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**IN THE FIRST JUDICIAL DISTRICT COURT  
OF THE STATE OF NEVADA IN AND FOR CARSON CITY**

ERIC JENG, an individual,  
  
Plaintiff,

vs.

BARBARA CEGAVSKE, in her official  
capacity as NEVADA SECRETARY OF  
STATE,  
  
Defendant.

Case No.: 22-000023-17  
Dept. No.: II

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF  
CHALLENGING REFERENDUM  
PETITION R-01-2022**

**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES**

COMES NOW, Plaintiff Eric Jeng, an individual registered to vote in Clark County,  
Nevada, by and through his attorneys of record, hereby submits this Memorandum of Points and

1 Authorities in Support of the Complaint for Declaratory and Injunctive Relief Challenging  
2 Referendum Petition R-01-2022 as follows:

3 **I. INTRODUCTION**

4 The referendum petition (“Petition”) proposed by Repair the Vote PAC and David G.  
5 Gibbs seeks to repeal multiple sections of Assembly Bill 321 (“AB 321”) related to mail voting  
6 procedures. But the Petition is legally deficient because its description of effect omits crucial  
7 details about what the Petition would accomplish and how, and what information it does contain  
8 is confusing, deceptive, misleading, and argumentative, failing to enable voters to make an  
9 informed decision as to whether to support it.

10 Perhaps most glaring, the Petition’s description states that AB 321 “permit[s] ballot  
11 harvesting,” a term that is both pejorative and never once defined or used in the text of the Petition  
12 or the statute it seeks to repeal. The confusing and highly misleading term falsely implies that AB  
13 321 currently facilitates widescale electoral fraud. AB 321 obviously does no such thing. What the  
14 Petition apparently seeks to repeal is a provision of AB 321 that allows is for voters to authorize a  
15 designated individual, including a friend or family member, to return a mail ballot on their behalf,  
16 as well as a provision that allows elderly or disabled voters to direct a friend or relative to record  
17 their choices for them if they are unable to mark their ballots themselves. By reading the  
18 description, however, potential signatories would have no idea that the Petition seeks to repeal  
19 their right under AB 321 to get assistance in completing and returning their mail ballots.

20 The description also deceptively omits other significant details about AB 321 in order to  
21 portray it in a negative light, preventing a signatory from understanding the Petition’s actual  
22 effects. For example, the description says that AB 321 “require[s] mail ballots without a legible  
23 postmark” to be accepted after election day, but wholly fails to mention that such ballots may only  
24 be accepted before 5 p.m. on the third day following the election, when only timely cast ballots  
25 are likely to arrive. Without this crucial limiting language included, voters are falsely led to believe  
26 that ballots without postmarks can be received and counted indefinitely under current law,  
27 effectively allowing votes to be cast after the election is complete. Once again, the description  
28 falsely implies that AB 321 would permit dishonest and unfair actions unless repealed by voters.



1 The Petition’s description is made even more confusing for voters by the language it uses  
2 when asking voters to either approve or disapprove of the referendum. Specifically, the description  
3 wrongly conflates “approv[ing] or disapprov[ing] of the selected provisions of Assembly Bill 321”  
4 with “approv[ing] or disapprov[ing] *this referendum*,” leading voters to think that by supporting  
5 the referendum, they are ensuring that the referenced sections of AB321 *will not* be annulled,  
6 repealed, set aside, and made inoperative. But the reality is the reverse—if the referendum is  
7 “approv[ed]”, the election practices authorized by the challenged portions of AB 321 will be  
8 repealed. This inversion is not only highly confusing, but also deceptive and misleading.

9 These and other gaps render the description incapable of facilitating a fully informed  
10 decision on the part of signatories and eventual voters, should the petition advance past the  
11 signature gathering stage. For these reasons, the Petition does not comply with the requirements  
12 of Nevada law, and the Court should enjoin the Defendant Secretary of State from taking any  
13 further action on it in its current form.

## 14 II. THE INITIATIVE PETITION

15 On June 2, 2021, Governor Steve Sisolak signed into law AB 321, which expanded voting  
16 access for Nevadans in a number of significant ways. In a statement upon the bill’s signing,  
17 Governor Sisolak celebrated the state’s accomplishment: “At a time when state legislatures across  
18 the country are attempting to roll back access to the polls, I am so proud that Nevada continues to  
19 push forward with proven strategies that make voting more accessible and secure.” Press Release,  
20 Nevada Governor’s Office, *Governor Sisolak signs groundbreaking legislation to expand voting*  
21 *access in Nevada, increase education funding* (June 2, 2021),  
22 [https://gov.nv.gov/News/Press/2021/Gov\\_signs\\_breakthrough\\_legislation\\_expand\\_voting\\_acc](https://gov.nv.gov/News/Press/2021/Gov_signs_breakthrough_legislation_expand_voting_access/)  
23 [ess/](https://gov.nv.gov/News/Press/2021/Gov_signs_breakthrough_legislation_expand_voting_access/).

24 Nearly eight months later, on or about January 28, 2022, David G. Gibbs, on behalf of  
25 Repair the Vote PAC, filed Referendum Petition R-01-2022, titled “Referendum on the Provision  
26 Related to Changes in Voting Provisions from Assembly Bill 321 of the 2021 Legislative Session”  
27 (the “Petition”), with the Secretary of State. See **Exhibit 1**, a true and accurate copy of the Notice  
28 of Intent to Circulate Statewide Initiative or Referendum Petition associated with Referendum

1 Petition R-01-2022. The Petition seeks to repeal multiple sections of AB 321 related to mail voting.  
2 First, the Petition asks voters to reject the sections of AB 321 requiring county and city clerks to  
3 send every active registered voter a mail ballot before a primary or general election unless the  
4 voter opts out by providing written notice to the county clerk no later than 60 days before the  
5 election. *See* Ex. 1 at 2-5 (quoting AB 321 §§ 3, 4, 51, 52).

6 Second, the Petition targets AB 321's ballot collection provisions that allow voters to  
7 designate an authorized individual to return their completed mail ballot on their behalf by mail or  
8 personal delivery to the county clerk, or any ballot drop box established in the county. *See* Ex. 1  
9 at 3, 5 (quoting AB 321 §§ 9(1), 57(1)). The Petition also seeks to do away with protections enacted  
10 in AB 321 that allow voters who have a physical disability, are over age 65, or are unable to read  
11 or write to direct an individual to mark and sign the ballot on their behalf. *See* Ex. 1 at 3 (quoting  
12 AB 321 § 7(2)).

13 Third, the Petition seeks repeal of AB 321's provisions permitting mail ballots to be  
14 counted where the postmark cannot be determined only if the ballots are received by 5 p.m. on the  
15 third day following election day. *See* Ex. 1 at 3, 5 ("If a mail ballot is received by mail not later  
16 than 5 p.m. on the third day following the election and the date of the postmark cannot be  
17 determined, the mail ballot shall be deemed to have been postmarked on or before the day of the  
18 election." (quoting AB 321 §§ 8, 56)).

19 Repealing these provisions would have sweeping consequences for the Nevada electorate.  
20 Yet, these consequences are not accurately described—and some are not even mentioned—in the  
21 Petition's description of effect, as NRS 295.009(1)(b) requires. The description reads in full:

22 This referendum asks the voters to approve or disapprove of the  
23 selected provisions of Assembly Bill 321 (AB321) related to  
24 changes in the election laws. In 2021 the Legislature enacted  
25 changes to election procedures in Nevada to require that each active  
26 registered voter automatically receive a mail ballot, to permit ballot  
27 harvesting, and to require mail ballots without a legible postmark  
28 received after the close of the polls be accepted as postmarked on or  
before the day of the election.

If voters approve this referendum, the referenced sections of AB321  
voting procedure changes cannot be amended, annulled, repealed,  
set aside, suspended or in any way made inoperative except by direct  
vote of the people.



1 If the voters disapprove this referendum, then automatically sending  
2 mail ballots to all active registered voters, ballot harvesting, and  
3 allowing mail ballots without a postmark received after the election  
4 day to be counted will be disallowed and cannot be amended,  
annulled, repealed, set aside, suspended or in any way made  
inoperative except by direct vote of the people.

5 See Ex. 1 at 6, 7.

### 6 **III. LEGAL STANDARD**

7 Nevada law allows challenges to an initiative petition when, as here, the description of  
8 effect is deficient. Specifically, NRS 295.061 states: “the description of the effect of an initiative  
9 or referendum required pursuant to NRS 295.000, may be challenged by filing a complaint in the  
10 First Judicial District Court not later than 15 days, Saturdays, Sundays and holidays excluded, after  
11 a copy of the petition is placed on file with the Secretary of State pursuant to NRS 295.015.”  
12 Plaintiff brings a timely legal challenge pursuant to the statute.

### 13 **IV. ARGUMENT**

14 Under NRS 295.009(1)(b), every initiative must “[s]et forth, in not more than 200 words,  
15 a description of the effect of the initiative or referendum if the initiative or referendum is approved  
16 by the voters.” The purpose of the description is to “prevent voter confusion and promote informed  
17 decisions.” *Nevadans for Nev. v. Beers*, 122 Nev. 930, 939, 142 P.3d 339, 345 (2006). Thus, “[t]he  
18 importance of the description of effect cannot be minimized, as it is what the voters see when  
19 deciding whether to even sign a petition.” *Coal. for Nev.’s Future v. RIP Com. Tax, Inc.*, No.  
20 69501, 2016 WL 2842925 at \*2 (2016) (unpublished disposition) (citing *Educ. Initiative PAC v.*  
21 *Comm. to Protect Nev. Jobs*, 129 Nev. 35, 37, 293 P.3d 874, 876 (2013)). “[T]he description of  
22 effect may hold even more impact with respect to a referendum, since merely gathering sufficient  
23 signatures to place a referendum on the ballot guarantees a change to the law regardless of the  
24 election’s outcome.” *Id.* (citing Nev. Const. art. 19, § 1(3) (providing that, if the voters approve  
25 the referendum, the statute “shall stand as the law of the state and shall not be amended, annulled,  
26 repealed, set aside, suspended or in any way made inoperative except by the direct vote of the  
27 people,” and if the voters disapprove the statute or resolution, it is rendered void)).

28 The Nevada Supreme Court has repeatedly held that “a description of effect must be

1 straightforward, succinct, and non-argumentative, and it must not be deceptive or misleading.”  
2 *Educ. Initiative PAC*, 129 Nev. at 42, 293 P.3d at 879 (internal quotation marks and citation  
3 omitted) . It must also “explain the[] ramifications of the proposed amendment” in order to allow  
4 voters to make an informed decision. *Nev. Judges Ass’n v. Lau*, 112 Nev. 51, 59, 910 P.2d 898,  
5 903 (1996). Here, the Petition’s description of effect violates each of these requirements.

6 **A. The Petition’s description of effect deceptively omits and misstates key details**  
7 **about its effects in order to portray AB 321 in a negative light.**

8 First, the description incorrectly states that AB 321 “require[s] that each active registered  
9 voter automatically receive a mail ballot.” This is false; AB 321 does not so require, as it clearly  
10 provides that voters may opt out of receiving a mail ballot. Ex. 1 at 2 (quoting AB 321 § 3(2)).  
11 The description makes no mention of this exception allowing registered voters to vote in-person if  
12 they so desire. Because it does not correctly describe the law that it seeks to repeal, the description  
13 “materially fails to accurately identify the consequences of the referendum’s passage.” *Las Vegas*  
14 *Taxpayer Accountability Comm. v. City Council of City of Las Vegas (“LVTAC”)*, 125 Nev. 165,  
15 184, 208 P.3d 429, 441 (2009) (invalidating a description that stated a “referendum’s passage  
16 would halt only new, additional development projects” when it would in fact “also affect existing  
17 redevelopment projects”).

18 Next, the description is highly argumentative, confusing, and deceptive because it states  
19 that AB 321 “permits ballot harvesting.” “Ballot harvesting” is a pejorative term for the assistance  
20 family members, civic organizations, and other groups or individuals provide when they collect  
21 completed mail ballots and, with the voters’ full authorization, and return them to election officials  
22 on behalf of voters who are unable to conveniently return them themselves. Ballot Harvesting,  
23 Dictionary.com (July 1, 2021), <https://www.dictionary.com/e/politics/ballot-harvesting/> (“In US  
24 politics, the term *ballot harvesting* is most commonly used by critics of the practice of groups or  
25 organizations collecting and turning in individual voters’ completed election ballots.”). The phrase  
26 has been employed to falsely suggest these groups or individuals are not simply helping eligible  
27 voters exercise their fundamental voting rights, but rather fabricating ballots or extorting votes  
28 from vulnerable populations in order to commit electoral fraud. *Id.* (“The word *harvesting* is often



1 seen as intending to imply that the practice results in (or is done as part of an effort to engage in)  
2 voter fraud.”). It is the kind of negative term that is “is inherently speculative and argumentative  
3 and is not proper for inclusion within a description of effect.” *BizPAC v. Fund Our Schs.*, No.  
4 81085, 2020 WL 4550932 at \*2 (Nev. 2020) (unpublished disposition); *see also No Solar Tax Pac*,  
5 2016 WL 4182739 at \*2 (invalidating an “argumentative” referendum description that claimed  
6 charges under existing law were “unaffordable and cost-prohibitive” and that repeal of the law  
7 would result in rates that were more “reasonable”).

8       Unsurprisingly given its connotations, the term “ballot harvesting” is never used in AB 321  
9 itself, nor defined anywhere in the Petition. Voters are instead forced to guess at the exact  
10 application of a phrase “that is subject to shifting and imprecise meanings, not a neutral, descriptive  
11 phrase” as Nevada law requires. *Prevent Sanctuary Cities v. Haley*, No. 74966, 2018 WL 2272955  
12 at \*4 (Nev. 2018). Thus, even aside from its negative and inherently argumentative nature, the  
13 inclusion of such an amorphous and ill-defined term in the description is sufficient reason to  
14 invalidate it. *See No Solar Tax PAC v. Citizens for Solar & Energy Fairness*, No. 70146, 2016 WL  
15 4182739 at \*2 (Nev. 2016) (unpublished disposition) (invalidating a description that “us[ed] terms  
16 that are not in the statutory language, such as ‘green energy’”). By reading the description, voters  
17 would be misled into believing that, by signing the Petition, they are combating some vague but  
18 menacing threat to election integrity, all the while having no idea that they are supporting  
19 eliminating their own ability to designate a friend, family member, or other individual to return  
20 their mail ballot on their behalf.

21       Also noticeably absent from the description is the fact that the referendum would do away  
22 with protections given to voters who need assistance completing and delivering their ballots due  
23 to age, physical disability, or the inability to read and write. *See Ex. 1* at 3, 5 (quoting AB 321  
24 §§ 7(2), 9(1), 57(1)). This obvious omission prevents voters from being informed of one of the  
25 Petition’s important, true effects—that if enacted, a voter who cannot read or write, is physically  
26 disabled, or is over age 65, would no longer be able to direct another person to fill out their ballot  
27 on their behalf—and it is yet another reason the description is invalid. *See Stumpf v. Lau*, 108 Nev.  
28 826, 832, 839 P.2d 120, 124 (1992), *overruled on other grounds by Herbst Gaming Inc. v. Heller*,

1 122 Nev. 877, 141 P.3d 1224.

2 The description also blatantly misrepresents AB 321's provision regarding the acceptance  
3 of mail ballots after election day where the postmark cannot be determined. It states that the law  
4 "require[s] mail ballots without a legible postmark received after the close of the polls [to] be  
5 accepted as postmarked on or before the day of the election," implying there is no limit to when  
6 unpostmarked mail ballots may be received and suggesting that it allows votes to be cast post-  
7 election day. *See* Ex. 1 at 6, 7. Thus, a voter reading the description may (incorrectly) believe that  
8 ballots may be accepted weeks, or even months, after election day, which is of course not the case.  
9 In fact, the law requires only that mail ballots received "*not later than 5 p.m. on the third day*  
10 *following the election*" be treated as timely when a postmark does not indicate otherwise. *See* Ex.  
11 1 at 3, 5 (quoting AB 321 §§ 8, 56) (emphasis added). The deadline is highly significant because,  
12 given mail delivery speeds, it is virtually certain that mail ballots received in that timeframe were  
13 cast on or before election day. Yet this limitation is not included in the description. The  
14 description's failure to inform potential signatories of this crucial fact is another "fatal omission  
15 that effectively prevents the signers from knowing what they are signing." *Stumpf*, 108 Nev. at  
16 832, 839 P.2d at 124.

17 **B. The description confusingly and misleadingly inverts the consequences of**  
18 **approval and disapproval.**

19 Even setting aside the description's attempts to conceal the Petition's negative effects and  
20 baselessly link AB 321 to fraud, it misstates the effects of approval and disapproval in a way that  
21 is highly confusing and materially misleading. The description wrongly conflates "approv[ing] or  
22 disapprov[ing] of the selected provisions of Assembly Bill 321" with "approv[ing]" or  
23 "disapprov[ing] *this referendum*," and in doing so, it gets the effect of the referendum exactly  
24 backwards. Ex. 1 at 7, 8 (emphasis added). A referendum seeks to repeal existing law, and voting  
25 for a referendum is therefore commonly understood to mean voting to repeal the law. The  
26 description of effect is thus wrong to claim that "[i]f voters approve this referendum, the referenced  
27 sections of AB 321 voting procedure changes cannot be amended, annulled, repealed, set aside,  
28 suspended or in any way made inoperative." Ex. 1 at 7, 8. In fact, if voters approve the referendum,



1 the referenced sections of AB321 *will* be annulled, repealed, set aside, and made inoperative.  
2 Conversely, if voters “*disapprove* this referendum,” the election practices authorized by the  
3 challenged portions of AB 321 will not “be disallowed” as the description claims. Quite the  
4 opposite, if voters disapprove the referendum—thereby upholding the challenged laws—it will  
5 result in the provisions remaining in place in perpetuity unless a future initiative or referendum  
6 succeeds where this one failed. *See Nev. Const. art. 19, § 1.* This error is highly confusing and  
7 prevents voters from understanding the effect of their signature on the Petition. The description  
8 thus once again “materially fails to accurately identify the consequences of the referendum’s  
9 passage” and, in fact, materially misrepresents them. *LVTAC*, 125 Nev. at 184, 208 P.3d at 441.

10 Taken together, these argumentative statements, omissions, and misstatements render it  
11 impossible for a potential signatory to make an informed decision whether to sign the Petition.  
12 This is particularly problematic in the context of a referendum because “merely gathering  
13 sufficient signatures to place a referendum on the ballot guarantees a change to the law regardless  
14 of the election’s outcome.” *Coal. for Nev.’s Future*, 2016 WL 2842925 at \*2. Accordingly, the  
15 Petition is invalid and must be stricken, and the Secretary of State should be enjoined from taking  
16 any further action upon it.

## 17 **V. CONCLUSION**

18 Because the Petition’s description of effect is argumentative, misleading, and confusing, it  
19 is legally insufficient, and this Court should not permit the Petition to proceed to the signature  
20 gathering phase in this form. For the reasons set forth above, the Court should grant Plaintiff’s  
21 requested relief, striking the Petition and issuing an injunction prohibiting the Secretary from  
22 taking further action upon it.

1 **AFFIRMATION**

2 The undersigned hereby affirm that the foregoing document does not contain the social  
3 security number of any person.

4 DATED this 18<sup>th</sup> day of February, 2022.

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6 **SCHULMAN & RABKIN, LLP**

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