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11  
12 **IN THE FIRST JUDICIAL DISTRICT COURT**  
13  
14 **OF THE STATE OF NEVADA IN AND FOR CARSON CITY**

15 ERIC JENG, an individual, )

16 Plaintiff, )

17 vs. )

18 BARBARA CEGAVSKE, in her official )  
19 capacity as NEVADA SECRETARY OF )  
20 STATE, )

21 Defendants, )

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

24 Defendant Intervenor )  
25 )

) Case No:22DC00023-B

) Dept No.: II

) **RESPONDING BRIEF FOR DISMISSAL**

26  
27 **DEFENDANT'S BRIEF IN SUPPORT OF DISMISSAL OF COMPLAINT WITH**  
28 **PREJUDICE**

29 COME NOW, Defendants Intervenor DAVID GIBBS *Et Al*, by and through their  
30 attorney of record, SIGAL CHATTAH, ESQ., of CHATTAH LAW GROUP, who hereby submit  
31 the foregoing BRIEF IN SUPPORT OF MOTION TO DISMISS COMPLAINT WITH  
32 PREJUDICE.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 The litigation *sub judice* involves a Complaint, filed on February 18, 2022, for  
5 Declaratory Relief and Injunctive Relief challenging Referendum Petition R-01-2022, filed  
6 against Nevada Secretary of State Barbara Cegavske. Defendant Intervenor submit the  
7 foregoing responding brief to dismiss this matter with prejudice for lack of subject matter  
8 jurisdiction and Plaintiff's failure to hold a hearing within 15 days of filing the Complaint under  
9 NRS 295.061.  
10

11 On or about January 28, 2022, Intervenor DAVID G. GIBBS, on behalf of the REPAIR  
12 THE VOTE PAC, filed Referendum Petition R-01-2022 with the Nevada Secretary of State. The  
13 Petition challenges portions of Assembly Bill 321, signed into law on June 2, 2021.

14 The Petition further seeks to repeal sections of AB 321 related to mail in ballot  
15 procedures in Nevada including but not limited to 1) County and City Clerk procedures for  
16 sending out mail in ballots; 2) Ballot Harvesting; and 3) counting mail ballots with questionable  
17 postmarking.  
18

19 **II.**

20 **LEGAL AUTHORITY**

21 **A. STANDARD FOR PETITION**

22 Nev. Const. Art. 19, § 1 provides in pertinent part: “

23 A person who intends to circulate a petition that a statute or resolution or part thereof  
24 enacted by the legislature be submitted to a vote of the people, before circulating the  
petition for signatures, shall file a copy thereof with the secretary of state.”

25 Sections 2 and 3 of Article 19, § 1 refers to a referendum on

1 “a statute ... or *any* part thereof.” Whenever a number of registered voters of this state  
2 equal to 10 percent or more of the number of voters who voted at the last preceding  
3 general election shall express their wish by filing with the secretary of state, not less than  
4 120 days before the next general election, a petition in the form provided for in Section 3  
5 of this Article that any statute or resolution or any part thereof enacted by the legislature  
6 be submitted to a vote of the people... The circulation of the petition shall cease on the  
7 day the petition is filed with the secretary of state or such other date as may be prescribed  
8 for the verification of the number of signatures affixed to the petition, whichever is  
9 earliest.”

10 Nev. Const. Art. 19, § 1(2) (emphasis added). Section 3 continues:

11 If a majority of the voters voting upon the proposal submitted at such election votes  
12 approval of such statute or resolution **or any part thereof**, such statute or resolution **or**  
13 **any part thereof** shall stand as the law of the state and shall not be amended, annulled,  
14 repealed, set aside, suspended or in any way made inoperative except by the direct vote  
15 of the people. If a majority of such voters votes disapproval of such statute or resolution  
16 **or any part thereof**, such statute or resolution **or any part thereof** shall be  
17 void and of no effect.

18 Nev. Const. Art. 19, § 1(3) (emphasis added).

19 The Nevada Constitution authorizes referenda on only a part of a statute by using the  
20 plain language “a statute ... or any part thereof.” Nev. Const. Art. 19, § 1(2). The phrase “part  
21 thereof” is not qualified in any way. Therefore, Plaintiff’s Complaint challenging same fails as  
22 delineated *infra*.

23 **B. PLAINTIFF’S FAILURE TO HOLD A HEARING WITHIN 15 DAYS**  
24 **PRECLUDES THE COURT FROM MAINTAINING THIS ACTION; IT**  
25 **SHOULD BE DISMISSED WITH PREJUDICE**

26 The Supreme Court in *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d  
27 670, (2008), stated “[O]ur prior cases have not been completely consistent in applying the  
28 standard of review for failure to state a claim upon which relief can be granted. The appropriate  
29 standard requires a showing beyond a doubt. *Dombroski v. NV Energy, Inc.*, 2016 Nev. LEXIS  
30 204, citing to *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670, (2008).

31 The question that remains for this Court is than to determine whether Plaintiff is  
32 jurisdictionally barred from asserting claims assuming all factual allegations are true. *See Buzz*

1 *Stew, 124 Nev. at 228, 181 P.3d at 672. See also SFR Invs. Pool 1, LLC v. U.S. Bank, N.A., 334*  
2 *P.3d 408, 418, (2014).* Here, Plaintiff's Complaint, even if taken as true, fails procedurally  
3 under NRS 295.061 for his failure to have a hearing within 15 days of filing the Complaint.

4 **1. This Court is Procedurally Barred from Hearing this Matter under NRS**  
5 **295.061**

6 NRS 295.061 entitled Challenge to description of petition; challenge to legal sufficiency  
7 of petition provides in pertinent part:

8 1. Except as otherwise provided in subsection 3, whether an initiative or referendum  
9 embraces but one subject and matters necessarily connected therewith and pertaining  
10 thereto, and the description of the effect of an initiative or referendum required pursuant  
11 to NRS 295.009...The court shall set the matter for hearing not later than 15 days after  
12 the complaint is filed and shall give priority to such a complaint over all other matters  
13 pending with the court, except for criminal proceedings.  
14 [Emphasis added]

15 NRS 295.061 requires Plaintiff to set the matter for hearing not later than 15 days after  
16 the Complaint is filed and the Court shall give priority to such a complaint over all other matters  
17 pending with the Court, except for criminal proceedings. *Id.*

18 The Complaint *sub judice* was filed on February 18, 2022, allowing for this Court to  
19 schedule a hearing on the matter no later than March 6, 2022. At the time of the date of this  
20 Response it has been over 40 days since the filing of the Complaint and the failure to have a  
21 hearing in this matter on or before March 6, 2022, mandates that this Complaint be dismissed  
22 with prejudice.

23 The purpose of an expedited hearing in NRS 295.061 is to prevent the prejudicial effect  
24 of having a Petition challenged based on the description of the effect of an initiative or  
25 referendum, precluded by lengthy languishment in Court during the time frame allowable for the  
Petitioners to obtain sufficient signatures to remain on the ballot if amended.

1 The last day for petitioners to submit signatures to the counties for verification is June 21,  
2 2022. Counties must certify petition sufficiency within 13 working days of submission. *Id.*

3 Therefore, a timely adjudication of this matter would have allowed even an Amended  
4 Petition have ample time to obtain signatures; here, an Amended Petition would overwhelmingly  
5 prejudice Petitioners to the extent that NRS 295.061 is specifically drafted to prevent. To avoid  
6 this undue prejudice, this Court should dismiss Plaintiff's Complaint with prejudice.

7 **C. PLAINTIFF FAILS TO MEET THE BURDEN OF PROVING THE PETITION IS**  
8 **CLEARLY INVALID**

9 Assuming *arguendo*, that this Court exercises subject matter jurisdiction, Plaintiff still  
10 fails to meet the burden to sustain a challenge to the referendum as demonstrated *infra*. The  
11 opponent of a petition bears the burden of demonstrating that the petition is "clearly invalid." *Las*  
12 *Vegas Taxpayer Accountability Comm. v. City Council of City of Las Vegas*, 125 Nev.165, 176,  
13 208 P.3d 429, 436 (2009).

14 The Nevada Supreme Court has previously held that the people's petition power is  
15 "'coequal, coextensive, and concurrent' with that of the Legislature." *Nevadans for the Prot. of*  
16 *Prop. Rights, Inc. v. Heller*, 122 Nev. 894, 914, 141 P.3d 1235, 1248 (2006); see also *We People*  
17 *Nevada ex rel. Angle v. Miller*, 124 Nev. 874, 887, 192 P.3d 1166, 1174, n. 39 (2008).

18 Plaintiff alleges violation of Description of Effect under NRS 295.009(1)(b) with five  
19 challenges:  
20

21 (a). ABR 321 does not require each active registered voter automatically receive a  
22 mail ballot;

23 (b). The term "ballot harvesting" is argumentative, confusing and deceptive;

24 (c). The absence from description that the referendum would do away with  
25 protections given to voters who may need assistance completing and delivering their ballots;

1 (d). Misrepresentation regarding acceptance of mail ballots after election day whether  
2 the postmark date cannot be determined; and

3 (e) Conflation of terms of approving/disapproving of selected provisions of AB 321.

4 **1. Plaintiff's Claim that AB 321 does not Require each Active Registered Voter**  
5 **Automatically Receive a Mail Ballot is Inaccurate**

6 The precise language of Sections 3 is as follows:

7 Sec. 3. 1. Except as otherwise provided in this section, the  
8 county clerk ***shall prepare and distribute to each active registered***  
9 voter in the county and each person who registers to vote or updates his or her  
10 voter registration information not later than the 14 days before the election ***a mail***  
11 ***ballot for every election.***

12 2. The county clerk shall allow a voter to elect not to receive a mail ballot  
13 pursuant to this section by submitting to the county clerk a written notice in the  
14 form prescribed by the county clerk which must be received by the county clerk  
15 not later than 60 days before the day of the election. [*Emphasis added*]

16 The rule is cardinal and universal that if a law is plain and unambiguous, there is no room  
17 for construction or interpretation. *Ex parte Rickey*, 31 Nev. 82, 100 P. 134, 141 (1909). [W]hen  
18 the language of a statute is plain, its intention must be deduced from such language, and the  
19 Court has no right to go beyond it. *State v. Washoe Cty. Comm'rs*, 6 Nev. 104, 107 (1870).

20 It is clear and plain that "shall prepare and distribute to each active registered  
21 voter in the county... a mail ballot for every election" clearly indicates that each voter will  
22 receive a mail in ballot. Therefore, it is clear that AB 321 Section 3 demonstrates that each active  
23 registered voter will automatically receive a mail in ballot unless a written notice is received by  
24 the county clerk no later than 60 days before the day of election. Accordingly, Plaintiff's  
25 argument that the Description of Effect misrepresents AB 321 is false and fails.

1           **2.       The Term Ballot Harvesting is Not Argumentative, Confusing or Deceptive**  
2           **or Used Pejoratively**

3           Next, Plaintiff attacks the description's use of the term "ballot harvesting". Ballot  
4 harvesting allows third parties to collect and deliver ballots.<sup>1</sup> In states where the practice is legal  
5 (like Nevada), volunteers or campaign workers can go directly to the homes of voters, collect the  
6 completed ballots, and drop them off at polling places or election offices. *Id.*

7           "Ballot harvesting" isn't an official legal term, but it generally refers to someone  
8 collecting ballots on behalf of others and then submitting them.<sup>2</sup> It is significant to note, that  
9 prior to AB 321, a family member may have returned a mail ballot at the request of a voter.  
10 Other third parties were precluded from doing so, and violation of NRS 293.353 was a category  
11 E felony; Therefore, ballot harvesting within consanguinity was allowed.

12           The term ballot harvesting is no different than using the term data harvesting or any other  
13 collection and is and accepted neutrally. The term itself describes a collection of ballots.

14           Furthermore, Plaintiff notes that absent from the description the fact that the referendum  
15 would do away with protections given to voters who may need assistance completing and  
16 delivering their ballots due to age, physical disability, or the inability to read and write. Here,  
17 Plaintiff seeks the description, limited to 200 words explain every minutia and detail of portions  
18 of the legislation that are encompassed in the notion of ballot harvesting includes.

19           If initiative petition signers are petitioning for enactment of a state law, the petition  
20 should state that law enactment is what the petition is about. *Stumpf v Lau*, 108 Nev. 826, 839  
21 P.2d 120 (1992). Here including that removal of ballot harvesting or AB 321 §§7 sufficiently  
22 identifies the portions of actions included in ballot harvesting. Therefore, Plaintiff's argument  
23  
24

25  

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<sup>1</sup> What is ballot harvesting, where is it allowed and should you hand your ballot to a stranger? - CBS News

<sup>2</sup> PolitiFact | What is ballot harvesting, and why is Trump tweeting about it during an election-year pandemic?

1 fails as the use of the terms “ballot harvesting” in the initiative is not argumentative, confusing or  
2 deceptive.

3       **3.       Mail Ballots Without Legible Postmark Received After Close of Polls**

4       AB 321 §8 provides

5       2. If a mail ballot is received by mail not later than 5 p.m. on the third day following  
6 the election and the date of the postmark cannot be determined, the mail ballot shall  
7 be deemed to have been postmarked on or before the day of the election.

8       *Id.*

9       The Description of Effect specifies that “to require mail ballots without a legible  
10 postmark received after the close of the polls be accepted as postmarked on or before the day of  
11 the election.” Plaintiff asserts that the failure to inform signatories of the crucial fact that §8  
12 limits the receipt of the date to the third day of the election is crucial rather than after the close  
13 of polls as a general statement, while the focus is on illegible postmark received after close of the  
14 polls.

15       Again, Plaintiff seeks to have specificity that is not required. The explanation to the  
16 initiative explains the ramifications that if a ballot without a legible postmark received after close  
17 of polls will not be accepted if it is not postmarked on or before the day of the election.

18       In *Nevada Judges Ass'n v. Lau* 910 P.2d 898 (1996), the Supreme Court held NRS  
19 293.250(5) requires initiative explanations to be "in easily understood language and of  
20 reasonable length stating that “[W]e recognize that it might be impossible for the Secretary of  
21 State to explain all the conceivable implications of every initiative placed on a ballot.” *Id. at*  
22 903. Here, Plaintiffs seek to place a burden on Petitioners of having every conceivable  
23 implication listed in a 200-word description which is precisely what *Lau* lists as an impossibility.  
24  
25



1           **4.       The Petition is Accurate, Straightforward and Succinct**

2           NRS 295.009 provides in pertinent part that a referendum petition must “[s]et forth, in  
3 not more than 200 words, a description of the effect of the...referendum if the ...referendum is  
4 approved by the voters.”

5           The Nevada Supreme Court has recognized that “this descriptive language is what  
6 appears directly above the signature lines, as registered voters decide the threshold issue of  
7 whether they even want the initiative placed on the ballot.” *Nevadans for Nevada v. Beers*, 122  
8 Nev. 930, 940, 142 P.3d 339, 346 (2006). Additionally, the court has explained that an accurate  
9 Description of Effect “is significant as a tool to help ‘prevent voter confusion and promote  
10 informed decisions.’” *Las Vegas Taxpayer Accountability Comm. v. City Council of City of Las*  
11 *Vegas*, 125 Nev. 165, 183, 208 P.3d 429, 441 (2009) (quoting *Beers*, 122 Nev. at 939, 142 P.3d  
12 at 345).

13           An accurate and complete Description of Effect is critical to ensuring “the people’s right  
14 to meaningfully engage in the initiative process.” *Beers*, 122 Nev. At 940, 142 P.3d at 345. A  
15 Description of Effect must “accurately identify the consequences of the referendum’s passage.”  
16 *Las Vegas Taxpayer Accountability Comm.*, 125 Nev. At 184, 208 P.3d at 441.  
17

18           While a Description of Effect need not explain hypothetical effects or mention every  
19 possible effect of the Referendum Petition, it “must be straightforward, succinct, and  
20 nonargumentative, and it must not be deceptive or misleading.” *Educ. Initiative PAC v. Comm.*  
21 *to Protect Nev. Jobs*, 129 Nev. Adv. Op. 5, 293 P.3d 874, 879 (2013).  
22

23           Here the description and effect provided is as follows:

24           This referendum asks voters to approve or disapprove of the selected provisions of  
25 Assembly Bill 321 (AB 321) related to changes in the election laws. In 2021 the  
Legislature enacted changes to election procedures n Nevada to require that each active  
registered voter automatically receive a mail ballot, to permit ballot harvesting and to

1 require mail ballots without a legible postmark received after the close of the polls be  
2 accepted as postmarked on or before the day of the election.

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

5 If the voters **disapprove this referendum**, then automatically sending mail ballots to all  
6 active registered voters, ballot harvesting, and allowing mail ballots without a postmark  
7 received after the election 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.

8  
9 The very purpose of the 200 words is to “accurately identify the consequences of  
10 the referendum’s passage.” *Las Vegas Taxpayer Accountability Comm., 125 Nev.*  
11 *165, 184, 208 P.3d 429, 441.* The description is succinct and straightforward and describes the  
12 effect of approval of same and meets the requirements of NRS 295.009(1)(b). Therefore,  
13 Plaintiff’s argument that the Description of Effect is confusing and conflates the effect the  
14 initiative is false and fails and should be disregarded.


#### 15 IV.

#### 16 **CONCLUSION**

17 Based on the above-mentioned points and authorities, Defendants respectfully request  
18 that this honorable court dismiss Plaintiff’s Complaint with prejudice.

19 Respectfully submitted this 11<sup>th</sup> day of April, 2022.

20  
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25 Attorney for Defendant-Intervenor

1 **CERTIFICATE OF MAILING**

2 I hereby Certify that on the 11<sup>th</sup> day of April, 2022, I personally served a true copy of the  
3 foregoing DEFENDANTS MOTION TO DISMISS by the Courts electronic service system  
4 pursuant to Administrative Order 14-2 to all registered parties:

5 */s/ Sigal Chattah*

6 

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An Agent of Chattah Law Group

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