In the
Supreme Court of the State of Nevada

Electronically Filed
Apr 26 2024 11:21 AM
Elizabeth A. Brown
Clerk of Supreme Court

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.

Case No.: 88307

First Judicial District Court
Case No.: 23 OC 00136 1B

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APPELLANT'S REPLY BRIEF

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Docket 88307 Document 2024-14642

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INTRODUCTION

Petition C-02-2023 seeks to amend the Nevada Constitution to impose stringent new voter identification requirements that would make it harder for many Nevadans to exercise their fundamental right to vote. If adopted, the Petition would limit in-person voting to those who can produce one of a narrow set of specified identification documents—none of which are available to all who need them without payment of a government fee. Because conditioning the right to vote on a government-issued identification card for which the government charges a fee would be an unconstitutional poll tax, adoption of the Petition would require the State to provide free identification to any voter who needs it. Yet the Petition fails to raise any revenue to fund the substantial cost of providing free voter identification. The Petition thus violates Article 19, Section 6's prohibition on unfunded mandates.

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The Petition is further deficient because its description of effect fails to alert voters to these and other significant consequences. The description says nothing about the poll tax that the Petition would create, nor does it mention the fiscal impact on the State from providing free identification cards to cure that constitutional defect. Indeed, the

description does not even specify which forms of identification the Petition would require from in-person voters or what additional documentation mail voters would need to supply—critical omissions that make it impossible for voters to understand how the Petition would affect their voting rights.

Repair the Vote's contrary arguments cannot withstand scrutiny. Repair the Vote misconstrues Ninth Circuit and U.S. Supreme Court precedent in denying that the Petition would require the State to provide free identification, and has no answer to the clearest evidence of this fact: that every state with a mandatory voter identification requirement provides free voter identification. Repair the Vote's argument that this is a premature substantive challenge ignores that Article 19, Section 6 prohibits implicit unfunded mandates along with explicit ones and would, if accepted, open an enormous loophole in Article 19, Section 6's protections against unfunded mandates. And the district court properly rejected Repair the Vote's efforts to insulate the Petition from judicial review based on a prior challenge of a similar petition by a different voter in a prior election cycle.

The Court should reverse.

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ARGUMENT

I. The Petition imposes an unfunded mandate in violation of Article 19, Section 6.

The Petition violates Article 19, Section 6 of the Nevada Constitution because it imposes an unfunded mandate: as a matter of federal constitutional law, the Petition's enforcement will require Nevada to expend state funds to make free voter identification generally available, but the Petition raises no revenue to fund that expenditure.

A. Adoption of the Petition would require Nevada to provide free identification to voters who need it.

The Petition would require Nevada to provide free identification to all voters who need it, to avoid imposing an unconstitutional poll tax. Under the Twenty-Fourth Amendment and the Equal Protection Clause, voters cannot be required to pay a fee to the government in order to vote. *See Harman v. Forssenius*, 380 U.S. 528, 540–41 (1965); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966). But unless Nevada expends state funds to make free identification widely available, the Petition would do just that. The Petition specifies a limited list of acceptable forms of voter identification, and each of the forms of identification on that list that are generally available to the public (that is, those not limited to tribal members, members of the military, or

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students at certain schools) require the payment of a government fee. *See* JA0015; Opening Br. 16–17. Voters cannot constitutionally be forced to pay such a government fee to vote, even if it is framed as a fee for an identification card. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (op. of Stevens, J.). As Ms. Fleischmann pointed out in her opening brief, that is why every state with a mandatory voter identification requirement offers free identification cards to all voters who need them, either voluntarily or—in the case of Idaho—after being sued for imposing an unconstitutional poll tax. Opening Br. 15–16 & n. 1. Repair the Vote identifies no contrary example.

In denying that free identification would be required, Repair the Vote misconstrues the Ninth Circuit's decision in *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012), *aff'd on other grounds sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013). *See* Ans. Br. 10–11. Unlike the Petition, the voter identification law in *Gonzalez* did not limit voters to presenting only government-issued identification for which a fee is charged. Rather, the law in *Gonzalez* allowed voters to present either (1) any form of photo identification, or (2) two non-photo documents such as utility bills or bank statements showing the voter's name and address.

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677 F.3d at 404 n.31. Utility bills and bank statements, of course, do not require payment of a government fee. And in upholding the law, the Ninth Circuit emphasized that fact, explaining that the law "allow[ed] voters to present the[] same sorts of primary documents" that might be required to *get* a photo identification card, rather than requiring a government-issued, fee-bearing card itself. *Id.* at 410. *Gonzalez* therefore did nothing to undermine the *Crawford* plurality's statement that a state could not constitutionally "require[] voters to pay a tax or a fee to obtain a new photo identification" as a requisite to voting. *Crawford*, 553 U.S. at 198.

For that reason, *Gonzalez* does not suggest that Nevada could enforce the Petition without providing free identification to all voters who need it. And because the Legislature must comply with both the U.S. and Nevada Constitutions, adoption of the Petition would require Nevada to do just that. The Petition therefore violates Article 19, Section 6, because Repair the Vote nowhere denies that providing free identification would require a new appropriation or expenditure that the Petition raises no revenue to fund.

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B. This is not a substantive challenge, and it could not be brought post-enactment.

Repair the Vote is also wrong to characterize Ms. Fleischmann's Article 19, Section 6 claim as a premature substantive challenge. Ans. Br. 12–13. Ms. Fleischmann's argument is not that the Petition is substantively unconstitutional and could never be enforced, but rather that the Petition implicitly requires the Legislature to provide for free identification for any voter who needs it without raising offsetting revenue. That is a straightforward Article 19, Section 6 claim that is "properly evaluated at the preelection stage." *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 890, 141 P.3d 1224, 1233 (2006).

Indeed, Ms. Fleischmann's challenge could not possibly be brought postelection. If the Petition becomes law, then either the Legislature will appropriate funds for free identification, or a federal court will order the State to provide such identification without charge, at state expense, in response to a lawsuit challenging the poll tax. Either way, Repair the Vote will have made an end run around Article 19, Section 6, and imposed a substantial mandatory expense on the Legislature via an initiative petition without raising the required revenue. The effect of Repair the Vote's argument would thus not be to *delay* the Article 19, Section 6

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challenge, but to immunize the Petition from such a challenge entirely. Repair the Vote has no answer to this argument, which Ms. Fleischmann raised in her Opening Brief. Opening Br. 21.

It makes no difference that the unfunded mandate is implicit rather than explicit. Article 19, Section 6's prohibition on unfunded mandates is not limited to express mandates. An initiative petition violates Section 6 if it "explicitly []or implicitly" compels an appropriation without raising offsetting revenue. *Herbst Gaming*, 122 Nev. at 890–91, 141 P.3d at 1233. Here, the appropriation for free identification is implicitly required by the Petition because the U.S. Constitution will require the State to provide acceptable identification without charge if the Petition's voter-identification requirement becomes law. The Petition therefore violates Article 19, Section 6.

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Repair the Vote's approach would create an enormous loophole in Article 19, Section 6's limitations on the initiative process. Under that approach, an initiative's proponents could easily evade Section 6 by drafting a measure that does not expressly require an appropriation but that demands action that inevitably requires one, and then disclaiming responsibility when the expenditure inevitably occurs. A petition might,

for example, demand that the State take possession of the Sphere at the Venetian Resort for public use, while saying nothing about the immense just-compensation payment that such an action would unavoidably require. Such a petition would do "exactly what Article 19, Section 6 aims to avoid" by foisting an immense expense on the Legislature without doing anything to pay for it. *Educ. Freedom PAC v. Reid*, 138 Nev. Adv. Op. 47, 512 P.3d 296, 303 (2022). This Petition is no different.

II. The Petition's description of effect is inadequate in violation of NRS 295.009(1)(b).

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The Petition's description of effect fails to comply with NRS 295.009(1)(b)'s requirement that a description of effect explain "what the initiative will accomplish and how it will achieve those goals." *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 38, 293 P.3d 874, 876 (2013). The description here is inadequate for three reasons.

First, the description does not inform voters that if the Petition is adopted, Nevada would be required to provide free identification to any voter who needs it to vote. *Supra* Part I. Nor does the description mention the resulting fiscal impact that the free identification requirement would have on the State. "[T]he need for or nature of the revenue source" that will fund the proposed initiative are key effects of the Petition that voters

are entitled to know about before signing the Petition, and that must be spelled out in the description of effect. *Reid*, 138 Nev. Adv. Op. 47, 512 P.3d at 304.

Second, and independent of the funding issue, the description fails to explain what the Petition will actually require of voters. The description is limited to noting that in-person voters must "present an approved photo identification" and that mail voters must provide "additional verification" of identity. JA0016. The description does not specify what the "approved" forms of identification are or what "additional verification" is required. Moreover, the description fails to explain that the Petition's photo identification requirement imposes different rules depending on the voter's age—only voters under 65 must present unexpired identification. *Id.* These omissions go to the heart of what the Petition requires and make it impossible for voters to understand how, concretely, the Petition would affect their own and other voters' ability to vote. They leave voters almost entirely in the dark about how, specifically, the Petition "intends to achieve [its] goals." *Educ. Initiative PAC*, 129 Nev. at 37, 293 P.3d at 876.

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Third, the description of effect fails to describe a core effect of the Petition—that *someone* is going to have to pay for the newly required identification, whether that is the State (because the federal constitution demands it) or voters (if, accepting Repair the Vote's argument, the State need not do so). By Repair the Vote's own account, the Petition will require voters without an acceptable form of identification to pay a government fee to vote: an extraordinarily significant effect that is not mentioned anywhere in the Petition: not in the description of effect, and not even in the Petition's operative text. Much as in *Prevent Sanctuary Cities v. Haley*, No. 74966, 2018 WL 2272955, at *4 (Nev. May 16, 2018) (unpublished disposition), this effect emerges only from the interaction between the Petition and other sources of law, including those governing the issuance of accepted forms of identification. The description of effect is inadequate for utterly failing to inform voters of this central effect.

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These deficiencies cannot be excused based on the 200-word statutory limit. The description contains a mere 47 words, leaving ample room to cure the omissions described above. And while a description of effect need not describe "every effect" of an initiative, Ans. Br. 14, the effects omitted here are among the most important to voters considering

whether to sign the Petition. The failure to include them violates NRS 295.009(1)(b).

III. The district court properly declined to preclude this challenge.

The district court properly rejected both of Repair the Vote's efforts to preclude Ms. Fleischmann's challenge based on a prior challenge brought by a different voter to a different, though substantively similar, petition two years ago. NRS 295.061(3) does not bar Ms. Fleischmann's challenge to the description of effect, and neither issue nor claim preclusion bar this challenge either.

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A. NRS 295.061(3) does not bar Ms. Fleischmann's challenge to the description of effect.

Repair the Vote's contention that NRS 295.061(3) bars Ms. Fleischmann's challenge to the description of effect is meritless, and the district court rightly rejected it. 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." By its plain terms, this provision applies only where (1) the description of effect for a particular petition was "challenged successfully," (2) that

description was then "amended in compliance with the order of the court," and (3) the plaintiff seeks to challenge the "amended description." *Id.* None of those prerequisites is satisfied here.

The core problem with Repair the Vote's reliance on NRS 295.061(3) is that the Petition that is the subject of this challenge is a new petition, with a new unique identifier (C-02-2023), filed with the Secretary of State just last year. As a legal matter, it is not a mere continuation of the prior petition from 2022 (C-03-2022). *See* NRS 295.015(3)(a); NRS 295.035. That conclusion follows directly from this Court's holding in *Personhood Nevada v. Bristol*, 126 Nev. 599, 603, 245 P.3d 572, 575 (2010), that appeals of petition challenges become moot after the end of each election cycle, even if the sponsor plans to submit an identical petition for the next election cycle. As Ms. Fleischmann explained in her Opening Brief, that conclusion would make no sense if a subsequent petition functioned as a mere continuation of the prior one. Opening Br. 26–27. Repair the Vote has no answer to this argument—it simply ignores it.

Once it is recognized that a subsequent petition is a *new* petition, Repair the Vote's textual argument collapses. NRS 296.061(3)'s text is simply not implicated, because the description of the present Petition has

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never yet been "challenged successfully" and never yet been "amended in compliance with the order of the court." It is, instead, the original description that Repair the Vote filed with the Secretary of State when it first filed the Petition.

Contrary to Repair the Vote's argument, there is nothing "absurd" about this conclusion. The evident purpose of NRS 295.061(3), particularly in the context of the other subsections of that statute, was to prevent seriatim challenges to a description of effect *within a single election cycle*, by forcing challengers to fully litigate all objections to the description in a single case, subject to very short deadlines, and then insulating the resulting amended description from further review. But nothing in NRS 295.061(3) says anything about the filing of similar petitions in subsequent years or suggests that the Legislature's purpose for enacting NRS 295.061(3) was to let petition proponents buy immunity for a particular description of effect for all time by amending it once. This Court's approach in *Personhood Nevada* of treating disputes as moot after the end of the cycle evidences just the opposite policy, of *refusing* to adjudicate in one cycle whether a petition could properly be presented in the next. 126 Nev. at 603, 245 P.3d at 575.

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Repair the Vote also worries about challenges in a new cycle by "the same person," or "even if the Nevada Supreme Court" upheld a description in a prior cycle, but the doctrines of issue preclusion and stare decisis readily address those issues, respectively. Those doctrines do not save Repair the Vote's argument here, however, because Ms. Fleischmann did not bring the 2022 challenge and this Court did not address the issue then. And, of course, even if this Court were to accept Repair the Vote's approach, NRS 295.061(3) only applies to challenges to descriptions of effect, so it would not affect Ms. Fleischmann's Article 19, Section 6 challenge here, nor do anything to prevent challenges to other newly proposed petitions that are similar to previous ones from prior cycles based on issues other than their descriptions of effect.

B. Issue or claim preclusion do not bar Ms. Fleischmann's challenge.

The district court also correctly rejected Repair the Vote's argument that claim or issue preclusion bar Ms. Fleischmann's challenge. The reason is simple: for either form of preclusion to apply, at least the party being precluded or someone in privity with her must have been a party to the prior case. *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054–55, 194 P.3d 709, 713 (2008). Privity requires a "relationship between the

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parties [that] is sufficiently close to supply preclusion." *Mendenhall v. Tassinari*, 133 Nev. 614, 618, 403 P.3d 364, 369 (2017) (internal quotation marks omitted). Ms. Fleischmann was not a party to the prior case, and nothing in the record suggests that she has any relationship with anyone who was.

Repair the Vote's only argument for privity between Ms. Fleischmann and the challenger in the prior case, Emily Persaud-Zamora, is that they have "a common interest in bringing a challenge to" the Petition as voters. Ans. Br. 18. But that is no relationship at all. Whenever preclusion doctrines are invoked, it is because parties in one case raise similar issues to those raised by other parties in another case. If that were enough of a relationship for preclusion, then the privity requirement would be all bark and no bite.

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This Court has never endorsed such a weak approach to privity, in the election context or any other. Repair the Vote relies entirely on a controversial line of election-contest cases from Washington State courts in which those courts carved out a rule that an election challenge by one voter precludes future challenges by all other voters. *See, e.g.*, *In re*

Coday, 156 Wash. 2d 485, 130 P.3d 809 (2006). But that approach has never been adopted in any other state, much less in this one.

Contrary to Repair the Vote's argument, Ans. Br. 19, this Court did not adopt that approach in *Law v. Whitmer*, No. 82178, 2020 WL 7240299 (Nev. Dec. 8, 2020) (unpublished disposition). This Court's decision in *Law* was a three-paragraph order that said nothing about the merits; what Repair the Vote cites comes from the district court's order, which the Court attached as an appendix to its decision. *See id.* And even the district court's order based its finding of privity on an *actual relationship* between the two sets of parties: that the parties to *Law* were nominated and selected as electors by one of the parties to the prior case. *Id.* at *16. The district court order then cited *Coday* only with a "*cf.*", and without elaboration. Such a citation, in dicta in a district court order appended to an unpublished order from this Court, does nothing to suggest this Court's endorsement or adoption of the *Coday* approach.

The Court should not adopt the *Coday* approach in this case, either. It would be inconsistent with the Court's past insistence on an actual "relationship between the parties" as a basis for finding privity. *Mendenhall*, 133 Nev. at 618, 403 P.3d at 369 (internal quotation marks

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omitted). It would raise risks of gamesmanship: if "all citizens of the state," Ans. Br. 20, are in privity for purposes of petition challenges, could a voter who supports a petition file a challenge, deliberately lose it, and thereby preclude all other challenges? Creating such perverse incentives would detract from the purpose and function of the petition challenge process. And above all else, Repair the Vote offers no affirmative argument for such a rule—it simply assumes, wrongly, that it is already the law.

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Finally, Repair the Vote does not explain why the district court abused its discretion in deciding not to apply claim or issue preclusion because "public policy" favored a decision on the merits in this case. JA0176; Opening Br. 29. Repair the Vote argues that "[p]recluding a party from bringing the same issue or claim in a different action" should supersede that policy. Ans. Br. 20. But of course, Ms. Fleischmann did not "bring[] the same issue or claim in a different action"—she is a new party. And at most, this amounts to an argument that the district court should have weighed the relevant considerations differently. But that does not suffice to show an abuse of discretion, which occurs only "if the district court's decision is arbitrary or capricious or if it exceeds the

bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)). Repair the Vote makes no showing that this standard is met. The district court was right—and certainly within its discretion—to favor a decision on the merits. It just reached the wrong result.

CONCLUSION

The Court should reverse.

Dated this 26th day of April, 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 3585 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.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2024, a true and correct copy of **APPELLANT'S REPLY 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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