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2024 FEB 21 PM 12:01

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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
18 individual,
19
20 Plaintiff,

21 vs.

22 FRANCISCO V. AGUILAR, in his
23 official capacity as NEVADA
24 SECRETARY OF STATE,
25 Defendant,

26 vs.

27 REPAIR THE VOTE, a Nevada political
28 action committee,
Intervenor-Defendant.

Case No.: 23 OC 00136 1B

Dept. No.: 2

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

✓

1 Unable to defend Initiative Petition C-02-2023 (the “Petition”) on the merits,
2 Intervenor-Defendant Repair the Vote attempts to shield it from any challenge on the
3 ground that a different plaintiff challenged a different petition two years ago. But
4 those arguments fail. NRS 295.061(3) applies only to bar seriatim challenges to a
5 single petition during a single signature-gathering cycle. And both issue and claim
6 preclusion apply only against parties to the prior case and their privies, not to those,
7 like Plaintiff, who have no relationship with the parties in the prior case.

8 The merits of Plaintiff’s challenge are therefore properly before the Court. And
9 Repair the Vote has no adequate answer. Repair the Vote does not deny, because it
10 cannot deny, that to enforce the Petition without imposing a poll tax in violation of
11 the federal Constitution, the Legislature would have no choice but to appropriate
12 funds to provide free identification cards to Nevada voters who need them. The
13 Petition therefore requires an appropriation without raising revenue, in violation of
14 Article 19, Section 6. And Repair the Vote likewise has no adequate explanation for
15 the description of effect’s failure to include even basic information about “what the
16 law proposes and how it intends to achieve that proposal.” *Educ. Initiative PAC v.*
17 *Comm. to Protect Nev. Jobs*, 129 Nev. 35, 42, 293 P.3d 874, 879 (2013).

18 The Court should therefore hold the Petition unlawful and enjoin the Secretary
19 of State from taking further action upon it.

20 ARGUMENT

21 Repair the Vote invokes three doctrines in an attempt to prevent any judicial
22 review of the Petition: NRS 295.061, res judicata, and collateral estoppel. Responding
23 Br. (“Resp.”) at 3–6. None apply. And on the merits, the Petition unlawfully requires
24 a government expenditure without raising revenue and contains an unlawfully
25 deficient description of effect.

26 I. **NRS 295.061(3) does not bar Plaintiff’s claims.**

27 NRS 295.061(3) does not bar Plaintiff’s claims because the Petition is a new
28 petition, newly filed with the Secretary of State in November of last year. Its

1 description of effect has therefore never been “challenged successfully” much less
2 “amended in compliance with the order of the court.” NRS 295.061(3). Rather, the
3 description of effect that Plaintiff challenges is the original description of effect that
4 has been included with the Petition ever since it was filed with the Secretary in
5 November.

6 Repair the Vote’s contrary argument assumes without any basis that because
7 the substance of the Petition is identical to the 2022 Petition, the Petition’s
8 description of effect is shielded from challenge for the same reason that the 2022
9 Petition’s amended description was shielded. But that is not what NRS 295.061(3)
10 says. Rather, the protection NRS 295.061(3) provides applies only to “the amended
11 description” of “an initiative or referendum” that has its description of effect
12 “amended in compliance with the order of the court.” And that is consistent with the
13 evident purpose of NRS 295.061(3), which is to prevent seriatim challenges to a
14 description of effect within a single signature-gathering period. Nothing in NRS
15 295.061(3) allows a new petition filed two years later to benefit from its protection.
16 And even if NRS 295.061(3) did apply, by the statute’s plain terms it would at most
17 bar Plaintiff’s challenge to the description of effect and would not affect Plaintiff’s
18 Article 19, Section 6 challenge.

19 **II. Neither issue nor claim preclusion bars Plaintiff’s claims.**

20 Repair the Vote also relies on claim and issue preclusion, but neither applies
21 for a simple reason: Plaintiff was not a party to the case challenging the 2022 Petition.
22 Claim preclusion applies only where “the same parties or their privies are involved
23 in both cases,” while issue preclusion applies only if “the party against whom the
24 judgment is asserted [was] a party or in privity with a party to the prior litigation.”
25 *Five Star Cap. Corp. v. Ruby*, 124 Nev. 1048, 1055, 1056-57, 194 P.3d 709, 713,714
26 (2008) (quoting *Univ. of Nev. v. Tarkanian*, 110 Nev. 581, 598, 879 P.2d 1180, 1191
27 (1994)).

1 There is no privity between Plaintiff here and the plaintiff in the 2022 case
2 because Repair the Vote makes no showing of any relationship whatsoever between
3 them. A finding of privity under Nevada law requires a “*relationship between the*
4 *parties* [that] is sufficiently close to supply preclusion.” *Mendenhall v. Tassinari*, 133
5 Nev. 614, 618, 403 P.3d 364, 369 (2017) (emphasis added; quotation marks omitted).
6 That some of the same lawyers who now represent Plaintiff also represented the
7 plaintiff in the 2022 case, and made similar arguments, is not enough. *See Metro*
8 *Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 848 & n.6 (9th Cir. 1996) (“The fact that
9 [parties] shared a common attorney and argued similar theories of liability is not
10 sufficient to demonstrate privity between the two parties.”)

11 Repair the Vote’s argument for privity relies entirely on a line of cases from
12 Washington State holding that all voters who sue “on behalf of the body politic
13 generally” are in privity with each other, because they supposedly all represent “the
14 same legal interests as all citizens of the state.” *In re Coday*, 156 Wash. 2d 485, 501,
15 130 P.3d 809, 817 (Wash. 2006). Nevada courts have never adopted that rule. To the
16 contrary, in the one (unpublished) Nevada case citing *Coday*, the Nevada Supreme
17 Court relied on direct evidence of a close relationship between parties—that the
18 challengers in the new case were presidential electors nominated and selected by a
19 party to the old case—to establish privity. *Law v. Whitmer*, No. 82178, 2020 WL
20 7240299, at *16 (Nev. Dec. 8, 2020) (unpublished disposition). Repair the Vote
21 identifies no such close relationship here. It has thus made no showing of privity, so
22 neither issue nor claim preclusion bars Plaintiff’s claims.

23 **III. The Petition contains an unfunded mandate.**

24 On the merits, Repair the Vote has no adequate answer to Plaintiff’s showing
25 that the Petition contains an unfunded mandate in violation of Article 19, Section 6,
26 because it will, as a matter of federal constitutional law, inevitably require the State
27 to expend money to expand the availability of free identification cards. *See Crawford*
28 *v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (op. of Stevens, J.). The issue

1 is not whether the Petition fails to “meet federal constitutional requirements,” as
2 Repair the Vote would have it, Resp. Br. 8:4–5, because the Legislature could easily
3 comply with both the Petition and the U.S. Constitution. The problem is that the
4 Legislature can do so *only by appropriating funds* to provide free identification
5 cards—funds for which the Petition does not raise any revenue. The Petition therefore
6 would require the Legislature to make an appropriation just as surely as if it said so
7 expressly, because that would be the only way for legislators to comply with both the
8 Nevada and United State constitutions, as they are duty bound to do. *See Nev. Const.*
9 *Art. 15, Section 2.* The Petition violates Article 19, Section 6 by imposing that
10 requirement on legislators without raising offsetting revenue.

11 Contrary to the court’s conclusion in the 2022 case, Nevada’s existing free
12 identification card program does not resolve this issue, because it provides free
13 original identification cards only to homeless youth. Mem. at 7; *see NRS 483.825(4).*
14 Most voters are therefore ineligible. The federal government’s passport fee waiver
15 program for indigent Americans similarly does not provide free identification to all
16 who need it. Resp. Ex. D. And it makes no difference that others might be able to
17 afford the fee, because poll taxes are unconstitutional “whether the citizen, otherwise
18 qualified to vote, has \$1.50 in his pocket or nothing at all, pays the fee or fails to pay
19 it.” *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966).

20 Moreover, the Court need not take Plaintiff’s word for it that a voter
21 identification requirement would demand expenditures, because the Secretary of
22 State has reached the same conclusion in five past financial impact statements for
23 related initiatives. Mem. at 6–7. Repair the Vote dismisses these statements because
24 they involved somewhat different petitions, but they confirm Plaintiff’s argument
25 that the Petition, by imposing a strict voter identification requirement, would
26 necessarily require an expenditure of state funds. This is why every financial impact
27 statement for photo identification initiatives has acknowledged that they “would
28 increase the expenditures of the state and local government entities[.]” *See Mem. at*

1 7 (quoting Exs. 3–7). The statements also confirm that the Petition’s mail-in ballot
2 identification requirement would involve far more than merely changing the form,
3 Resp. 8; as a past financial impact statement stated, implementing such a
4 requirement would require “systematic changes” to election procedures including
5 “security features[.]” Ex. 7. Such changes would undoubtedly require *some*
6 government expense.

7 **IV. The Petition’s description of effect is inadequate.**

8 Finally, the Petition’s description of effect is also legally inadequate for similar
9 reasons. It does not mention that the Petition would require an expenditure of funds.
10 It does not specify what forms of identification would be accepted, nor explain that
11 this varies depending on the voter’s age. And it does not specify what “additional
12 verification of” identity would be required for mail ballots. It therefore provides far
13 too little information to allow voters to understand “what the law proposes and how
14 it intends to achieve that proposal,” as Nevada law requires. *Educ. Initiative PAC*,
15 129 Nev. at 42, 293 P.3d at 879.

16 **CONCLUSION**

17 For the reasons discussed, the Petition is legally deficient. Plaintiff’s requested
18 relief should be granted.

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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 16th day of February, 2024.

5 **BRAVO SCHRAGER LLP**

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1 CERTIFICATE OF SERVICE

2 I hereby certify that on this 16th day of February, 2024, I served the foregoing
3 **REPLY IN SUPPORT OF MEMORANDUM OF POINTS AND AUTHORITIES**
4 **IN SUPPORT OF COMPLAINT FOR DECLARATORY AND INJUNCTIVE**
5 **RELIEF CHALLENGING INITIATIVE PETITION C-02-2023** via electronic
6 mail, per the January 31, 2024, Stipulation and Scheduling Order of the Court, as
7 follows:

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