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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,

and

DAVID GIBBS, individually and on behalf of
REPAIR THE VOTE PAC,

Defendant-Intervenors

Case No.: 22 OC 00023 1B

Dept. No.: I

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND
JUDGMENT**

This matter came before this Court pursuant to NRS 295.061 and Plaintiff Eric Jeng's request to enjoin Defendant Barbara Cegavske, in her capacity as Nevada Secretary of State (the "Secretary") from allowing Referendum Petition R-01-2022, titled "Referendum on the Provision Related to Changes in Voting Provisions from Assembly Bill 321 of the 2021 Legislative Session" (the "Petition") to proceed. The Petition was filed with the Secretary on January 28, 2022, by Defendant David G. Gibbs, on behalf of the Repair the Vote political action committee (collectively, "Proponents") who are also intervenors in this matter.

As an initial procedural matter, the Republican Party of Nevada moved to intervene in this matter on April 12, 2022. The parties in this matter did not object to the intervention; therefore, the Court grants the motion to intervene filed by the Republican Party of Nevada. The Court, having reviewed the papers and pleadings on file, considered the matter, being fully advised, and good cause appearing, finds, concludes, and orders as follows:

1 **FINDINGS OF FACT AND CONCLUSIONS OF LAW¹**

2 **A. FINDINGS OF FACT**

3 The Petition seeks to repeal portions of Assembly Bill 321 ("AB 321"), 81st Leg., Reg.
4 Sess. (Nev. 2021), related to mail ballot procedures. Governor Steve Sisolak signed AB 321 into
5 law on June 2, 2021.

6 On or about January 28, 2022, Proponents filed the Petition with the Secretary of State.

7 First, the Petition asks voters to reject the sections of AB 321 requiring county and city
8 clerks to send every active registered voter a mail ballot before a primary or general election unless
9 the voter opts out by providing written notice to the county clerk no later than 60 days before the
10 election. *See* Exhibit 1 to Plaintiff's Memorandum of Points and Authorities in Support of
11 Complaint ("Ex. 1") at 2-5 (quoting AB 321 §§ 3, 4, 51, 52).

12 Second, the Petition targets AB 321's ballot collection provisions, which presently allow
13 voters to designate an authorized individual of their choice to return their completed mail ballot
14 on their behalf by mail or personal delivery to the county clerk, or any ballot drop box established
15 in the county. *See* Ex. 1 at 3, 5 (quoting AB 321 §§ 9(1), 57(1)). The Petition also seeks to do away
16 with provisions enacted in AB 321 that allow voters who have a physical disability, are over age
17 65, or are unable to read or write to direct an individual to mark and sign the ballot on their behalf.
18 *See* Ex. 1 at 3 (quoting AB 321 § 7(2)).

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

25
26
27 ¹ Any findings of fact which are more appropriately considered conclusions of law shall be
28 treated as such, and any conclusions of law which are more appropriately considered findings of
fact shall be treated as such.

1 The Petition includes a description of effect as required by NRS 295.009(1)(b), which
2 reads, in full:

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

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

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

21 Pursuant to NRS 295.061, Mr. Jeng initiated this action on February 18, 2022, which
22 contends that the Initiative's 200-word description of effect is deficient because it is
23 argumentative, confusing, deceptive, and misleading.

24 **B. CONCLUSIONS OF LAW**

25 **1. The Court has jurisdiction to hear this challenge.**

26 As a threshold matter, the Court has jurisdiction to hear Mr. Jeng's challenge to the Petition.
27 Proponents argue that "NRS 295.061 requires Plaintiff to set the matter for hearing" within 15
28 days of the Complaint being filed and that, because a hearing was not scheduled in this window,
this Court lacks jurisdiction to hear Mr. Jeng's challenge. This misstates the law. NRS 295.061(1)
provides that the Court, not the plaintiff, sets a matter for hearing. *See* NRS 295.061(1) ("The court
shall set the matter for hearing...") (emphasis added). To hold that dismissal is required when the
Court is unable to meet this deadline given other demands of its docket would deprive citizens of
their right to challenge a ballot petition under NRS 295.061(1) based on procedural matters outside
of their control.

1 NRS 295.061's requirement that the Court set an initiative challenge for hearing within 15
2 days of the filing of the complaint is a directory deadline that can be excused, not a mandatory
3 deadline affecting jurisdiction. Proponents do not contest that Mr. Jeng fulfilled his procedural
4 obligations under NRS 295.061(1) by timely filing his Complaint no later than 15 days after
5 Proponents filed the petition with the Secretary. Construing the 15-day deadline for the Court to
6 set a hearing as mandatory would result in the "harsh, unfair or absurd consequence[]" of Mr.
7 Jeng's challenge being denied through no fault of his own without its merits ever being addressed.
8 *Id.* This could not be the Legislature's intent, and it would raise potential due process concerns.
9 *Cf. Nunn v. Braden Mfg.*, No. CIV. A. 93-4875, 1993 WL 483174, at *2 n.2 (E.D. Pa. Nov. 24,
10 1993) ("[W]ere we to accept defendant's arguments and grant the dismissal, plaintiff's action
11 would be terminated through no fault of his own and without the most minimal protections of due
12 process.").

13 As described above, Nevada law allows challenges to an initiative petition when the
14 description of effect is deficient. Specifically, NRS 295.061 states: "the description of the effect
15 of an initiative or referendum required pursuant to NRS 295.000, may be challenged by filing a
16 complaint in the First Judicial District Court not later than 15 days, Saturdays, Sundays and
17 holidays excluded, after a copy of the petition is placed on file with the Secretary of State pursuant
18 to NRS 295.015." Mr. Jeng brings a timely legal challenge pursuant to the statute.

19 **2. The Petition's description of effect is invalid.**

20 Under NRS 295.009(1)(b), every initiative must "[s]et forth, in not more than 200 words,
21 a description of the effect of the initiative or referendum if the initiative or referendum is approved
22 by the voters." The purpose of the description is to "prevent voter confusion and promote informed
23 decisions." *Nevadans for Nev. v. Beers*, 122 Nev. 930, 939, 142 P.3d 339, 345 (2006). Thus, "[t]he
24 importance of the description of effect cannot be minimized, as it is what the voters see when
25 deciding whether to even sign a petition." *Coal. for Nev.'s Future v. RIP Com. Tax, Inc.*, No.
26 69501, 2016 WL 2842925 at *2 (2016) (unpublished disposition) (citing *Educ. Initiative PAC v.*
27 *Comm. to Protect Nev. Jobs*, 129 Nev. 35, 37, 293 P.3d 874, 876 (2013)). "[T]he description of
28 effect may hold even more impact with respect to a referendum, since merely gathering sufficient

1 signatures to place a referendum on the ballot guarantees a change to the law regardless of the
2 election's outcome." *Id.* (citing Nev. Const. art. 19, § 1(3) (providing that, if the voters approve
3 the referendum, the statute "shall stand as the law of the state and shall not be amended, annulled,
4 repealed, set aside, suspended or in any way made inoperative except by the direct vote of the
5 people," and if the voters disapprove the statute or resolution, it is rendered void)).

6 The Nevada Supreme Court has repeatedly held that "a description of effect must be
7 straightforward, succinct, and non-argumentative, and it must not be deceptive or misleading."
8 *Educ. Initiative PAC*, 129 Nev. at 42, 293 P.3d at 879 (internal quotation marks and citation
9 omitted). It must also "explain the[] ramifications of the proposed amendment" in order to allow
10 voters to make an informed decision. *Nev. Judges Ass'n v. Lau*, 112 Nev. 51, 59, 910 P.2d 898,
11 903 (1996). Here, the Petition's description of effect violates these requirements.

12 The description is argumentative, confusing, and deceptive because it states that AB 321
13 "permits ballot harvesting." "Ballot harvesting" is a politically-loaded and pejorative term not used
14 within AB 321 itself, and which the Court finds is not in the common vernacular to sufficiently
15 ensure Nevada voters will not be affected by its negative, partisan meanings. It also does not
16 accurately describe what AB 321 allows: namely, that family members, friends, civic
17 organizations, and other groups and individuals may provide assistance to voters by—with the
18 voters' full authorization—collecting completed mail ballots and returning them to election
19 officials to ensure that they are received in time to be counted. Ballot Harvesting, Dictionary.com
20 (July 1, 2021), <https://www.dictionary.com/e/politics/ballot-harvesting/> ("In US politics, the term
21 *ballot harvesting* is most commonly used by critics of the practice of groups or organizations
22 collecting and turning in individual voters' completed election ballots."). The phrase has been used
23 to suggest these groups or individuals are not simply helping eligible voters exercise their
24 fundamental voting rights, but rather fabricating ballots or extorting votes from vulnerable
25 populations in order to commit electoral fraud, in the absence of evidence that this is a widespread
26 problem stemming from AB 321's provisions. *Id.* ("The word *harvesting* is often seen as intending
27 to imply that the practice results in (or is done as part of an effort to engage in) voter fraud.").

1 Thus, “ballot harvesting” is the kind of negative term that is “is inherently speculative and
2 argumentative and is not proper for inclusion within a description of effect.” *BizPAC v. Fund Our*
3 *Schs.*, No. 81085, 2020 WL 4550932 at *2 (Nev. 2020) (unpublished disposition); *see also No*
4 *Solar Tax Pac*, 2016 WL 4182739 at *2 (invalidating an “argumentative” referendum description
5 that claimed charges under existing law were “unaffordable and cost-prohibitive” and that repeal
6 of the law would result in rates that were more “reasonable”).

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

19 The description also fails to advise voters that, if approved, the referendum would do away
20 with protections given to voters who need assistance completing and delivering their ballots due
21 to age, physical disability, or the inability to read and write. *See Ex. 1* at 3, 5 (quoting AB 321
22 §§ 7(2), 9(1), 57(1)). The Court notes that a not insignificant proportion of the Nevada electorate
23 is comprised of elderly or disabled voters, and that among those are many veterans; the Court
24 believes that the potential for impinging upon the abilities of those voters to seek assistance with
25 their ballots is something the electorate should be made aware of in a clear manner. This omission
26 prevents voters from being informed of one of the Petition’s important, true effects—that if
27 enacted, a voter who cannot read or write, is physically disabled, or is over age 65, would no longer
28 be able to direct another person to fill out their ballot on their behalf, and is therefore another

1 reason the description is invalid. *See Stumpf v. Lau*, 108 Nev. 826, 832, 839 P.2d 120, 124 (1992),
2 *overruled on other grounds by Herbst Gaming Inc. v. Heller*, 122 Nev. 877, 141 P.3d 1224 (2006).

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

19 The description of effect also misstates the effects of approval and disapproval in a way
20 that is highly confusing and materially misleading. The description wrongly conflates "approv[ing]
21 or disapprov[ing] of the selected provisions of Assembly Bill 321" with "approv[ing]" or
22 "disapprov[ing] *this referendum*," and, in doing so, it gets the effect of the referendum exactly
23 backwards. *Ex. 1 at 7, 8* (emphasis added). A referendum seeks to repeal existing law, and voting
24 for a referendum is therefore commonly understood to mean voting to repeal the law. The
25 description of effect is thus wrong to claim that "[i]f voters approve this referendum, the referenced
26 sections of AB 321 voting procedure changes cannot be amended, annulled, repealed, set aside,
27 suspended or in any way made inoperative." *Ex. 1 at 7, 8*. In fact, if voters approve the referendum,
28 the referenced sections of AB321 *will* be annulled, repealed, set aside, and made inoperative.

1 Conversely, if voters “disapprove this referendum,” the election practices authorized by the
2 challenged portions of AB 321 will not “be disallowed” as the description claims. Quite the
3 opposite, if voters disapprove the referendum—thereby upholding the challenged laws—it will
4 result in the provisions remaining in place in perpetuity unless a future initiative or referendum
5 succeeds where this one failed. *See Nev. Const. art. 19, § 1.* This error is extremely confusing and
6 prevents voters from understanding the effect of their signature on the Petition. In general, there is
7 little reason for such procedural materials in the description at all, as it does not appear helpful in
8 meeting the requirement of informing voters of the effects the changes in the law the referendum
9 seeks to make would have.

10 Taken together, the Court finds that these argumentative statements, omissions,
11 misstatements, and superfluities render it impermissibly difficult for a potential signatory to make
12 an informed decision whether to sign the Petition, in violation of Nevada law concerning the
13 proposal of referenda and their presentation to the electorate.

14 **IT IS THEREFORE ORDERED** and declared that the Referendum Petition R-01-2022
15 is legally deficient because it violates the description of effect requirements of NRS 295.009.

16 **IT IS FURTHER ORDERED** and declared that Defendant-Intervenors Repair the Vote
17 PAC’s proponents, officers, or agents, including David Gibbs, are hereby enjoined from collecting
18 signatures in support of the Petition and from submitting any signatures for verification pursuant
19 to NRS 293.1276. Any signatures previously collected are declared invalid.

20 **IT IS FURTHER ORDERED** and declared that Defendant Secretary of State is enjoined
21 from placing the Petition on the ballot.

22 Date this 3rd day of May, 2022.

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25 District Court Judge
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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the First Judicial District Court, and that on this 4th day of May, 2022, I have deposited by standard mailing, postage paid, at Carson City, Nevada, a true and correct copy of the foregoing Order addressed as follows:

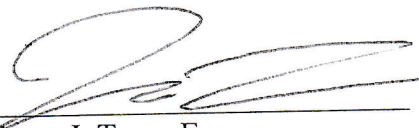
Craig Newby, Esq.
Nevada Office of Attorney General
100 N Carson Street
Carson City, NV 89701

Bradley S. Schrager, Esq.
3773 Howard Hughes Parkway, Suite 590 S
Las Vegas, NV 89619

Sigal Chattah, Esq.
5875 S Rainbow Blvd., No. 204
Las Vegas, NV 89118

Brian R. Hardy, Esq.
10001 Park Run Drive
Las Vegas, NV 89145

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Jackson J. Tann, Esq.
Law Clerk, Dept. I