 interference with the legislative process. By contrast, this Article argues that pre-  
26 election review of challenges based on noncompliance with procedural requirements  
27 or subject matter limitations is proper. Such claims do not implicate the same level of  
28 justifiability concerns; rather, they address the justifiable issue whether the measure's  
proponents are legally entitled to invoke the direct legislation process in the instance."

1 James D. Gordon III & David B. Magleby, *Pre-election Judicial Review of Initiatives*  
2 *and Referendums*, 64 Notre Dame L. Rev. 298 (1989). The Nevada Supreme court has  
3 cited this article with approval in prior decisions. *See Herbst Gaming, Inc. v. Heller*,  
4 141 P.3d 1224, 1228 n. 7 (Nev. 2006); *Garvin v. Ninth Judicial Dist. Court*, 118 Nev.  
5 749, 766 n. 75 (2002); *Citizens for Train Trench Vote v. Reno*, 118 Nev. 574, 535 n.16  
(2002), *overruled in part by Garvin*, 118 Nev. at 765 n.72; *Glover v. Concerne d*  
*Citizens for Fuji Park*, 118 Nev. 488, 498 n.37 (2002), *overruled in part by Garvin*,  
118 Nev. at 765 n.71.

6 Therefore, this Court finds that factual and legal issues important for a reasoned  
7 decision must be developed.  
8

9  
10 **II**  
**INITIATIVE**

11 The first issue as to the Initiative is the application of NRS 295.009(1)(a) which  
12 states, in pertinent part:

13 **NRS 295.009 Requirements for petition: Must embrace one subject; must**  
14 **include description.**

15 1. Each petition for initiative or referendum must:

16 (a) Embrace but one subject and matters necessarily connected therewith and  
17 pertaining thereto.

18 The Petitioner argues that the single subject rule does not apply in this action.  
19 Petitioner argues that this statute should only be applied to a statewide initiative and has no  
20 applicability to this municipal initiative. The City counters that NRS 295.009(1)(a) is an  
21 important consideration in analyzing any Initiative or Referendum at any level within the  
22 state. This court agrees. The Initiative must clearly state to the voter the purpose or intent,  
23 by a single subject, along with an accurate statement of the potential result. The Court  
24 believes this is fundamental to the process.

25 The Initiative involved in this petition presents two unrelated provisions. The first,  
26 §1(1) requires voter approval for appropriations to make payments for lease-purchase  
27  
28

1 agreements for public buildings. The provision applies to *all* construction or remodeling  
2 projects. It does not specifically limit itself to redevelopment but attempts to limit the  
3 Council's powers to use lease-purchase agreements to conduct business.

4         The second provision in §1(2) does relate to redevelopment, as it attempts to substitute  
5 all registered voters as the "legislative body" for the purposes of NRS Chapter 279 and  
6 requires that the voters approve all redevelopment plans and agreements. It attempts to limit  
7 the powers of the Redevelopment Agency—a legal entity separate from the City itself.  
8

9         The Initiative petition includes two distinct subjects, one relating to voter approval for  
10 *all* lease purchase agreements (whether for redevelopment projects or otherwise), and the  
11 other seeking to govern the redevelopment agency by popular vote. They are not functionally  
12 related or germane to one another such that voters are given notice of the measure's general  
13 subject.  
14

15         The Court also rejects the Petitioners' argument that the Initiative is limited to a single  
16 subject of requiring voter approval for expenditure of taxes for development projects. While  
17 such a description might be considered generally true as to § 1(1), through which voter  
18 approval of a specific type of appropriations would be required, § 1(2) is not so limited. That  
19 section would require voter approval of issues beyond particular proposals to spend taxpayer  
20 money on specific development projects; it would also require voter approval of the multitude  
21 of other decisions relating to the contents of a redevelopment plan.  
22

23         Finally, severance was never discussed as an option to salvage the Initiative. The  
24 Court also notes that petitioners did not request severance in the event the Court found a  
25 violation of the single subject rule.  
26  
27  
28

1 For these reasons, the Court concludes that the Initiative has not met the threshold  
2 requirement for placement on the ballot.  
3

4  
5 **III**  
6 **REFERENDUM**

7 Petitioners' argument in support of the Referendum mirrors the Initiative in that  
8 petitioners have complied with all requirements of NRS 295.215 and therefore the City has a  
9 nondiscretionary, ministerial duty to place the measure on the ballot.

10 The City counters that the Referendum incorrectly describes its effect in violation of  
11 NRS 295.009(1)(b). The City further argues that the Referendum petition is legally  
12 inadequate because it inaccurately describes the effect of the potential passage of the  
13 Referendum.  
14

15 Pursuant to NRS 295.009(1)(b), a petition must accurately describe the effect of a  
16 ballot measure:

17 1. Each petition for initiative or referendum must:

18 \* \* \*

19 (b) Set forth, in not more than 200 words, a description of the effect of  
20 the initiative or referendum if the initiative or referendum is approved  
21 by the voters. The description must appear on each signature page of  
22 the petition.

23 As stated above, each petition for Initiative or Referendum must set forth "a  
24 description of the effect of the initiative or referendum if the initiative or referendum is  
25 approved by the voters. The description must appear on each signature page of the petition."  
26  
27  
28

1 Respondents assert that the petition to propose the Referendum had an improper  
2 description of its effect, because it advised the signers only that the proposal would eliminate  
3 further redevelopment "projects," when it would actually abolish the entire existing "plan"  
4 and the redevelopment "area." See *City of Las Vegas Downtown Redevelopment Agency v.*  
5 *Crockett*, 117 Nev. 816 (2001), which explains the meaning of these terms under NRS  
6 Chapter 279.

8 A review of the procedural validity of a ballot measure requires a determination  
9 regarding compliance with the statutory requirement that voters be adequately advised of the  
10 effect of the measures NRS 295.009(1)(b). *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877  
11 (2006).

12 Petitioners' primary argument is that challenges to the "constitutional" validity of  
13 proposed direct legislation cannot be accomplished in pre-election litigation, relying on  
14 *Herbst*.

16 In *Herbst*, the Supreme Court reasoned that pre-election review of constitutional  
17 challenges to a ballot initiative is generally not appropriate because the case would not be  
18 ripe. *Herbst*, 141 P.3d at 1231. The Supreme Court recognized, however, that when harm is  
19 probable, and not just speculative, the matter is ripe for judicial review, even if the harm does  
20 not yet exist. *Id.*

22 The Nevada Supreme Court has also recognized an exception for pre-election review  
23 where the constitutional violation is "patently, or plainly and palpably, unconstitutional." See  
24 *Citizens for a Public Train Trench Vote v. City of Reno*, 118 Nev. 574, 585 (2002) (holding  
25 that a measure need not be included on the ballot merely because threshold procedural  
26 requirements have been met).

1 The Court finds the petition misleads the voters by explaining that the repeal of  
2 ordinance 5830 would have only a prospective effect by preventing "further development  
3 projects or incurring further indebtedness" for those projects. The petition fails to describe  
4 the impact of the Referendum on existing projects and existing indebtedness. The petition  
5 states:  
6

7 The referendum asks registered voters in the City of Las Vegas to  
8 repeal Ordinance No. 5830, entitled "An Ordinance to Adopt an  
9 Amended and Restated Redevelopment Plan. Which Includes  
10 Additional Property Within the Plan, and to Provide for other Related  
11 Matters." Ordinance No. 5830 amended and restated the  
12 Redevelopment Plan for the Downtown Las Vegas Redevelopment  
13 Area by expanding the area covered by the Plan, restating the purpose  
14 of the Redevelopment Plan, and making certain other findings. *Repeal  
15 of Ordinance No. 5830 would prevent the Redevelopment Agency from  
16 undertaking further redevelopment projects in the Redevelopment Area  
17 or incurring further indebtedness to support such additional projects.*  
18 (Emphasis added).

14 The petition fails to inform the voters of the true effect of passage of the Referendum:  
15 termination of the Redevelopment Plan and the impairment of the outstanding securities of the  
16 Redevelopment Agency.

17 Failure to inform the signers of the true effect on outstanding obligations was material  
18 and invalidates the petition under 295.009(1)(b). The City properly determined that the  
19 Referendum failed to meet threshold requirements for placement on the ballot.  
20

21 The Referendum is not the proper subject matter for direct legislation because it would  
22 allow the electorate to violate NRS 279.608, which authority even the City Council does not  
23 possess. The petition also did not adequately advise the voters of the effect of the measure as  
24 required by NRS 295.009(1)(b). Furthermore, the Referendum is clearly unconstitutional and  
25 cannot possibly be implemented in a constitutional manner. The City properly exercised its  
26  
27  
28



1 authority in refusing to place the Referendum on the ballot. *Garvin v. Dist. Ct.*, 118 Nev. 749,  
2 766 (2002).

3 For these reasons, the Court concludes that the Referendum has not met the threshold  
4 requirement for placement on the ballot.  
5

6  
7 **ORDER**

8  
9 Now, therefore, it is hereby

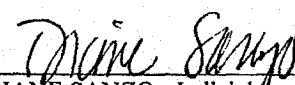
10 **ORDERED** that Petitioners' Petition for Writ of Mandamus and Complaint for  
11 Declaratory and Injunctive Relief is hereby denied.

12 DATED this 17<sup>th</sup> day of April, 2009

13  
14  
15   
16 \_\_\_\_\_  
DISTRICT JUDGE

17 I hereby certify that on the date filed, I faxed  
18 and placed a copy of the foregoing Order in the  
folder(s) in the Clerk's Office of the following:

19 Richard G. McCracken, Esq. 386-9848  
20 Daniel F. Polsenberg, Esq. 949-8398  
21 Bradford Jerbic, Esq. 386-1749  
22 Mark E. Ferrario, Esq. 796-7181

23   
24 \_\_\_\_\_  
25 DIANE SANZO, Judicial Assistant  
26  
27  
28

### CERTIFICATE OF SERVICE

The undersigned certifies that on April 20, 2009, I served the foregoing document described as NOTICE OF APPEAL in this action by sending via facsimile a true copy thereof, to:

Daniel F. Polsenberg Jacqueline Gilbert LEWIS AND ROCA, LLP 3993 Howard Hughes Parkway, Suite 600 Las Vegas, Nevada 89169	Attorney for City Council of Las Vegas and City Clerk Beverly K. Bridges  FAX: 702-949-8398
Bradford Jerbic, Esq. City Attorney of Las Vegas 400 East Stewart Street, 911 Las Vegas, Nevada	City Attorney  FAX: 702-386-1749
Mark E. Ferrario Jason Woodbury Tami D. Cowden KUMMER KAEMPFER BONNER RENSHAW & FERRARIO 3800 Howard Hughes Parkway, 7' Fl Las Vegas, Nevada 89169	Attorneys for Amicus Curiae Downtown Las Vegas Alliance  FAX: 702-796-7181
Beverly K Bridges, City Clerk City Hall, First Floor 400 Stewart Avenue Las Vegas, NV 89101	FAX: 702-382-4803

By FAX, I transmitted the above-described document by facsimile machine to the above-listed fax numbers. The transmission originated from facsimile phone number (702) 386-9848 and was reported as complete and without error. The facsimile machine properly issued a transmission report, a copy of which is attached hereto.

I declare under penalty of perjury under the laws of the State of Nevada and the United States of America that the foregoing is true and correct.

DATED: April 20, 2009

  
DEBORAH TRUJILLO