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13 *Attorneys for Intervenor Fair Maps Nevada*

14 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

15 **IN AND FOR CARSON CITY**

16 ERIC JENG, an individual,

17 Plaintiff,

18 vs.

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

22 Defendant.

Case No.: 23 OC 000137 1B

Dept. No.: II

23 **FAIR MAPS NEVADA'S MOTION TO STRIKE A PORTION OF PLAINTIFF'S**
24 **REPLY, OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE SUR-REPLY**

25 Intervenor Fair Maps Nevada, a Nevada political action committee ("Fair Maps"), by
26 and through its attorneys, hereby moves the Court to strike a portion of Plaintiff Eric Jeng's
27 ("Plaintiff") Reply in Support of Memorandum of Points and Authorities in Support of
28 Complaint for Declaratory and Injunctive Relief Challenging Initiative Petition C-04-2023
("Reply"). Alternatively, Fair Maps requests leave to file a sur-reply. This motion is supported
by the following Memorandum of Points and Authorities, the pleadings and papers on file with
the Court, and any oral argument entertained by the Court at a hearing in this matter.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In his reply filed on January 3, 2024, Plaintiff advances an argument that he never presented
4 in his Memorandum of Points and Authorities in Support of the Complaint for Declaratory and
5 Injunctive Relief (“MPA”). In doing so, Plaintiff circumvents the standard briefing schedule set
6 forth in the Court’s procedural rules and deprives Fair Maps of the opportunity to respond to
7 Plaintiff’s new argument. The case law is clear that a reply brief must be limited in scope to
8 those arguments presented in the original motion--new arguments are prohibited. Because
9 Plaintiff has violated this rule, Fair Maps requests that the new argument in Plaintiff’s reply
10 brief be stricken, or in the alternative, that Fair Maps be granted leave to file a sur-reply.

11 **II. FACTUAL AND PROCEDURAL BACKGROUND**

12 Fair Maps filed Initiative Petition #C-04-2023 (“Petition”) on November 14, 2023 to amend
13 the Nevada Constitution. Complaint (“Compl.”), Ex. 1. Plaintiff filed a Complaint for
14 Declaratory Relief and the MPA in support of the Complaint on December 7, 2023, seeking to
15 prevent the Petition from the ballot. *See generally* Compl; MPA. Fair Maps filed an Answering
16 Brief in response to Plaintiff’s MPA on December 26, 2023. On January 3, 2024, Plaintiff filed
17 a Reply in support of the MPA, in which he advanced a new argument not presented in his MPA.
18 Specifically, in his Reply, Plaintiff now contends for the first time that issue preclusion bars Fair
19 Maps from relitigating whether the Petition will require an expenditure of funds. Reply at 2-3.
20 Because this new argument did not exist in the original MPA, Fair Maps has not had an
21 opportunity to respond.

22 **III. ARGUMENT**

23 **A. Plaintiff’s Reply Brief Improperly Contains An Argument Not Presented In His**
24 **MPA**

25 For the first time, Plaintiff contends issue preclusion bars Fair Maps from relitigating
26 whether the Petition will require an expenditure of funds. Reply at 2-3. It is well-established
27 and universally recognized in all courts that a party cannot raise new arguments and/or issues
28 for the first time in its reply brief. *See, e.g., Phillips v. Mercer*, 94 Nev. 279, 283, 579 P.2d 174,

1 176 (1978); *Blouin v. Blouin*, 67 Nev. 314, 316, 218 P.2d 937, 938 (1950); *see also Zamini v.*
2 *Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (noting “[t]he district court need not consider
3 arguments raised for the first time in a reply brief.”); *Knapp v. Miller*, 873 F. Supp. 375, 378 n.3
4 (D. Nev. 1994). The reasoning behind this rule is “the opposing party is not afforded any
5 opportunity to respond.” *Knapp*, 873 F. Supp. at 378 n. 3.

6 The reasons [why a court will not review issues first raised in the reply brief] are
7 obvious. It robs the [opposing party] of the opportunity . . . to present an analysis
8 of the pertinent legal precedent that may compel a contrary result. The rule also
9 protects this court from publishing an erroneous opinion because we did not have
10 the benefit of the [opposing party’s] response.

11 *Stump v. Gates*, 211 F.3d 527, 533 (10th Cir. 2000); *see also Francis v. Wynn Las Vegas, LLC*,
12 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011) (declining to consider argument because
13 moving party “raised it for the first time in his reply brief, thereby depriving [the non-moving
14 party] of a fair opportunity to respond”); *Weaver v. State, Dep’t of Motor Vehicles*, 121 Nev. 494,
15 502, 117 P.3d 193, 198-99 (2005) (arguments raised for first time in reply brief need not be
16 considered).

17 Likewise, First Judicial District Court Rule (“FJDCR”) 3.9 provides the “purpose of a
18 reply is to rebut facts, law, or argument raised in the opposition. Parties will not file a reply that
19 simply repeats facts, law, or argument contained in the motion, or to provide facts or law that
20 should have been but were not included in the motion. The court may strike a reply in its entirety
21 or in part and impose other sanctions if a reply violates this rule.” FJDCR 3.9.

22 Here, the face of Plaintiff’s Reply demonstrates arguments that were not presented in the
23 MPA. Because Plaintiff held back from his MPA the argument related to issue preclusion, instead
24 saving those arguments for the Reply, Fair Maps has been denied the opportunity to respond. For
25 this reason, the Court should strike the argument on pages 2 and 3 of the Reply related to issue
26 preclusion. *See* FJDCR 3.9.

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1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDONALD CARANO
3 LLP and that on January 22, 2024, I served the within **MOTION TO STRIKE A PORTION OF**
4 **PLAINTIFF’S REPLY, OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE**
5 **SUR-REPLY** on the parties in said case by placing a true copy thereof enclosed in sealed
6 envelopes with postage prepaid thereon in the United States Post Office mail at 100 West Liberty
7 Street, 10th Floor, Reno, Nevada 89501 addressed as follows:

8 Bradley S. Schrager, Esq.
9 Daniel Bravo, Esq.
10 6675 South Tenaya Way, Suite 200
Las Vegas, NV 89113

Laena St-Jules, Esq.
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

11 David R. Fox
12 Elias Law Group LLP
13 250 Massachusetts Ave. NW, Suite 400
Washington, DC 20001

14
15 I am familiar with the firm’s practice for collection and processing of correspondence for
16 mailing with the United States Postal Service.

17 The envelopes addressed to the above parties were sealed and placed for collection by the
18 firm’s messengers and will be deposited today with the United States Postal Service in the ordinary
19 course of business.

20 I declare under penalty of perjury that the foregoing is true and correct.

21 Executed on January 22, 2024 at Reno, Nevada.

22
23 By *Tracy Brown*
24 An employee of McDonald Carano LLP
25
26
27
28

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
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EXHIBIT 1

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EXHIBIT 1

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9 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

10 **IN AND FOR CARSON CITY**

11 ERIC JENG, an individual,

Case No.: 23 OC 000137 1B

12 Plaintiff,

Dept. No.: II

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14 FRANCISCO V. AGUILAR, in his official
15 capacity as NEVADA SECRETARY OF
STATE,

16 Defendant.

17
18 **FAIR MAPS NEVADA'S SUR-REPLY TO PLAINTIFF'S REPLY IN SUPPORT OF**
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF COMPLAINT
19 **FOR DECLARATORY AND INJUNCTIVE RELIEF CHALLENGING INITIATIVE**
20 **PETITION C-04-2023**

21 Intervenor Fair Maps Nevada, a Nevada political action committee ("Fair Maps"), by
22 and through its attorneys, hereby files its sur-reply to Plaintiff Eric Jeng's ("Plaintiff") Reply in
23 Support of Memorandum of Points and Authorities in Support of Complaint for Declaratory and
24 Injunctive Relief Challenging Initiative Petition C-04-2023 ("Reply"). This sur-reply is
25 supported by the following Memorandum of Points and Authorities, the pleadings and papers
26 on file with the Court, and any oral argument entertained by the Court at a hearing in this matter.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Despite clear guidance from the Nevada Supreme Court, Plaintiff seeks to use a mooted
4 appeal from a 2020 ballot initiative petition (“2020 Petition”) to preclude Fair Maps from
5 making any argument related to whether the Initiative Petition C-04-2023 (“Petition”) will
6 require an expenditure of state funds. Because issue preclusion is wholly inapplicable to the
7 instant suit, Plaintiff’s untimely argument should be disregarded.

8 II. ARGUMENT¹

9 A. Issue Preclusion is Inapplicable and Barred Under *Personhood Nev. v. Bristol*

10 As a threshold and dispositive matter, issue preclusion is inapplicable here. In *Personhood*
11 *Nev. v. Bristol*, the Nevada Supreme Court considered an appeal regarding appellant’s proposed
12 ballot initiative petition. 126 Nev. 599, 600, 245 P.3d 572, 573 (2010). The district court
13 determined the proposed initiative violated the single subject rule and enjoined its placement from
14 the general election ballot. *Id.* at 601, 245 P.3d at 574. Appellants appealed the district court’s
15 determination; however, a decision was not rendered prior to the deadline for submitting initiatives
16 with the necessary number of signatures to the Secretary of State. *Id.* The appeal was thus moot.
17 *Id.*

18 Rather than dismissing the appeal, the Nevada Supreme Court ordered supplemental briefing
19 regarding whether the district court’s order had a preclusive effect on future litigation. *Id.* at 601-
20 02, 245 P.3d at 574. The Court determined that vacating the district court’s order was not
21 necessary, because it adopted Restatement (Second) of Judgments, which advocates that “issue
22 preclusion principles do not apply when an appeal has been rendered moot.” *Id.* at 604-05, 245
23 P.3d at 576. The Court ultimately concluded “*the district court’s order has no preclusive effect,*
24 *and thus, there is no need to set the order aside to avoid it being used as binding precedent.” Id.*
25 *at 605, 245 P.3d at 576 (emphasis added).*

26 _____

27 ¹ For the sake of brevity, Fair Maps does not repeat additional factual or procedural background.
28 Fair Maps incorporates by reference all pleadings in this matter, including Fair Maps’ Motion to
Strike, filed concurrently.

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1 Here, Plaintiff seeks to do exactly what *Personhood* prohibits—use a prior district court’s
2 order where an appeal was rendered moot as binding precedent. In the 2020 Petition appeal, Fair
3 Maps cross appealed, arguing the district court erred in determining that its original description of
4 effect was misleading. *Jackson v. Fair Maps Nevada PAC*, No. 80563, 2020 WL 4283287, at *1
5 (Order of Affirmance, July 24, 2020). The Nevada Supreme Court dismissed the cross appeal,
6 noting that “[i]n light of our above-mentioned determination, however, *this issue is moot.*” *Id.*
7 (emphasis added). Thus, Plaintiff’s argument that Fair Maps is precluded from arguing whether
8 the Petition will require an expenditure is categorically barred under *Personhood*.

9 **B. The Required Elements of Application of Issue Preclusion Are Not Met**

10 Even if issue preclusion did apply to the Petition, Plaintiff has not demonstrated the required
11 factors have been met. To determine whether issue preclusion should apply, the Nevada Supreme
12 Court has articulated a four-part test: “(1) the issue decided in the prior litigation must be identical
13 to the issue presented in the current action; (2) the initial ruling must have been on the merits and
14 have become final; . . . (3) the party against whom the judgment is asserted must have been a party
15 or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily
16 litigated.” *Five Star Cap. Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008), *holding*
17 *modified on other grounds by Weddell v. Sharp*, 131 Nev. 233, 350 P.3d 80 (2015). As the party
18 asserting preclusion, Plaintiff bears the burden of proving the preclusive effect of the judgment.
19 *Bennett v. Fidelity & Deposit Co. of Maryland*, 98 Nev. 494, 452, 652 P.2d 1178, 1180 (1982).
20 Plaintiff has failed to meet this burden.

21 First, the Nevada Supreme Court has never sanctioned the form of issue preclusion pressed by
22 Plaintiff in this case: non-mutual offensive issue preclusion, in which “the plaintiff seeks to
23 foreclose the defendant from litigating an issue the defendant has previously litigated
24 unsuccessfully in an action with another party.” *Parklane Hosiery Co. v. Shore*, 439 U.S. 322,
25 326 n.4 (1979). Instead, the Nevada Supreme Court repeatedly has stated that issue preclusion
26 applies only in subsequent litigation “between the parties” to the prior case. *Five Star*, 124 Nev.
27 at 1055, 194 P.3d at 713-14 (explaining that issue preclusion “applies to prevent relitigation of
28 *only a specific issue that was decided in a previous suit between the parties.*”) (emphasis added);

1 *see also id.* at 1052, 194 P.3d at 711 (stating issue preclusion may “apply when the issues
2 addressed in an earlier suit arose in a later suit *between the parties*”) (emphasis added). Those
3 statements in turn are supported by the Nevada Supreme Court’s pre-*Five Star* case law, where it
4 likewise stated that issue preclusion applies only to “issues that were actually decided and
5 necessary to a judgment in an earlier suit on a different claim *between the same parties.*” *City of*
6 *Reno v. Reno Police Protective Ass’n*, 118 Nev. 889, 894, 59 P.3d 1212, 1216 (2002) (emphasis
7 added). Because the parties from the 2020 Petition are not the same as the instant case, issue
8 preclusion is not applicable. *See Jackson v. Fair Maps Nevada PAC*, No. 19-OC-002909 1B (Nev.
9 1st Jud. Dist. Ct. Jan 2, 2020), Compl. Ex. 3.

10 Second, as described herein, the ruling in the 2020 Petition was not on the merits and did not
11 become final. *See supra*, Section A; *see also Personhood*, 126 Nev. at 605, 245 P.3d at 576.
12 Because Plaintiff cannot satisfy his burden to prove the preclusive effect of the 2020 Petition
13 judgment, issue preclusion is inapplicable.

14 **C. Fair Maps’ Alternative Description**

15 While Fair Maps contends that issue preclusion is applicable, in the interest of expediency,
16 Fair Maps has attached a proposed alternative description of effect that describes the expenditure
17 of state funds hereto as **Exhibit A**.

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III. CONCLUSION

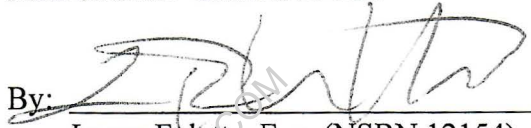
For all of the above reasons, the Court should reject Plaintiff's untimely and unpersuasive argument in his Reply.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned affirms that this document does not contain any personal information, as defined in NRS 603A.040.

Dated this 22nd day of January, 2024.

McDONALD CARANO LLP

By: 

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Attorneys for Fair Maps Nevada

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CERTIFICATE OF SERVICE

Pursuant to NRC 5(b), I hereby certify that I am an employee of McDONALD CARANO LLP and that on January 22, 2024, I served the within **SUR-REPLY TO PLAINTIFF'S REPLY IN SUPPORT OF MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF CHALLENGING INITIATIVE PETITION C-04-2023** on the parties in said case by placing a true copy thereof enclosed in sealed envelopes with postage prepaid thereon in the United States Post Office mail at 100 West Liberty Street, 10th Floor, Reno, Nevada 89501 addressed as follows:

Bradley S. Schrage, Esq.
Daniel Bravo, Esq.
6675 South Tenaya Way, Suite 200
Las Vegas, NV 89113

Laena St-Jules, Esq.
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

David R. Fox
Elias Law Group LLP
250 Massachusetts Ave. NW, Suite 400
Washington, DC 20001

I am familiar with the firm's practice for collection and processing of correspondence for mailing with the United States Postal Service.

The envelopes addressed to the above parties were sealed and placed for collection by the firm's messengers and will be deposited today with the United States Postal Service in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 22, 2024 at Reno, Nevada.

By *Nancy L Brown*
An employee of McDonald Carano LLP

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INDEX OF EXHIBITS

Exhibit No.	Description	Pages
A	Proposed Alternative Description of Effect	1

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EXHIBIT A

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EXHIBIT A

Exhibit A—Proposed Alternative Description of Effect

Petition C-04-2023

A. Redline Version

This measure will amend the Nevada Constitution to establish a redistricting commission to map electoral districts for the Nevada Senate, Assembly, and U.S. House of Representatives.

The Commission will have seven members, four who will be appointed by the leadership of the Legislature, and three who are unaffiliated with the two largest political parties who will be appointed by the other four commissioners. Commissioners may not be partisan candidates, lobbyists, or certain relatives of individuals. Commission meetings shall be open to the public which shall have opportunities to participate in the hearings.

The Commission will ensure, to the extent possible, that the districts comply with the U.S. Constitution, have an approximately equal number of inhabitants, are geographically compact and contiguous, provide equal opportunities for racial and language minorities to participate in the political process, respect areas with recognized similarities of interests, including racial, ethnic, economic, social, cultural, geographic, or historic identities, do not unduly advantage or disadvantage a political party, and are politically competitive.

This amendment will require redistricting following the 2026 election and each federal census thereafter. The existing and ongoing expense will be shifted to the Commission but will remain based in the legislative branch.

B. Clean Version

This measure will amend the Nevada Constitution to establish a redistricting commission to map electoral districts for the Nevada Senate, Assembly, and U.S. House of Representatives.

The Commission will have seven members, four who will be appointed by the leadership of the Legislature, and three who are unaffiliated with the two largest political parties who will be appointed by the other four commissioners. Commissioners may not be partisan candidates, lobbyists, or certain relatives of individuals. Commission meetings shall be open to the public which shall have opportunities to participate in the hearings.

The Commission will ensure, to the extent possible, that the districts comply with the U.S. Constitution, have an approximately equal number of inhabitants, are geographically compact and contiguous, provide equal opportunities for racial and language minorities to participate in the political process, respect areas with recognized similarities of interests, including racial, ethnic, economic, social, cultural, geographic, or historic identities, do not unduly advantage or disadvantage a political party, and are politically competitive.

This amendment will require redistricting following the 2026 election and each federal census thereafter. The existing and ongoing expense will be shifted to the Commission but will remain based in the legislative branch.