

In the
Supreme Court of the State of Nevada

JENNIFER FLEISCHMANN, an individual,

Appellant,

vs.

REPAIR THE VOTE PAC, a political action committee; and FRANCISCO V. AGUILAR, in his official capacity as NEVADA SECRETARY OF STATE,

Respondents.

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APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed.

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Dated this 29th day of March, 2024.

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INTRODUCTION

Petition C-02-2023 asks the people of Nevada to impose a strict new photo-identification requirement for voting that, under federal constitutional law, could be enforced only if Nevada also expends substantial funds to make free qualifying identification available to every voter who needs it. Yet the Petition does not raise any revenue to cover that significant required expenditure, and it carefully declines to mention that expenditure and other significant consequences of the Petition in the description of effect. The Petition therefore violates Article 19, Section 6 of the Nevada Constitution and contains a deficient description of effect in violation of NRS 295.009(1).

In holding otherwise, the district court mischaracterized Plaintiff-Appellant Jennifer Fleischmann's challenge as a substantive, federal constitutional challenge to the Petition. But Ms. Fleischmann's argument is *not* that the Petition cannot constitutionally be enforced, but rather that it can be enforced if, and only if, the Legislature appropriates funds to pay for free identification cards for every voter who needs one. The Petition therefore requires that appropriation just as surely as if it expressly mandated it.

The district court also wrongly refused to address the substantial problems with the description of effect, which uses less than a quarter of the available words and entirely fails to describe the *effects* of the Petition, as NRS 295.009(1) requires. It therefore leaves potential signatories to guess at the Petition's significant effects on the State's budget and voters'—including their own—ability to vote.

The Court should reverse.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to NRAP 3A(b)(1) because it is an appeal from a final order resolving all claims presented to the district court, and pursuant to NRAP 3A(b)(3) because it is an appeal granting an injunction. The final order was entered on March 6, 2024. Notice of entry of the order and the notice of appeal were filed on March 11, 2024. This appeal is timely because it was filed within 30 days after the entry of the final judgment as NRAP 4(a)(1) requires.

ROUTING STATEMENT

This case is presumptively retained by this Court pursuant to NRAP 17(a)(2) because it is a case involving a ballot or election issue.

ISSUES PRESENTED FOR REVIEW

1. Whether the Petition contains an unfunded mandate in violation of Article 19, Section 6 of the Nevada Constitution, where its adoption will require the provision of free voter identification at state expense to be in compliance with federal law and where it does not raise any revenue to fund the provision of such identification.

2. Whether the Petition's description of effect satisfies NRS 295.009(1)(b), where the description fails to describe the budgetary consequences and other substantial effects of the Petition.

3. Whether the district court abused its discretion when it declined to preclude Ms. Fleischmann from challenging the Petition because a different person with whom Ms. Fleishmann has no relationship unsuccessfully challenged a substantively identical petition in 2022, in a case to which Ms. Fleishmann was not a party.

STATEMENT OF THE CASE

David G. Gibbs filed Petition C-02-2023 on November 8, 2023, on behalf of Repair the Vote. The Petition seeks to amend Article 2 of the Nevada Constitution to impose new voter-identification requirements, mandating that in-person voters show one of a short list of photo

identification cards in order to vote and that absentee voters include an identification number on their absentee ballot envelope. JA0015.

On December 4, 2023, Plaintiff-Appellant Jennifer Fleischmann filed a complaint and legal memorandum challenging the Petition against the Secretary of State in the First Judicial District Court, claiming that (1) the Petition contains an unfunded mandate in violation of Article 19, Section 6, JA0003–09; and (2) the Petition’s description of effect is inadequate in violation of NRS 295.009(1)(b), JA0009–11. The complaint sought declaratory and injunctive relief barring the Secretary of State from taking further action on the Petition. JA0011–12.

On January 31, 2024, Repair the Vote intervened to defend the Petition. JA0073. Repair the Vote filed a responding brief on February 9, which was docketed on February 13, JA0080–0126, and Ms. Fleischmann filed a reply on February 16, which was docketed on February 21, JA0127–34. At a hearing on February 26, Senior Judge Maddox orally denied Ms. Fleischmann’s request for declaratory and injunctive relief. JA0156. The district court issued its written order on March 6, 2024. JA0171–77. This appeal immediately followed. JA0189–90.

STATEMENT OF FACTS

Under current Nevada law, voters' identities are verified primarily through signature matching: whether a voter votes in person or by mail, an election worker compares their signature to the one on their voter registration application or on some other form of identification. NRS 293.277, 293.269927. The Petition seeks to change that by adding two new sections to Article 2 of the Nevada Constitution, which would impose strict new identification requirements on in-person and mail voting.

The first new section, Section 1B, would require for the first time that all in-person voters present one of a limited set of government-issued photo identification documents before receiving a ballot. JA0015. The accepted forms of identification would be limited to: (1) a Nevada driver's license; (2) a state or federal identification card; (3) an employee photo-identification card issued by the federal, state, or local government; (4) a U.S. passport; (5) a U.S. military identification card; (6) a student photo-identification card issued by a Nevada public college, university, or technical school; (7) tribal photo identification; (8) a Nevada concealed-firearms permit; or (9) some "[o]ther form of government-issued photo identification that the Legislature may approve." *Id.* For voters under 70

years old, the photo identification would have to be current or expired for no more than four years. *Id.* Voters who are 70 years of age or older would be able to use identification that has been expired for any length of time. *Id.*

The second new section, Section 1C, would mandate that Nevadans who vote by mail include an identifying number from one of several specified government sources along with their signature on their mail-in ballot envelope. *Id.* A mail voter must include either the last four digits of their Nevada driver's license number or, if they do not have a Nevada driver's license, the last four digits of their Social Security number. *Id.* If the voter has neither number, then they must specify "the number provided by the county clerk when the voter registered to vote." *Id.*

The Petition's 47-word description of effect states, in full:

If passed, this initiative would amend the State Constitution to require that all persons voting in person present an approved photo 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.

JA0016.

The Petition represents the second time that Repair the Vote has sought signatures on a petition to impose these new requirements. Two

years ago, in 2022, Repair the Vote sponsored a substantively similar petition, No. 03-2022. JA0110–14. A different plaintiff, Emily Persaud-Zamora, challenged the 2022 petition for having an unlawful description of effect and for violating Article 19, Section 6’s unfunded mandate prohibition. JA0100–01. That case, too, was assigned to Senior Judge Maddox, and he largely rejected Ms. Persaud-Zamora’s challenge in a late-April 2022 order. JA0100–07. Ms. Persaud-Zamora did not appeal, but the 2022 petition failed when Repair the Vote did not submit adequate signatures by the statutory deadline.

SUMMARY OF THE ARGUMENT

The Petition imposes an unfunded mandate in violation of Article 19, Section 6, and it contains a deficient description of effect in violation of NRS 295.009(1). For both reasons, the Court should reverse the district court and enjoin the Secretary of State from taking further action on the Petition.

First, the Petition imposes an unfunded mandate in violation of Article 19, Section 6. The federal constitutional bar on poll taxes precludes states from imposing voter identification requirements if they do not make qualifying identification available to all voters who need it

without charge. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (op. of Stevens, J.). But none of the accepted forms of identification in the Petition is generally available free of charge. The adoption of the Petition would therefore force the Legislature to expend additional funds to make qualifying identification available to every voter who needs it without charge. The Petition violates Article 19, Section 6 because it raises no new revenue to cover that required expenditure.

Contrary to the district court's conclusion, this is not a substantive challenge to the Petition's constitutionality. The problem is not that the Petition cannot constitutionally be enforced, but rather that it can be enforced *only if* the Legislature appropriates funds for free identification. Because the Legislature is duty bound to comply with both the Nevada and the U.S. Constitution, Nev. Const. art. 15, § 2, if the Petition is adopted, the Legislature will therefore be obligated to appropriate those funds—precisely what Article 19, Section 6 prohibits in the absence of new revenue. Article 19, Section 6's prohibition on unfunded mandates cannot be evaded simply by failing to mention the required funding in the Petition.

Second, the Petition's 47-word description of effect is unlawful because it provides only an extremely high-level overview of the direct requirements that the Petition would impose, while saying nothing about the Petition's *effects*, including the state expenditures that would be required and the fact that voters without qualifying identification would need to obtain such identification in order to vote in person. Moreover, because the description does not say what forms of identification are acceptable under the Petition, nor how voters must provide additional verification of identity when voting by mail, the description does not allow voters to assess the practical effect of the Petition on their own ability to vote and on the voting rights of others. And contrary to Repair the Vote's argument below, NRS 295.061(3) does not bar Ms. Fleischmann's challenge to the description of effect because the Petition is a new petition that has not previously been challenged, even though it is substantively the same as a petition proposed two years ago that failed to attract sufficient signatures.

Third, the district court properly declined to preclude Ms. Fleishmann from challenging the Petition. A different plaintiff unsuccessfully challenged a substantively identical petition that Repair

the Vote sponsored two years ago and did not appeal. But Ms. Fleishmann was not a party to that challenge and has no relationship with anyone who was, so that prior challenge has no preclusive effect here. And regardless, the district court properly exercised its discretion to decline to apply preclusion.

STANDARD OF REVIEW

This case turns on the proper interpretation of NRS 295.009; Article 19, Section 6 of the Nevada Constitution; and the Petition. “Questions of law, including questions of constitutional interpretation and statutory construction, are reviewed de novo.” *Peck v. Zipf*, 133 Nev. 890, 892, 407 P.3d 775, 778 (2017) (cleaned up); *see also Helton v. Nev. Voters First PAC*, 138 Nev. Adv. Op. 45, 512 P.3d 309, 313 (2022) (applying de novo review to petition challenge). Review of issue and claim preclusion determinations is subject to a mixed standard of review: the Court reviews *de novo* whether preclusion is available, but “the actual decision to apply it is left to the discretion of the district court.” *State, Univ. & Comm. Coll. Sys. v. Sutton*, 120 Nev. 972, 984, 103 P.3d 8, 16 (2004).

ARGUMENT

I. The Petition imposes an unfunded mandate because its adoption would require Nevada to provide free voter identification.

The Petition violates Article 19, Section 6 of the Nevada Constitution because its adoption would require the State to expend funds to make free voter identification generally available, but it raises no offsetting revenue.

A. Article 19, Section 6 bars implicit unfunded mandates, not just express ones.

Article 19, Section 6 prohibits any petition that “makes an appropriation or otherwise requires the expenditure of money, unless [it] also imposes a sufficient tax, not prohibited by the Constitution, or otherwise constitutionally provides for raising the necessary revenue.” Nev. Const. art. 19, § 6. This prohibition applies to constitutional and statutory initiatives alike. *Educ. Freedom PAC v. Reid*, 138 Nev. Adv. Op. 47, 512 P.3d 296, 303 (2022). It serves to prevent initiative proponents from “creat[ing] a hole in the state’s budget” that the Legislature will have to fill, while requiring the people to consider and provide for the cost of their proposals. *Id.* at 302–03.

In rejecting Ms. Fleischmann’s unfunded mandate claim, the district court focused exclusively on the express text of the Petition, reasoning that “nothing in the text of the Initiative would require a Nevada official to appropriate funds to [sic], or to expend new funds.” JA0175. But Article 19, Section 6’s bar on unfunded mandates is not limited to *express* expenditure requirements. Rather, a petition violates Article 19, Section 6 if it either “explicitly [or *implicitly* compels an appropriation or expenditure” without raising revenue. *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 891, 141 P.3d 1224, 1233 (2006) (emphasis added). The fact that an initiative “does not include any *explicit* expenditure or appropriation” is no defense. *Reid*, 138 Nev. Adv. Op. 47, 512 P.3d at 303 (emphasis added). It is enough that “the budgeting official must approve the appropriation or expenditure, regardless of any other financial considerations,” *Herbst Gaming*, 122 Nev. at 890, 141 P.3d at 1233, even if “the initiative leaves it up to the Legislature to determine how to fund the proposed change,” *Reid*, 138 Nev. Adv. Op. 47, 512 P.3d at 303.

Barring both implicit and express unfunded mandates is consistent with Article 19, Section 6’s important policy purpose. If a petition will

invariably require the expenditure of state funds, then it makes little difference whether it says so directly or imposes the requirement indirectly. Either way, the adoption would “create a hole in the state’s budget” that the people should have to consider and that the Legislature would have to fill. *Id.* at 302–03. If anything, an implicit unfunded mandate is *worse*, because it makes it more likely that voters will “ignore completely the cost of what they are proposing” when the required expenditure is hidden and does not appear anywhere on the face of the petition. *Id.* at 302 (quoting Hearing on S.J.R. 1 Before the S. Judiciary Comm., 55th Leg. (Nev., Feb. 18, 1971) (statement of Senator James I. Gibson)).

The district court therefore erred in asking only whether the Petition *expressly* mandates an expenditure. It should have considered the implicit effects of the Petition as well.

B. The Petition could be implemented and enforced only by providing free identification to all who want it.

The consideration of implicitly mandated expenditures is critical, because the Petition includes a big one: its enforcement would, as a matter of federal constitutional law, require Nevada to provide free identification cards to all voters who need one.

Under the Twenty-Fourth Amendment, “no State [may] condition the federal franchise upon payment of a poll tax,” nor impose any “material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax.” *Harmon v. Forssenius*, 380 U.S. 528, 540–41 (1965). The Equal Protection Clause imposes a similar prohibition in state elections: a state violates the Clause “whenever it makes the affluence of the voter or payment of any fee an electoral standard.” *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966). This is true “whether the citizen, otherwise qualified to vote, has [the funds to pay] or nothing at all, pays the fee or fails to pay it.” *Id.* at 668.

As the Supreme Court explained in *Crawford*, voter identification requirements run afoul of the poll-tax prohibition if the state charges a fee for the issuance of an acceptable identification card, even if many voters already have one: “The fact that most voters already possess a valid driver’s license, or some other form of acceptable identification, would not save the statute under our reasoning in *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification.” *Crawford*, 553 U.S. at 198 (op. of Stevens, J.); see also *id.* at 211–16

(Souter, J., dissenting) (arguing that even incidental costs like travel time and fees for underlying documents render voter identification requirements unconstitutional); *id.* at 239 (Breyer, J., dissenting) (similar). For this reason, states with mandatory voter identification requirements invariably make free identification cards available to all voters who need them.¹ And when Idaho recently enacted a mandatory

¹ See, e.g., *Ga. Voter Identification Requirements*, GA. SEC'Y OF STATE, <https://sos.ga.gov/page/georgia-voter-identification-requirements> (last visited Mar. 28, 2024) (“Georgia law requires photo identification when voting If you do not have one of the six acceptable forms of photo ID, the State of Georgia offers a free ID card.”); Ind. Code § 3-5-2-40.5; *Identification Cards*, IND. BUREAU OF MOTOR VEHICLES, <https://www.in.gov/bmv/licenses-permits-ids/learners-permits-and-drivers-licenses-overview/identification-cards/> (last visited Mar. 28, 2024) (click “What is the fee for an identification card?”) (“A free ID card may be issued if you are at least 18 years old, a United States citizen, and you are eligible to vote.”); Kan Stat. § 25-2908; *Photo ID*, KANSAS SEC'Y OF STATE, <https://sos.ks.gov/elections/photo-id.html> (last visited Mar. 28, 2024) (“Registered voters who do not have an approved government-issued photo ID and would like one to vote may apply for a free nondriver identification card with the Kansas Division of Motor Vehicles.”); La. RS 40:1321(C) (“[T]his fee shall be waived for . . . [a]ny person who does not have a Louisiana driver’s license, upon presentation of his voter registration card or certificate.”); N.C.G.S. 163-166.16; *State IDs*, N.C. DMV, <https://www.ncdot.gov/dmv/license-id/identification/Pages/default.aspx> (last visited Mar. 28, 2024) (offering no-fee ID cards to North Carolina residents who are at least 17 years old); N.D. Cent. Code § 16.1-01-04.1; *ID Card Requirements*, N.D. DEP'T OF TRANSP., <https://www.dot.nd.gov/driver/id-card-requirements> (last visited Mar. 28, 2024) (no fee for those at least 18 years old); SC Code §

voter identification law that did *not* include free identification for everyone due to an eligibility limitation, it was forced to repeal that limitation after being sued for imposing an unconstitutional poll tax. *See March for Our Lives Idaho v. McGrane*, No. 1:23-cv-00107, 2023 WL 6623631, at *2 (D. Idaho Oct. 11, 2023) (describing plaintiffs’ poll-tax claim); H.B. 532 § 1, 67th Leg., 2d Reg. Sess. (Idaho 2024) (to be codified at Idaho Code § 49-2444) (repealing the challenged limitation).

If the Petition is adopted, then Nevada, too, will need to make free voter identification available to all voters for the first time. Under the Petition, “[e]ach voter in Nevada shall present photo identification to verify their identity when voting in person . . . before being provided a ballot,” and only certain forms of photo identification are accepted. JA0015. And none of the accepted types of identification is currently available to every eligible voter without paying a government fee: Nevada

7-13-710 (2022); *Identification Cards*, SCDMV, <https://www.scdmvonline.com/Driver-Services/Identification-Cards> (last visited Mar. 28, 2024) (“Original ID cards and renewals are free for people who are 17-years-old or older.”); Wis. Stat. § 6.79; *Wisconsin ID card for voting purposes - petition process (IDPP)*, WISC. DEPT OF TRANSP., <https://wisconsin.gov/Pages/dmv/license-drvs/how-to-apply/petition-process.aspx> (last visited Mar. 28, 2024) (“Getting a free ID for Voting is easy even if you do not have the documentation to get a regular Wisconsin ID!”).

charges fees for the issuance of drivers' licenses, non-driver identification cards, and concealed gun permits, *Driver's License and ID Card Fees*, NEV. DMV, <https://dmv.nv.gov/dlfees.htm> (last visited Mar. 28, 2024); NAC 202.020(2)(a)–(b)²; the federal government charges fees for passports, *see* 22 CFR § 22.1³; and the remaining accepted forms of identification—government employee identification, public university student identification, and tribal identification—are not generally available to all voters. Thus, the adoption of the Petition, standing alone, would unconstitutionally force Nevadans to pay a government fee for identification if they wish to vote.

² Existing Nevada law allows for a one-time waiver of the identification card fee for homeless people younger than 25, and for a single duplicate card for other homeless people and recently released inmates. *See* NRS 483.825(1), (4). That very narrow waiver excludes the vast majority of Nevadans who will require an identification card to vote if the Petition becomes law.

³ The federal government sometimes waives passport fees based on a case-by-case determination of inability to pay due to indigency. *See generally* U.S. CITIZENSHIP & IMMIGRATION SERVS., Policy Memorandum 602.0011.1 (Mar. 13, 2011), https://www.uscis.gov/sites/default/files/document/memos/FeeWaiverGuidelines_Established_by_the_Final%20Rule_USCISFeeSchedule.pdf. This waiver, too, excludes the vast majority of Nevadans who will require an identification card to vote.

That does not, however, mean that the Petition is substantively unconstitutional—and this case is *not* a substantive challenge to the Petition’s federal constitutionality. If the Petition is adopted, there will be one and only one way for the Legislature to implement it without running afoul of the U.S. Constitution: the Legislature will have to make free identification available to all voters who need it. *See Crawford*, 553 U.S. at 198 (op. of Stevens, J.). And because the Legislature swears an oath to uphold *both* the Nevada and United States constitutions, Nev. Const. art. 15, § 2, it will be duty bound to do just that. The Petition therefore requires the state to fund expanded free photo identification for all voters just as surely as if it said so expressly, because providing such identification is the only way that the Petition’s requirements may constitutionally be enforced.

There is no dispute that expanded access to free identification would require a government expenditure. As financial impact statements for past voter identification initiatives that expressly required provision of free identification have noted, such expanded access “would increase the expenditures of the state and local government entities required to issue the cards” and “would result in a loss of fee revenue for the state.”

JA0026, JA0029, JA0031, JA0033, JA0036. Indeed, a 2014 study issued by Harvard Law School concluded that, “[w]hen aggregating the overall costs to individuals for ‘free’ IDs in all voter ID states, plus the costs to state government for providing ‘free’ IDs, the expenses can accumulate into the \$10s of millions per state.” JA0050 (citation omitted). Moreover, Repair the Vote has never denied that providing free identification to all who want it would require a substantial government expenditure. *See* JA0080–88.

C. Ms. Fleischmann’s unfunded-mandate claim is not an impermissible substantive challenge to the Petition.

Neither the district court nor Repair the Vote disputed the analysis in the prior section or denied that the Petition’s photo identification requirement could lawfully be implemented only by expanding access to free identification. Instead, at Repair the Vote’s urging, the district court sidestepped the question, holding that “the issue of whether the enactment of the Initiative meets federal constitutional requirements is not relevant to the Court’s analysis of whether the Initiative requires an appropriation or expenditure,” and that any substantive constitutional challenge should be brought after the Petition becomes law. JA0175; *see*

also JA0087 (same). But this misunderstands the nature of Ms. Fleischmann's challenge.

Ms. Fleischmann's argument is not that the Petition is substantively unconstitutional and could not be enforced if enacted—the sort of substantive challenge that must be heard only after the Petition becomes law. *Herbst Gaming*, 122 Nev. at 888, 141 P.3d at 1231. To the contrary, under Ms. Fleischmann's argument, the Petition *can* be enforced, but *only if* the Legislature appropriates the funds necessary to expand access to free identification to all voters who need it. The Petition therefore requires that appropriation, without raising revenue to fund it, in violation of Article 19, Section 6's limits on initiative petitions. And this Court has consistently held that challenges under Article 19, Section 6 are “properly evaluated at the preelection stage.” *Herbst Gaming*, 122 Nev. at 890, 141 P.3d at 1233.

For similar reasons, the rationale underlying *Herbst Gaming's* ban on preelection substantive challenges does not apply here. *Herbst Gaming* involved a challenge to a petition that would restrict smoking in public places, and the Court held that any alleged harm to affected businesses was not ripe because it lacked “a concrete factual context in

which a provision may be evaluated.” 122 Nev. at 887–88, 141 P.3d at 1231. Such a challenge could be addressed far more concretely after the petition became law.

Here, in contrast, Ms. Fleischmann’s challenge could not be addressed *at all* after the Petition becomes law, because the sole basis for the challenge is Article 19, Section 6’s limitations on the initiative petition process. Under Ms. Fleischmann’s argument, the Petition is substantively enforceable so long as the Legislature also expands access to free identification. If the Petition is approved by voters, the Legislature will surely do just that, either of its own accord or in response to a federal lawsuit, and there will be no further opportunity for an Article 19, Section 6 challenge. Repair the Vote would thereby have made an end run around Article 19, Section 6’s prohibition.

Thus, because the Petition requires an appropriation or expenditure but does not “provide[] for raising the necessary revenue” as Article 19, Section 6 requires, it is *void ab initio* for unlawfully mandating an unfunded expenditure. *Rogers v. Heller*, 117 Nev. 169, 173, 18 P.3d 1034, 1036 (2001).

II. The Petition’s description of effect is inadequate.

A. The description of effect violates NRS 295.009(1)(b).

The Petition is also invalid because its description of effect is inadequate. NRS 295.009(1)(b) requires petition signature pages to include a description of effect, in not more than 200 words, that summarizes the effects of the proposed law. The description of effect must be “straightforward, succinct, and nonargumentative [and] not be deceptive or misleading.” *Reid*, 138 Nev. Adv. Op. 47, 512 P.3d at 304 (quoting *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 37, 293 P.3d 874, 876 (2013)). To satisfy this standard, descriptions of effect must describe “what the initiative is designed to achieve and how it intends to reach those goals.” *Educ. Initiative PAC*, 129 Nev. at 37, 293 P.3d at 876. That includes identifying “the need for or nature of the revenue source” that will fund the proposed initiative. *Reid*, 138 Nev. Adv. Op. 47, 512 P.3d at 304.

The Petition’s 47-word description of effect falls far short of this standard. It provides a cursory, incomplete, and extremely high-level overview of the direct requirements that the Petition would impose: a requirement that in-person voters show “approved photo identification

before being provided a ballot,” and that “voters submitting a mail-in ballot provide additional verification of their identity when completing their mail-in ballot.” JA0016. It says nothing, however, about “how [the Petition] intends to achieve those goals,” *Educ. Initiative PAC*, 129 Nev. at 48, 293 P.3d at 883: it explains neither what forms of photo identification are “approved” nor how mail voters are to “provide additional verification of their identity.” JA0016. Nor does it explain that the photo-identification requirement imposes differing rules on different people depending on their age. *Cf. Nev. Judges Ass’n v. Lau*, 112 Nev. 51, 58–60, 910 P.2d 898, 903–04 (1996) (holding that the ballot language for a term-limit petition “could have been unnecessarily misleading” because it provided “no explanation” for its distinct effects on judicial positions). And this is not a scenario where additional detail was impossible because of the 200-word limit: the Petition used fewer than 25% of the available words.

Moreover, the Petition’s description of effect also violates NRS 295.009(1) because it describes only the Petition itself and “does not describe any *effects*.” *Prevent Sanctuary Cities v. Haley*, No. 74966, 2018 WL 2272955, at *4 (Nev. May 16, 2018) (unpublished disposition)

(emphasis added). In addition to describing the Petition itself, a description of effect must “alert voters to the breadth and range of effects that the initiative will have.” *Id.* Here, that would include telling potential signatories that if the Petition is enacted, federal law will require Nevada to provide free voter identification to all who need it, at state expense. *See supra* Part I(B). But even if the Court disagrees with that federal-law analysis, *someone* will have to pay for the necessary identification—the voters themselves. The description should therefore explain, at a minimum, that voters who lack approved photo identification will need to pay a government fee to get such identification if they wish to vote. *See Prevent Sanctuary Cities*, 2018 WL 2272955, at *4.

The district court dismissed these arguments as “hyper-technical nitpicking” and refused to “exam[ine] the brief, and clearly worded [description]” even to assess whether the arguments are correct. JA0174. But the deficiencies go to the core of the Petition, and leave the description so bereft of detail that potential signatories who read only the description will have no clue how it will affect their own voting patterns, nor what they would have to do to vote if the Petition is enacted—

considerations that are likely to be central to their decision whether to sign the petition. The description had another 153 words at its disposal; it could have made additional effort to educate the public on what the Petition would actually do, how it would do it, and what the consequences of its adoption for voters and for the State would be. The failure to do so renders the description deficient under NRS 295.009(1)(b).

B. NRS 295.061(3) does not insulate the description of effect from challenge.

The district court properly rejected Repair the Vote's effort to avoid scrutiny of the description of effect by contending that NRS 295.061(3) insulates the description of effect from challenge. JA0176–77. NRS 295.061(3) provides that, “[i]f a description of the effect of an initiative or referendum . . . is challenged successfully . . . and such description is amended in compliance with the order of the court, the amended description may not be challenged.”

NRS 295.061(3) does not bar Ms. Fleischmann's description-of-effect challenge for the simple reason that the Petition's description has not been “amended in compliance with the order of [a] court” following a successful challenge. The Petition is a *new* “initiative or referendum,” with its own unique identifier, *see* NRS 295.015(3)(a), filed with the

Secretary of State in November of last year. Ms. Fleischmann's underlying suit is the first (and only) legal challenge to the Petition. The Petition's description of effect has therefore never been "challenged successfully," much less "amended in compliance with the order of [a] court." NRS 295.061(3). Rather, the description of effect that Ms. Fleischmann challenges is the original, unamended description of effect that was included with the Petition when it was filed with the Secretary of State.

Repair the Vote's contrary argument before the district court assumed, without basis, that because the Petition's substance (including its description of effect) is identical to an earlier petition from the 2022 cycle whose description of effect *was* amended by court order, this Petition's description of effect is shielded from challenge. But this Court has made clear that petitions exist only for a single election cycle by refusing to review the legality of petitions that have failed to attract sufficient signatures by the statutory deadline. *Personhood Nev. v. Bristol*, 126 Nev. 599, 603, 245 P.3d 572, 575 (2010). The Court has held that such disputes are moot even if the sponsor "plan[s] to file an identical initiative petition" for the next election cycle. *Id.* That reasoning

necessarily recognizes that a petition refiled in a subsequent election year is a new petition, not a mere continuation of the old one—otherwise, a dispute over a petition’s legality would not be moot if the sponsor still planned to pursue it in the next cycle. *See id.* And because NRS 295.061(3) applies only to “the amended description” of a single “initiative or referendum” whose description of effect was “amended in compliance with the order of [a] court,” it therefore bars only seriatim challenges to the description of effect for a single petition within a single election cycle.

For those reasons, nothing in NRS 295.061(3) allows a new petition filed two years later to benefit from that statute’s protection, so the district court properly rejected Repair the Vote’s effort to insulate the description of effect from challenge.

III. The district court properly declined to preclude Ms. Fleishmann from bringing this challenge based on a prior case to which she was not a party.

Finally, the district court correctly rejected Secure the Vote’s effort to preclude Ms. Fleischmann’s challenge because a different plaintiff unsuccessfully challenged a substantively identical petition in district court two years ago and did not appeal. *Res judicata*, or claim preclusion,

applies only where “the same parties or their privies are involved in both cases,” while collateral estoppel, or issue preclusion, applies only if “the party against whom the judgment is asserted [was] a party or in privity with a party to the prior litigation.” *Five Star Cap. Corp. v. Ruby*, 124 Nev. 1048, 1051, 1055, 1056–57, 194 P.3d 709, 711, 713–14 (2008) (quoting *Univ. of Nev. v. Tarkanian*, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994) (per curiam)), *holding modified by Weddell v. Sharp*, 131 Nev. 233, 350 P.3d 80 (2015). Neither doctrine applies here, because Ms. Fleischmann was not a party to the prior challenge, and she has no relationship with anyone who was.

There is no privity between Ms. Fleischmann and Ms. Persaud-Zamora, the plaintiff in the 2022 election cycle. A finding of privity under Nevada law requires a “relationship between the parties [that] is sufficiently close to supply preclusion.” *Mendenhall v. Tassinari*, 133 Nev. 614, 618, 403 P.3d 364, 369 (2017) (cleaned up). Repair the Vote offered no evidence of any relationship whatsoever between Ms. Fleishman and Ms. Persaud-Zamora.

Rather, Repair the Vote’s argument for privity relied entirely on the fact that both plaintiffs were “registered voter[s] in the State of

Nevada[.]” JA0084. Repair the Vote cited a line of cases from Washington State holding that all voters who sue “on behalf of the body politic generally” are in privity with each other, because they supposedly all represent “the same legal interests as all citizens of the state.” *In re Coday*, 156 Wash. 2d 485, 501, 130 P.3d 809, 817 (2006) (quotation omitted). But Nevada courts have never adopted that rule—they have consistently demanded an actual “relationship.” *E.g.*, *Mendenhall*, 133 Nev. at 618, 403 P.3d at 369. Repair the Vote shows no such relationship here.

Because Ms. Fleishmann was not a party to the prior challenge and is not in privity with anyone who was, neither issue preclusion nor claim preclusion bar this challenge. But even if preclusion were potentially available, “the actual decision to apply it is left to the discretion of the district court.” *Sutton*, 120 Nev. at 984, 103 P.3d at 16. Here, the district court held that “public policy” favored a decision on the merits and therefore declined to apply claim and issue preclusion to bar Ms. Fleishmann’s challenge. JA0176. This discretionary determination provides an alternative, independently sufficient basis for the district court’s decision not to apply preclusion here.

CONCLUSION

The Court should reverse.

Dated this 29th day of March, 2024.

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CERTIFICATE OF COMPLIANCE

1. I certify that this Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally-spaced typeface, size 14, Century Schoolbook.

2. I further certify that this Brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the Brief exempted by NRAP 32(a)(7)(C), it contains 5856 words.

3. Finally, I hereby certify that I have read this Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 29th day of March, 2024.

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I hereby certify that on this 29th day of March, 2024, a true and correct copy of **APPELLANT’S OPENING BRIEF** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court’s electronic filing system:

By: /s/ Dannielle Fresquez
Dannielle Fresquez, an Employee of
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