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14
15 **IN THE FIRST JUDICIAL DISTRICT COURT**
16 **OF THE STATE OF NEVADA IN AND FOR CARSON CITY**

17 Jennifer Fleischmann, an individual,

18 Plaintiff,

19 vs.

20 FRANCISCO V. AGUILAR, in his official
21 capacity as NEVADA SECRETARY OF
STATE;

22 Defendant.
23

Case No.: 230c0016 10

Dept. No.: 7

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF
CHALLENGING INITIATIVE
PETITION C-02-2023**

24 Plaintiff Jennifer Fleischmann, an individual registered to vote in Nevada, by
25 and through her attorneys of record, submits this Memorandum of Points and
26 Authorities in support of her Complaint for Declaratory and Injunctive Relief
27 challenging Initiative Petition C-02-2023 as follows:
28

REC'D & FILED

2023 DEC -4 PM 2: 50

WILLIAM SCOTT HOEN
CLERK

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C. COOPER

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1 INTRODUCTION

2 Initiative Petition C-02-2023 (the “Petition”) seeks to amend Article II of the
3 Nevada Constitution to impose two significant changes to the state’s electoral system.
4 The first of the proposed new sections, Section 1B, would impose a photo-
5 identification requirement for in-person voting in Nevada, requiring each voter to
6 present one of the limited forms of government-issued photo identification approved
7 by the Petition in order to receive a ballot. *See Ex. 1.* The second new section, Section
8 1C, would mandate that a Nevadan who votes by mail include an identifying number
9 from one of several specified government sources with their mail-in ballot. *See id.* The
10 Petition also includes a brief 47-word description, stating in its entirety:

11 If passed, this initiative would amend the State Constitution to
12 require that all persons voting in person present an approved photo
13 identification before being provided a ballot. It also requires that
voters submitting a mail-in ballot provide additional verification of
their identity when completing their mail-in ballot.

14 *Id.* at 3. These two changes would make Nevada’s voter-identification laws among
15 the strictest in the country. *See Voter ID Laws*, NAT’L CONF. OF STATE
16 LEGISLATURES, <https://www.ncsl.org/elections-and-campaigns/voter-id> (Nov. 9,
17 2023).

18 The Petition is invalid because it violates two threshold requirements of
19 Nevada law. The Petition violates the unfunded-expenditure prohibition in Article
20 19, Section 6 of the Nevada Constitution because it requires the expenditure of state
21 money without providing for raising the necessary revenue. And the Petition’s
22 description of effect is legally deficient under NRS 295.009(1)(b) because it fails to
23 adequately explain the initiative and its main consequences.

24 The Court should therefore enjoin the Nevada Secretary of State (the
25 “Secretary”) from taking any further action on the Petition.
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27
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1 BACKGROUND

2 On November 8, 2023, David G. Gibbs, on behalf of the Repair the Vote political
3 action committee, filed the Petition with the Secretary. It seeks to amend Article II
4 of the Nevada Constitution to add two new voter-identification requirements.

5 *First*, Section 1B would require in-person voters to provide current
6 identification—or identification expired for no more than four years—in the form of
7 (1) a Nevada driver’s license; (2) a state or federal identification card, (3) an employee
8 photo-identification card issued by the federal, state, or local government; (4) a U.S.
9 passport; (5) a U.S. military identification card; (6) a student photo-identification
10 card issued by a Nevada public college, university, or technical school; (7) tribal photo
11 identification; (8) a Nevada concealed-firearms permit; or (9) some “[o]ther form of
12 government-issued photo identification that the Legislature may approve.” *See* Ex. 1
13 at 2. If a voter is 70 years old or older, different requirements apply: The identification
14 can be expired for any length of time.

15 Significantly, each of the accepted forms of photo identification generally
16 requires the payment of a fee to a government entity, and *none* is currently freely
17 available to every eligible Nevada voter. But for a voter identification requirement to
18 be constitutionally applied, free voter identification must be available to any voter
19 who wants it, so that no one is required to pay a government fee to vote. Making free
20 voter identification available to any Nevadan voter who wants it, however, would
21 necessarily require the expenditure of government funds. For this reason, prior
22 petitions seeking to implement voter identification in Nevada have expressly
23 recognized that some form of free identification would have to be made available to
24 Nevada voters. *See, e.g.*, Exs. 3–7 at 1; Ex. 8 at 3. These prior petitions have either
25 failed judicial scrutiny or been withdrawn: none has garnered sufficient support from
26 voters to reach the ballot. No doubt hoping to avoid that result, the instant Petition
27 tries to obfuscate the unavoidable need to expend money to provide free identification
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1 by referring to such identification only obliquely, as an unspecified “other form of
2 government-issued photo identification that the Legislature may approve.” Ex. 1 at
3 2. And the Petition provides no source of revenue to cover the necessary cost. The
4 Petition therefore violates both the constitutional prohibition on unfunded mandates
5 and the requirement that voters be expressly informed about the material aspects of
6 what they are voting for.

7 *Second*, Section 1C of the Petition would mandate that Nevadans who vote by
8 mail include an identifying number from one of several specified government sources
9 with their mail-in ballots. *See id.* The voter must include either the last four digits of
10 their Nevada driver’s license number or, if they do not have a Nevada driver’s license,
11 the last four digits of their Social Security number; if the voter has neither number,
12 then they must provide “the number provided by the county clerk when the voter
13 registered to vote.” *Id.* As this not currently a part of the requirements to have a ballot
14 counted in Nevada, it (along with the photo ID requirement in Section 1B) would
15 require significant voter outreach and education in order to ensure that voters are
16 aware of this significant change and are not disenfranchised as a result. It will also
17 require expenditures to significantly modify the materials that are now sent to mail
18 voters, including substantial revisions to the ballot envelope certificates to allow for
19 voters to provide this new information when they return their ballots.

20 The Secretary is required to post on its website a fiscal note explaining each
21 petition’s anticipated financial effect on state or local governments within 10 business
22 days of receiving the petition. NRS 295.015(4). As of the date of this filing, however,
23 the Financial Impact Statement for the Petition remains “pending”—and thus not
24 available—on the Secretary’s website. *See Ex. 2; see also 2024 Petitions & General*
25 *Election Ballot Questions*, NEV. SEC’Y OF STATE,
26 <https://www.nvsos.gov/sos/elections/2024-petitions> (Nov. 21, 2023). There have been
27 at least *five* previous financial impact statements posted on the Secretary’s website
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1 for similar initiatives proposing substantially identical voter-identification
2 requirements, however, and each acknowledged that such initiatives *would* impose
3 additional costs on state government. *See* Exs. 3–7.

4 LEGAL STANDARD

5 Nevada law allows challenges to an initiative petition where the description of
6 effect is deficient. *See* NRS 295.061. Similarly, Nevada courts have characterized
7 Article 19, Section 6’s prohibition on initiatives that mandate unfunded expenditures
8 as a “threshold content restriction” that “is properly evaluated at the preelection
9 stage.” *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 890 & n.38, 141 P.3d 1224, 1233
10 & n.38 (2006) (per curiam) (quoting *Rogers v. Heller*, 117 Nev.169, 173, 18 P.3d 1034,
11 1036 (2001) (per curiam)).

12 ARGUMENT

13 The Petition suffers from a central, fatal flaw: If enacted, it would require the
14 expenditure of government funds, but it provides no revenue source to cover these
15 new costs. The voter identification requirement *cannot* be implemented unless the
16 State appropriates funds to offer all Nevada voters free voter IDs that do not
17 currently exist, an unavoidable predicate that the Petition neither addresses nor
18 funds. And the Petition also ignores, and fails to fund, the significant voter education
19 and outreach efforts that would be necessary for the Petition’s implementation, as
20 well as changes that would need to be made to voting materials that do not currently
21 reflect these new requirements. Because the Petition does not specify the source of
22 funding for any of these necessary expenditures, or articulate these requirements (or
23 other critical features of the Petition) in its description of effect, it is fundamentally
24 deficient and cannot proceed to the electorate.

25 **I. The Petition unlawfully mandates an unfunded expenditure.**

26 Under Article 19, Section 6 of the Nevada Constitution, an initiative is
27 prohibited if it “makes an appropriation or otherwise requires the expenditure of
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1 money, unless [it] also imposes a sufficient tax, not prohibited by the Constitution, or
2 otherwise constitutionally provides for raising the necessary revenue.” Nevada courts
3 have therefore held that initiatives are void if they “creat[e] a new requirement for
4 the appropriation of state funding that does not now exist.” *Educ. Freedom PAC v.*
5 *Reid*, 512 P.3d 296, 303–04 (Nev. 2022). “[A]n initiative makes an appropriation or
6 expenditure when . . . the budgeting official must approve the appropriation or
7 expenditure, regardless of any other financial considerations.” *Herbst Gaming*, 122
8 Nev. at 890, 141 P.3d at 1233.

9 The Petition makes an appropriation under this standard because will require
10 the creation of a free form of voter identification, but it does not provide for raising
11 the revenue required to do so. Under the Petition, “[e]ach voter in Nevada shall
12 present photo identification to verify their identity when voting in person . . . before
13 being provided a ballot” and lists various forms of qualifying identification. Ex. 1 at
14 2. *None* of the types of identification that are expressly and specifically identified in
15 the Petition is currently available to every eligible voter without paying a fee to a
16 government entity. Consequently, absent additional government action and
17 expenditure to provide free qualifying identification to all voters, the photo-
18 identification requirement as proposed will require at least some Nevadans to pay a
19 government fee in order to exercise their right to vote. This is a quintessential poll
20 tax, one that the U.S. Supreme Court has rejected as unconstitutional. *See, e.g.,*
21 *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (opinion of Stevens,
22 J.). The only way to avoid this result would be for the Legislature to appropriate funds
23 needed to offer free voter identification to Nevadans. The Petition therefore requires
24 this appropriation, but fails to provide revenue to fund it.

25 Recognizing that voter-identification requirements cannot be implemented as
26 unlawful poll taxes, previous similar initiatives in Nevada have acknowledged that
27 the State must provide for free identification. *See* Exs. 3–6 at 1 (each requiring
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1 Legislature “to direct one or more government entities to issue, at no charge, a voter
2 identification card to a person who is registered to vote in Nevada and who does not
3 [] possess any other form of proof of identity that is specified within the Initiative”);
4 Ex. 7 at 1 (proposing to “require that the fee be waived for the issuance of a new or
5 replacement state identification card that is requested in order to comply with the
6 voting requirements specified in the Initiative”); Ex. 8 at 3 (directing Secretary “to
7 create a special photographic identification document for voting purposes” that would
8 be “issued upon request to any eligible voter in Nevada” as part of similar photo
9 identification initiative). And the financial impact statements for those initiatives
10 acknowledged that “[l]egislation requiring the issuance of voter identification cards
11 at no charge would increase the expenditures of the state and local government
12 entities required to issue the cards.” Exs. 3–6; *see also* Ex. 7 at 2 (“[T]he provisions of
13 the Initiative requiring the waiver of fees for new or replacement identification cards
14 issued in order to comply with the voting requirements specified in the Initiative
15 would result in a loss of fee revenue for the state.”).

16 Providing widespread access to free identification cards would be a significant
17 change: Nevada currently provides for fee exemptions for state identification *only*
18 when a person declares themselves homeless. *See Nevada Identification Cards*, NEV.
19 DEP’T OF MOTOR VEHICLES, <https://dmv.nv.gov/idcards.htm> (last visited Dec. 2, 2023)
20 (click “Fee Exemptions”). Even then, if the person is at least 25 years old, the fee
21 exemption only applies to *duplicate* state-identification cards, not originals. *Id.*¹

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24 ¹ A previous court ruling adjudicating a similar challenge to a voter-
25 identification petition rejected an unfunded-expenditure claim because “Nevada
26 already has a mechanism for free identification cards.” Findings of Fact &
27 Conclusions of Law at 7, *Persaud-Zamora v. Cegavske*, No. 22 OC 00022 1B (Nev. 1st
28 Jud. Dist. Ct. Apr. 26, 2022). This conclusion ignored that, at present, Nevada
provides free identification *only* in highly limited circumstances, and certainly does
not provide free identification to any eligible voter.

1 Thus, for the Petition to be implemented consistent with federal constitutional
2 requirements, it would necessarily require appropriations and expenditures to
3 significantly expand access to free state identification. The required expenditures
4 would be significant: a 2014 study issued by Harvard Law School concluded that,
5 “[w]hen aggregating the overall costs to individuals for ‘free’ IDs in all voter ID states,
6 plus the costs to state government for providing ‘free’ IDs, the expenses can
7 accumulate into the \$10s of millions per state.” Richard Sobel, *The High Cost of ‘Free’*
8 *Photo Voter Identification Cards*, CHARLES HAMILTON HOUSTON INST. FOR RACE &
9 JUST. 2 (June 2014), [https://hltproducton.wpengine.com/wp-content/uploads/2014/06/](https://hltproducton.wpengine.com/wp-content/uploads/2014/06/FullReportVoterIDJune20141.pdf)
10 [FullReportVoterIDJune20141.pdf](https://hltproducton.wpengine.com/wp-content/uploads/2014/06/FullReportVoterIDJune20141.pdf). Yet the Petition fails to account for these
11 necessary expenditures—it simply pretends they don’t exist.

12 The Petition attempts to get around this obvious problem by referring to the
13 necessary free identification requirement only obliquely—as an unidentified “other
14 form of government-issued photo identification that the Legislature may approve.”
15 Ex. 1 at 2. But the federal constitution requires that at least one other form of this
16 approved government-issued photo identification must be free to all Nevada voters.
17 And that will necessarily require a substantial outlay of government funds.

18 The Petition overlooks other necessary expenditures as well. Financial impact
19 statements for similar photo-identification initiatives have consistently
20 acknowledged that such initiatives would require extensive voter-education and
21 public-outreach campaigns, revised and additional election materials, and expanded
22 poll-worker training and wages, all of which “will increase expenditures of state
23 government and may increase expenditures of local government entities.” Exs. 3–6.
24 Additionally, the Petition’s mail-in ballot identification requirements would require
25 mail ballots and envelopes to be redesigned, automated signature verification
26 machines to be recalibrated, security and verification procedures to be developed, and
27 election officials to be trained on the new procedures, equipment, and software. *See*,

1 e.g., Ex. 7. Moreover, given that some voters might have registered to vote using
2 previous versions of the registration form or might have acquired or cancelled their
3 Nevada driver's license since they registered to vote, the new verification requirement
4 would necessitate an expensive information-gathering campaign on the part of the
5 State.

6 Each of these expenditures would be required by the Petition, whose measures
7 cannot be lawfully implemented without them. The Petition thus leaves "budgeting
8 officials no discretion in appropriating or expending the money mandated by the
9 initiative—the budgeting official must approve the appropriation or expenditure" to
10 comply with its provisions. *Herbst Gaming*, 122 Nev. at 890, 141 P.3d at 1233.
11 Because the Petition requires an appropriation and expenditure but does not
12 "provide[] for raising the necessary revenue" as Article 19, Section 6 requires, it is
13 void ab initio for unlawfully mandating an unfunded expenditure. *Rogers*, 117 Nev.
14 at 173, 18 P.3d at 1036.

15 **II. The Petition's description of effect omits critical details.**

16 The Petition also includes an unlawfully deficient description of its effects.
17 Under NRS 295.009(1)(b), initiative petitions must "set forth, in not more than 200
18 words, a description of the effect of the initiative or referendum if the initiative or
19 referendum is approved by the voters." The purpose of the description of effect is to
20 "prevent voter confusion and promote informed decisions." *Nevadans for Nev. v.*
21 *Beers*, 122 Nev. 930, 939, 142 P.3d 339, 345 (2006) (per curiam) (quoting *Campbell v.*
22 *Buckley*, 203 F.3d 738, 746 (10th Cir. 2000)). To achieve this end, "a description of
23 effect must identify what the law proposes and how it intends to achieve that
24 proposal." *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 42, 293
25 P.3d 874, 879 (2013). In doing so, it "must be straightforward, succinct, and
26 nonargumentative, and it must not be deceptive or misleading." *Id.* (cleaned up)
27 (quoting *Las Vegas Taxpayer Accountability Comm. v. City Council*, 125 Nev. 165,
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1 183, 208 P.3d 429, 441 (2009)). A description must also sufficiently “explain the[]
2 ramifications of the proposed amendment” to allow voters to make an informed
3 decision. *Nev. Judges Ass’n v. Lau*, 112 Nev. 51, 59, 910 P.2d 898, 903 (1996). While
4 the description need not explain *every* possible effect, it must at a minimum
5 accurately describe the main consequences of the initiative. *See, e.g., Las Vegas*
6 *Taxpayer Accountability Comm.*, 125 Nev. at 184, 208 P.3d at 441 (finding description
7 of effect materially misleading where it “materially fails to accurately identify the
8 consequences of the referendum’s passage”). Notably, this includes identifying “the
9 need for or nature of the revenue source” to fund the proposed initiative. *Educ.*
10 *Freedom PAC*, 512 P.3d at 304.

11 The Petition’s description, which is only 47 words long, simultaneously
12 includes several misstatements and omits other critical details. Most significantly, it
13 wholly ignores the need for additional revenue to fund the Petition’s necessary
14 expenditures described above. It does not even attempt to describe what forms of
15 photo identification would be acceptable under the Petition, and fails to mention that,
16 regardless of the Petition’s voter-identification requirements, voters can still obtain
17 a provisional ballot under federal law, *see* 52 U.S.C. § 21082—a requirement that
18 cannot be evaded, *see, e.g., Rolf Jensen & Assocs. v. Dist. Ct.*, 128 Nev. 441, 445, 282
19 P.3d 743, 746 (2012). Nor does the description mention that the Petition would set
20 differing rules for use of expired identification cards depending on an individual
21 voter’s age. *See* Ex. 1 at 2. The description also fails to explain what “additional
22 verification of their identity” voters must provide in order to have their mail-in ballot
23 counted. As a result of this requirement, many eligible voters could have their mail-
24 in ballots rejected because they fail to provide acceptable additional verification—a
25 material consideration that is omitted from the description.

26 As a result of any and all of these omissions and misstatements, the 47-word
27 description fails to sufficiently “identify what the law proposes and how it intends to
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1 achieve that proposal.” *Educ. Initiative PAC*, 129 Nev. at 42. The description is thus
2 legally deficient under NRS 295.009(1)(b).

3 CONCLUSION

4 Because the Petition mandates significant public expenditures without
5 providing for reciprocal revenues, it violates Article 19, Section 6 of the Nevada
6 Constitution and is void. And because the description of effect omits critical details
7 and is misleading, it is legally insufficient. The Court should therefore grant
8 Plaintiff’s requested relief, striking the Petition and issuing an injunction prohibiting
9 the Secretary from taking further action upon it.

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1 **AFFIRMATION**

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

4 DATED this 4th day of December, 2023.

5
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