

1 BRADLEY S. SCHRAGER, ESQ. (NSB 10217)
JOHN SAMBERG, ESQ. (NSB 10828)
2 ERIC LEVINRAD, ESQ. (*Admitted pro hac vice*)
DANIEL BRAVO, ESQ. (NSB 13078)
3 **WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP**
3773 Howard Hughes Parkway, Suite 590 South
4 Las Vegas, NV 89169
(702) 341-5200/Fax: (702) 341-5300
5 bschrager@wrslawyers.com
jsamberg@wrslawyers.com
6 dbravo@wrslawyers.com

7 WILLIAM STAFFORD, ESQ. (*Admitted pro hac vice*)
LINDSAY MCALEER, ESQ. (*Admitted pro hac vice*)
8 **ELIAS LAW GROUP LLP**
1700 Seventh Ave, Suite 2100
9 Seattle, WA 98101
(206) 656-0235/Fax: (202) 968-4498
10 bstafford@elias.law
lmcaleer@elias.law

11 *Attorneys for Plaintiff*

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

15
16 EMILY PERSAUD-ZAMORA, an individual,

17 Plaintiff,

18 vs.

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

21 Defendant,

22 and

23 R.I.S.E. Nevada – Restore Integrity in State
24 Elections PAC,

25 Intervenor-Defendant,

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Case No.: 22 OC 00071 1B

Dept. No.: I

**OPPOSITION TO MOTION TO
DISMISS COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF CHALLENGING
INITIATIVE PETITION S-05-2022**

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I. INTRODUCTION

The Court should deny the partial motion to dismiss filed by Intervenor-Defendant RISE Nevada (“Proponent”). Although Proponent concedes that Plaintiff’s description of effect challenge is properly before this Court, Proponent contends that Plaintiff’s unfunded mandate challenge to Initiative Petition S-05-2022 (“Petition”) is premature, arguing that it may only be properly raised after signatures are gathered and the Petition is certified by the Secretary of State pursuant to NRS 295.061(2).

Proponent’s argument is contrary to Nevada law, contrary to Nevada Supreme Court practice, and would undermine public policy. Proponent focuses on the fact that the unfunded mandated challenge, which arises under Article 19, Section 6 of the Nevada Constitution, is not among those expressly listed in NRS 295.061(1), which sets forth the timing and procedure for filing challenges to initiative and referendum petitions under Nevada’s statutory single-subject and description of effect rules. Because it is not listed in NRS 295.061(1), Proponent contends that an unfunded mandate challenge may only be brought in accordance with the procedural requirements in NRS 295.061(2), which governs challenges to the “legal sufficiency” of a Petition. But Proponent ignores that *also not expressly identified* in NRS 295.061(1) are several other types of challenges that Nevada courts have found to be ripe for review at the pre-election stage and not subject to NRS 295.061, including challenges to an initiative on the grounds that it improperly seeks to legislate administrative details, or that a proposed initiative is really a referendum. *See PEST Comm. v. Miller*, 648 F. Supp. 2d 1202, 1216 & n.7 (D. Nev. 2009), *aff’d*, 626 F.3d 1097 (9th Cir. 2010). As for Article 19, Section 6’s unfunded mandate requirement, the Nevada Supreme Court itself has previously held that compliance with it is a “threshold content restriction” that “is properly evaluated at the preelection stage,” *id.* at 890 n.38, 141 P.3d at 1233 (quoting *Rogers*, 117 Nev. at 173, 18 P.3d at 1036). Unlike the challenges described in NRS 295.061, the Legislature has not placed procedural limits on when an unfunded mandate challenge may be brought during the pre-election stage.

Consistent with this long-standing precedent, the Nevada Supreme Court has decided

1 several unfunded mandate challenges brought before the Secretary certified the petition, including
2 in decisions issued just a few weeks ago on June 28, 2022. *See Educ. Freedom PAC v. Reid*, 138
3 Nev. Adv. Op. 47 (2022); *Helton v. Nevada Voters First PAC*, 138 Nev. Adv. Op. 45 (2022).
4 Remarkably, Proponent’s motion does not even mention (much less grapple with) this history. The
5 Court should reject the motion to dismiss and find that Plaintiff’s challenge under Article 19,
6 Section 6 is both timely and ripe for review.

7 **II. LEGAL STANDARD**

8 A case is ripe for review when “the degree to which the harm alleged by the party seeking
9 review is sufficiently concrete, rather than remote or hypothetical, [and] yield[s] a justiciable
10 controversy.” *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 887-88, 141 P.3d 1224, 1230-31
11 (2006). Although the substantive constitutionality of a ballot initiative is generally not ripe for
12 review until the initiative is enacted, *see id.* at 884, 141 P.3d at 1229, the Nevada Supreme Court
13 has held that compliance with Article 19, Section 6’s appropriation or expenditure provision is a
14 “threshold content restriction” that “is properly evaluated at the preelection stage,” *id.* at 890 n.38,
15 141 P.3d at 1233 (quoting *Rogers v. Heller*, 117 Nev. 169, 173, 18 P.3d 1034, 1036 (2001)), and
16 has decided many such challenges brought at the same stage that Plaintiff’s challenge was filed.

17 **III. LEGAL ARGUMENT**

18 Plaintiff’s unfunded mandate challenge under Article 19, Section 6 is timely and ripe for
19 review. Proponent’s argument that Plaintiff’s challenge is premature should be rejected for
20 multiple reasons.

21 NRS 295.061 does not encompass an unfunded mandate challenge. *See PEST Comm. v.*
22 *Miller*, 648 F. Supp. 2d at 1216. In *PEST Committee v. Miller*, the federal court for the District of
23 Nevada directly addressed whether an unfunded mandate challenge is subject to NRS 295.061 and
24 concluded that it is not. *Id.* In that case, the court considered a challenge to Nevada’s single-subject
25 rule under the First Amendment. The court held that NRS 295.061 does not create a private right
26 of action because “private parties may bring nonsubstantive, pre-election challenges to initiatives
27 without NRS 295.061.” *Id.* It went on to list the multiple types of challenges that Nevada courts
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1 have heard outside of NRS 295.061, including that “an initiative requires an expenditure of money
2 without raising the necessary revenue” under Article 19, Section 6, and concluded that “NRS
3 295.061 encompasses none of these pre-election challenges.” *Id.* (citing *Herbst Gaming*, 141 P.3d
4 at 1233). Thus, the court explained, “Plaintiffs’ asserted interpretation—that NRS 295.061 creates
5 a private right of action—is inconsistent with the widespread practice in Nevada courts of hearing
6 pre-election challenges where no specific statute authorizes such challenges.” *Id.* at 1216–17.
7 Rather, NRS 295.061(1) “is a ‘procedural mechanism for asserting challenges to a measure based
8 on the single-subject requirement and the description of effect.’” *Id.* at 1217 (quoting *Las Vegas*
9 *Taxpayer Accountability Comm. v. City Council of the City of Las Vegas*, 125 Nev. 17, 208 P.3d
10 429, 438 (2009)).

11 And, indeed, Nevada courts, including the Nevada Supreme Court, have repeatedly
12 considered challenges brought against proposed petitions alleging that they amount to unfunded
13 mandates in violation of Article 19, Section 6 on the same timeline that Plaintiff proceeds under
14 here. These decisions include two decided by the Nevada Supreme Court as recently as just a few
15 weeks ago. On June 28, 2022, the Nevada Supreme Court reached the merits on two unfunded
16 mandate challenges during the signature gathering phase and *before* the Secretary certified the
17 petition as sufficient. *See, e.g., Educ. Freedom PAC*, 138 Nev. Adv. Op. 47 (invalidating petition
18 requiring an appropriation for education accounts without a reciprocal funding mechanism where
19 unfunded mandate challenge was raised in accordance with the timing set forth in NRS
20 295.061(1)); *Helton*, 138 Nev. Adv. Op. 45 (same timing for plaintiff’s challenge, although the
21 court declined to invalidate petition under Article 19, Section 6).

22 Ignoring this extensive precedent, Proponent contends that an unfunded mandate challenge
23 must relate to the “legal sufficiency” of the Petition pursuant to NRS 295.061(2) and thus may
24 only be raised *after* the Petition has been circulated for signatures and the Secretary of State has
25 certified the petition as sufficient. Mot. to Dismiss at 7.¹ Proponent is wrong. Even setting aside

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27 ¹ NRS 295.061(2) provides that “[t]he legal sufficiency of a petition for initiative . . . may be
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1 the discussion in *PEST Committee*, which properly found that NRS 295.061 does not provide the
2 exclusive procedural grounds for a pre-election challenge, an unfunded mandate claim challenges
3 a threshold content restriction on a Petition, not its “legal sufficiency” as used in NRS 295.061.
4 *See Herbst Gaming*, 122 Nev. at 886, 141 P.3d at 1230. The term is a term of art that refers to a
5 very specific aspect of the petition process, not—as Proponent seems to believe—a catch-all for
6 any challenge that is not based on the single subject or description of effect requirements.
7 Procedurally, after a petition is submitted with the county clerks, if the clerks determine that the
8 raw count of the total is 100 percent or more of the required number needed, the clerks verify the
9 signatures. *See* NRS 293.1278. Assuming that the petition contains enough signatures after the
10 clerks complete the statistical sampling of the signature verification process, the Secretary makes
11 a determination that the petition is “sufficient.” NRS 293.1277.

12 “Legal sufficiency” challenges accordingly relate to the Secretary’s sufficiency
13 determination, including whether enough valid signatures have been collected or if the clerk’s
14 verification sampling was proper. There is no basis for concluding that the term also encompasses
15 the threshold question of whether the Petition creates an unfunded mandate. Indeed, several other
16 pre-election challenges also fall outside of NRS 295.061, including challenges alleging an
17 initiative seeks to legislate administrative details, and an initiative petition is really a referendum.
18 *PEST Comm.*, 648 F. Supp. at 1216 (citations omitted). Further, as the district court recognized in
19 *PEST Committee*, nothing in NRS 295.061 indicates that the statute provides the *exclusive*
20 procedures for filing pre-election challenges. Its plain language addresses only three types of pre-
21 election challenges and there is no “catch all” language to capture other proper pre-election
22 challenges recognized by Nevada courts.

23 This also makes sense as a practical matter. Nothing about the Secretary’s certification of
24 a petition as sufficient makes an unfunded mandate challenge suddenly ripe for review. Indeed, it
25 is apparent on from the face of many Petitions, particularly this one, whether an expenditure or
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27 challenged by filing a complaint in district court not later than 7 days . . . after the petition is
28 certified as sufficient by the Secretary of State.”

1 appropriation would be required without reciprocal funding mechanism included. Whether
2 signatures have been properly tabulated and the Secretary made a proper sufficiency determination
3 are questions unrelated to funding for the Petition or the required expenditures. Moreover, the
4 Secretary's sufficiency determination cannot possibly be evaluated until after the signatures have
5 been gathered and the petitions submitted to the Secretary for this purpose. If anything, allowing
6 unfunded mandate challenges earlier improves the efficiency of the Petition process and avoids
7 wasting resources gathering signatures for a facially invalid Petition. Indeed, even if NRS 295.061
8 did restrict Plaintiff's ability to raise an unfunded mandate challenge prior to certification, the
9 remedy would be to dismiss Plaintiff's claim without prejudice, so that she can bring it at a later
10 date. That would be an extremely inefficient process, given that the threshold constitutional
11 violation is already evident from the face of the proposed Petition itself.

12 Plaintiff has appropriately raised her unfunded mandate challenge at the pre-election stage.
13 Nevada courts have characterized Article 19, Section 6's prohibition on initiatives that mandate
14 unfunded expenditures as a "threshold content restriction" that is ripe for review before the
15 initiative is placed on the ballot. *Herbst Gaming*, 122 Nev. at 890 n.38 (quoting *Rogers*, 117 Nev.
16 at 173, 18 P.3d at 1036). Because Plaintiff raised a description of effect challenge to the Petition
17 under NRS 295.061(2), she timely filed her Complaint within 15 days of when the Petition was
18 placed on file with the Secretary pursuant to NRS 295.015. Plaintiff brought her claim under
19 Article 16, Section 6 at the same time because no further evidence is required to show that the
20 Petition mandates an unfunded expenditure and it is more efficient for the Court to hear the
21 challenges together. Thus, this Court has jurisdiction to hear both of Plaintiff's pre-election
22 challenges to the Petition.

23 IV. CONCLUSION

24 For reasons discussed above, this Court has jurisdiction to hear Plaintiff's unfunded
25 mandate challenge and Proponent's Motion to Dismiss should be denied.
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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 8th day of July, 2022.

5 **WOLF, RIFKIN, SHAPIRO,**
6 **SCHULMAN & RABKIN, LLP**

7 By: 

8 BRADLEY S. SCHRAGER, ESQ. (NSB 10217)
9 JOHN SAMBERG, ESQ. (NSB 10828)
10 ERIC LEVINRAD, ESQ. (*Admitted pro hac vice*)
11 DANIEL BRAVO, ESQ. (NSB 13078)
12 3773 Howard Hughes Parkway, Suite 590 South
13 Las Vegas, Nevada 89169

14 WILLIAM STAFFORD, ESQ. (*Admitted pro hac vice*)
15 LINDSAY MCALEER, ESQ. (*Admitted pro hac vice*)
16 **ELIAS LAW GROUP LLP**
17 1700 Seventh Ave, Suite 2100
18 Seattle, WA 98101

19 *Attorneys for Plaintiff*

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 2022, a true and correct copy of the **OPPOSITION TO MOTION TO DISMISS COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF CHALLENGING INITIATIVE PETITION S-05-2022** was served upon all parties via electronic mailing to the following:

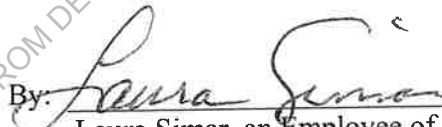
Craig A. Newby, Esq.
Laena St Jules, Esq.
OFFICE OF THE ATTORNEY GENERAL
555 E. Washington Avenue, Suite #3900
Las Vegas, NV 89101
CNewby@ag.nv.gov
LStJules@ag.nv.gov

Jeffrey F. Barr, Esq.
Michelle D. Alarie, Esq.
ARMSTRONG TEASDALE, LLP
3770 Howard Hughes Parkway, Suite 200
Las Vegas, Nevada 89169
jbarr@atllp.com
malarie@atllp.com

Attorney for Barbara Cegavske

*Attorneys for Intervenor-Defendant,
R.I.S.E Nevada – Restoring Integrity in
State Elections PAC*

Julie Harkleroad
Judicial Assistant to
Hon. Judge Maddox
JHarkleroad@carson.org

By: 
Laura Simar, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN &
RABKIN, LLP

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