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

12 ERIC JENG, an individual,
13 Plaintiff,

14 vs.

15 FRANCISCO V. AGUILAR, in his
16 official capacity as NEVADA
SECRETARY OF STATE,
17 Defendant,

18 and

19 Fair Maps Nevada,

20 Intervenor-Defendant.
21

Case No.: 23 OC 000137 IB

Dept. No.: II

**RESPONSE IN OPPOSITION TO
FAIR MAPS NEVADA'S MOTION
TO STRIKE A PORTION OF
PLAINTIFF'S REPLY PETITION
C-04-2023**

22 Plaintiff has been clear from the very start of this case that a central basis for
23 his claims is the First Judicial District Court's holding in a 2020 case that a 2019
24 petition materially identical to Initiative Petition C-04-2023 would "result in the
25 expenditure of state funds." That holding featured not only in Plaintiff's Complaint
26 but also his opening brief. Plaintiff had no reason to suspect that Fair Maps Nevada
27 would simply ignore that prior decision entirely and litigate this case as if the 2020
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1 decision had never happened. But when Fair Maps Nevada intervened and filed its
2 response brief, that is precisely what it did. It was completely appropriate for Plaintiff
3 to address that tactical decision by Fair Maps Nevada in Plaintiff's reply, including,
4 specifically, to make the point that issue preclusion bars Fair Maps Nevada's effort
5 to relitigate issues previously decided in the 2020 case. The Court should deny both
6 Fair Maps Nevada's motion to strike and its alternative request to file a (meritless)
7 sur-reply.

8 ARGUMENT

9 **A. The Court should deny the motion to strike.**

10 Plaintiff's Complaint and opening brief—filed simultaneously on December 7,
11 2023—rely repeatedly on the First Judicial District Court's decision in *Jackson v.*
12 *Fair Maps Nevada PAC*, No. 19-OC-00209 1B (1st Jud. Dist. Ct. Nev. Jan. 2, 2020),
13 *aff'd*, No. 80563 (Nev. July 24, 2020). Plaintiff attaches that decision as an exhibit,
14 cites it repeatedly, and argues that it compels the conclusion that the Petition
15 challenged here will require an expenditure of state funds for the same reason that
16 the materially identical petition challenged in *Jackson* did so. *See* Compl. ¶¶ 8–9, 17,
17 29; Pl.'s Mem. in Supp. of Compl. 3–4, 5, 9. Plaintiff does not directly use the term
18 “issue preclusion,” but that is because there was not—at that time—anyone or
19 anything to preclude. Fair Maps Nevada was not at that time a party to this case,
20 and there was no reason to believe that it or anyone else would make any arguments
21 inconsistent with the decision in *Jackson*.

22 That changed on December 26, when Fair Maps Nevada filed its responsive
23 brief after intervening in this case. Despite Plaintiff's repeated reliance on the
24 *Jackson* decision, Fair Maps Nevada chose to ignore that decision entirely and
25 pretend that whether the Petition requires an expenditure is a brand new, open
26 question. Fair Maps Nevada's Answering Brief at 3–6, 8.

27 Plaintiff was entitled to address and rebut Fair Maps Nevada's surprising
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1 approach in its reply, and that is just what Plaintiff did. Plaintiff's reply pointed out
2 that issue preclusion bars many of the arguments in Fair Maps Nevada's response
3 brief, which were a blatant attempt to relitigate whether the Petition will require an
4 expenditure of funds. See Pl.'s Reply at 2. Plaintiff raised this issue preclusion
5 argument in direct response to Fair Maps Nevada's contention that the Petition's
6 expenditure of funds was an unsettled matter. This was Plaintiff's first opportunity
7 to make that point: Plaintiff could not have argued that issue preclusion bars Fair
8 Maps Nevada's arguments before Fair Maps Nevada made them, in an opening brief
9 filed before Fair Maps Nevada was even a party to the case.

10 Plaintiff did nothing wrong in raising in his reply the preclusive effect of a
11 decision Plaintiff had repeatedly cited in his opening brief, to address arguments first
12 made in Fair Maps Nevada's response. None of the cases Fair Maps Nevada cites
13 addresses a similar circumstance. Several involve only the entirely separate rule that
14 an appellant may not raise a new claim of error in a reply brief on appeal. See *Phillips*
15 *v. Mercer*, 94 Nev. 279, 283, 579 P.2d 174, 176 (1978); *Blouin v. Blouin*, 67 Nev. 314,
16 317, 218 P.2d 937, 938 (1950); *Stump v. Gates*, 211 F.3d 527, 533 (10th Cir. 2000). All
17 but one of the rest involve *entirely new issues* raised for the first time in a reply. See
18 *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671 n. 7, 262 P.3d 705, 715 (2011)
19 (entirely new argument that damages were not ascertained); *Weaver v. State DMV*,
20 121 Nev. 494, 502, 117 P.3d 193, 198–99 (2005) (entirely new constitutional challenge
21 to statute at issue); *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (entirely new
22 privilege argument). That leaves *Knapp v. Miller*, 873 F. Supp. 375, 378 (D. Nev.
23 1994), which directly refutes Fair Maps Nevada's argument because it *did* consider
24 an argument from a reply, after explaining that it merely "refine[d]" the party's
25 original argument, rather than making an entirely new one. That is far closer to the
26 scenario here.

27 Plaintiff's issue preclusion argument is also consistent with First Judicial
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1 District Court Rule 3.9, because the argument is directly responsive to Fair Maps
2 Nevada’s arguments, in its response brief, that the Petition will not require the
3 expenditure of state funds. Rule 3.9 provides that “[t]he purpose of a reply is to rebut
4 facts, law, or argument *raised in the opposition.*” (emphasis added). Plaintiff’s reply
5 does exactly that. The Court should therefore deny the motion to strike.

6 **B. The Court should not allow Fair Maps Nevada to file a sur-reply.**

7 The Court should also deny Fair Maps Nevada’s alternative request to file a
8 sur-reply regarding the preclusive effect of the *Jackson* decision. Fair Maps Nevada
9 had every opportunity to address the effect and significance of *Jackson* in its response
10 brief, after Plaintiff repeatedly relied on that decision in his Complaint and opening
11 brief. Fair Maps Nevada made a clear, tactical decision to ignore *Jackson* instead.
12 There is no basis for rewarding Fair Maps Nevada with a second bite at the apple.

13 In any event, Fair Maps Nevada makes two arguments in the proposed sur-
14 reply, and both are meritless. First, the dismissal of Fair Maps Nevada’s cross-appeal
15 in *Jackson* as moot does not rob the district court’s decision of preclusive effect
16 because that dismissal came only after Fair Maps Nevada conceded the issue on
17 appeal. As *Personhood Nevada v. Bristol* explains, dismissal of an appeal as moot
18 eliminates a judgment’s preclusive effect only if the “appeal is dismissed as moot by
19 *no fault of the appellant.*” 126 Nev. 599, 605, 245 P.3d 572, 576 (2010) (emphasis
20 added). In *Jackson*, Fair Maps Nevada was directly responsible for the dismissal of
21 its cross-appeal as moot, because—as the Nevada Supreme Court explained—it never
22 pressed its cross-appeal or otherwise “indicated that it would prefer to proceed with
23 its original petition instead of its amended petition.” Compl. Ex. 4 at 2. Nothing in
24 *Personhood Nevada* allows a party to eliminate a preclusive judgment by mooting its
25 own appeal.

26 Second, it makes no difference that Plaintiff was not a party in *Jackson*,
27 because issue preclusion requires only that “the party *against whom the judgment is*
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1 asserted must have been a party” to the prior case. *Five Star Cap. Corp. v. Ruby*, 124
2 Nev. 1048, 1055, 194 P.3d 709, 713 (2008) (emphasis added). If the Supreme Court
3 wanted to require that *both parties* be the same for issue preclusion, it could easily
4 have said so in *Five Star*; indeed, it imposed that very requirement on the separate
5 doctrine of claim preclusion. *See id.* at 1054, 194 P.3d at 712–13 (holding that for
6 claim preclusion, “the parties or their privies [must be] the same”). Fair Maps Nevada
7 also relies on “pre-*Five Star* case law,” but the court in *Five Star* explains that there
8 was a “lack of clarity in [prior] caselaw regarding the factors relevant to determining
9 whether claim or issue preclusion apply,” and it therefore “establish[ed] clear tests
10 for making such determinations” going forward. *Id.* As Plaintiff explained in his
11 Reply, *Five Star*’s “clear test[]” for issue preclusion is satisfied here.

12 Finally, Fair Maps Nevada also attempts in its proposed sur-reply to belatedly
13 remedy its deficient description of effect by adding one sentence that explains “[t]he
14 existing and ongoing expense will be shifted to the Commission but will remain based
15 in the legislative branch.” Proposed Sur-Reply, Ex. A. But the proposed revision is
16 still deceptive and misleading because it describes merely a *shift* in expenditures, and
17 not the *additional* expenditures that *Jackson* held would be required to establish the
18 redistricting commission as a new government body. The proposed revision is also
19 deceptive and misleading because it fails to inform voters that the Petition will result
20 in mid-cycle redistricting that would replace maps the Legislature has already drawn.
21 The revised description of effect cannot, in any event, resolve the problem that the
22 Petition proposes an unfunded mandate in violation of Article 19, Section 6 of the
23 Nevada Constitution and is therefore invalid.

24 CONCLUSION

25 The Court should deny Fair Maps Nevada’s motion to strike and its alternative
26 motion for leave to file a sur-reply.

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 7th day of February, 2024.

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6
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 7th day of February, 2024, a true and correct copy
3 of the **RESPONSE IN OPPOSITION TO FAIR MAPS NEVADA'S MOTION TO**
4 **STRIKE A PORTION OF PLAINTIFF'S REPLY PETITION C-04-2023** was
5 served upon all parties via electronic mailing to the following:
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