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WILLIAM SCOTT HOEN
CLERK

BY _____
DEPUTY

7 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8 IN AND FOR CARSON CITY

9 JENNIFER FLEISCHMANN, an INDIVIDUAL,)

10 Plaintiff,)

11 and)

12 FRANCISCO V. AGUILAR, in his official
13 capacity as NEVADA SECRETARY OF
14 STATE,)

15 Defendant.)

Case No. 23 OC 00136 1B

Dept No. 2

**FINDINGS OF FACTS, CONCLUSIONS
OF LAW, AND ORDER**

16 This matter came before this Court on Plaintiff, Jennifer Fleischman ("Plaintiff")
17 Complaint, filed on December 4, 2023, seeking declaratory and injunctive relief. Plaintiff was
18 represented by her counsel of record, David R. Fox, Esq., with Elias Law Group LLP, and Scott
19 Gilles, Esq., of the Griffin Company. Defendant, Francisco V. Aguilar, in his official capacity
20 as Nevada Secretary of State was represented by counsel Jules St-Laena, with the Nevada
21 Attorney General's Office. Defendant filed an Answer to the Complaint. Intervenor, David G.
22 Gibbs, on behalf of the Repair the Vote PAC was present with his counsel of record, David C.
23 O'Mara, Esq. with the O'Mara Law Firm, P.C. Intervenor-Defendant Repair the Vote filed a
24 Responding Brief on February 9, 2024, and Plaintiff filed her Reply on February 16, 2024.

25 On November 8, 2023, David G. Gibbs, on behalf of the Repair the Vote political action
26 committee, filed Initiative Petition C-02-2023.

27 On December 4, 2023, Plaintiff, Jennifer Fleischmann ("Plaintiff") filed a Complaint
alleging two issues which preclude the Petition (C-02-2023) from being circulated for signature

1 gathering or considered by Nevada. Plaintiff argues that the Petition, if enacted, would violate
2 Article 19, Section 6 of the Nevada Constitution by failing to provide for a funding mechanism
3 for the changes it proposes, including the necessary expenditure of public funds to expand
4 access to free photo identification for eligible voters. Plaintiff also argues that the description
5 of effect does not comply with Nevada law because it omits information about the Petition,
6 including the need for an additional revenue source, a description of what forms of
7 identification would be acceptable, and an explanation of what form the “additional
8 verification” of identity for mail in ballot would take. Plaintiff asks this Court to enjoin the
9 Secretary of State from taking further action on the Petition and prohibiting the Petition from
10 being placed on the general election ballot.

11 Intervenor-Defendant, Repair the Vote filed a Responsive Brief disputing Plaintiff’s
12 allegation, and instead, argued that the Petition could not be challenged, pursuant to NRS
13 295.061, the challenge was precluded under the legal doctrines of Res Judicata/Collateral
14 Estoppel, that the Description of Effect is proper and valid, and that the Petition does not violate
15 Nevada’s Constitutional prohibition of initiative that mandate unfunded expenditures.

16 In Plaintiff’s reply, Plaintiff argues that the challenge is not precluded by NRS 295.061
17 or precluded under the legal doctrines of Res Judicata and Collateral Estoppel because Plaintiff
18 was not a party, or in privity, to the previous parties in the *Persaud-Zamora* litigation.

19 FINDINGS OF FACTS

20 On November 8, 2023, David G. Gibbs, on behalf of the Repair the Vote political action
21 committee, filed Initiative Petition C-02-2023. The Petition seeks to amend the Nevada
22 Constitution to include voter identification requirement on in-person voting. The Initiative also
23 seeks to revise the vote by mail process to require Nevadans who vote by mail to include an
24 identifying number from one of specified government issued documents with their mail-in
25 ballots.

26 The initiative would add to the Nevada Constitution the following text:

27 Article 2 of the Nevada Constitution is hereby amended by adding thereto new sections to

1 be designated as Section 1C, to read as follows:

2 **Sec. 1B. Photo Identification.** Each voter in Nevada shall present photo
3 identification to verify their identity when voting in person at a polling place
4 during early voting or on election day before being provided a ballot. To be
5 considered valid, the photo identification must be current or expired for no more
6 than four years. If the voter is 70 years old or more, the identification can be
7 expired for any length of time, so long as it is otherwise valid. Acceptable forms
8 of identification include:

- 9 1. Nevada driver's license.
- 10 2. Identification card issued by the State of Nevada, any other State, or the US
11 Government
- 12 3. Employee photo identification card issued by the US government, Nevada
13 government, or any county, municipality, board, authority, or other Nevada
14 government entity,
- 15 4. US Passport,
- 16 5. US military identification card
- 17 6. Student photo identification card issued by a Nevada public college, university, or
18 technical school.
- 19 7. Tribal photo identification.
- 20 8. Nevada concealed firearms permit.
- 21 9. Other form of government-issued photo identification that the Legislature may
22 approve.

23 **Sec 1C. Voter Verification.** Each voter in Nevada who votes by mail-in-ballot
24 shall enter one of the following in the block provided next to the voter's
25 signature for election officials to use in verifying the voter's identity.

- 26 10. The last four digits of their Nevada driver's license number.
- 27 11. If the voter does not possess a Nevada driver's license, the last four digits of their
Social Security Number.
12. If the voter is neither a Nevada driver's license or Social Security number, the
number provided by the county clerk when the voter registered to vote.

19 The Initiative Petition specifically provides the following Description of Effect:

20 *If passed, this initiative would amend the State Constitution to require that all*
21 *persons voting in person present an approved photo identification before being*
22 *provided a ballot. It also requires that voters submitting a mail-in ballot*
23 *provide additional verification of their identity when completing their mail-*
24 *ballot.*

24 CONCLUSIONS OF LAW

25 A. The Description of Effect is Proper and Valid.

26 Nevada law allows Plaintiff to petition to bring suit alleging that the description of the
27 initiative's effect is deficient pursuant to NRS 295.061. Each petition for initiative or

1 referendum must set forth, in 200 words, “a description of the effect of the initiative or
2 referendum if the initiative or referendum is approved by the voters.” NRS 295.009.1(b). “A
3 description of effect serves a limited purpose to facilitate the initiative process, and to that end,
4 it must be straightforward, succinct, and nonargumentative summary of what the initiative is
5 designed to achieve and how it intends to reach those goals.” *Education Init. v. Comm. to*
6 *Protect Nev. Jobs*, 293 P.3d 874, 876 (Nev. 2013). “The description of effect cannot
7 constitutionally be required to delineate every effect that an initiative will have; to conclude
8 otherwise could obstruct, rather than facilitate, the people’s right to the initiative process.” *Id.*
9 Judicial review of a petition’s description of effect does not involve the close textual analysis
10 statutory construction does.” *Prevent Sanctuary Cities v. Haley*, 421 P.3d 281, *3 (Nev. 2018)
11 (unpublished decision).

12 When “the information contained in the description is neither deceptive nor misleading” so
13 as to be “substantively correct and does not misrepresent what the initiative will accomplish or
14 how it will achieve those goals,” it satisfies the description requirement. *Id.* at 884.

15 In this case, Plaintiff complaints regarding the Description of Effect are hyper-technical
16 nitpicking of the description. The Description of Effect is substantively correct, does not
17 misrepresent what the initiative will accomplish, and is straightforward, succinct, and is a
18 nonargumentative summary of what the initiative is designed to achieve. The Court does not,
19 and will not exam the brief, and clearly worded by imposing a hyper-technical examination as
20 to whether the description covers each and every aspect of the initiative. *See e.g. Educ. Init.*,
21 129 Nev. at 49.

22 Accordingly, the Court finds that the Description of Effect adequately summarizes the
23 Initiative and complies with NRS 295.009.

24 **B. The Petition Does Not Violate the Nevada Constitution’s Prohibition of Initiatives**
25 **that Mandate Unfunded Expenditures**

26 Article 19, Section 6 of the Nevada Constitution does not permit an initiative to “make[] an
27 appropriation or otherwise require the expenditure of money, unless such statute or amendment
also imposes a sufficient tax...” An “appropriation is the setting aside of fund” and an

1 “expenditure of money is the payment of funds.” See *Rogers v. Heller*, 117 Nev. 169, 18 P.3d
2 1034, 1036. When an initiative “neither explicitly nor implicitly compels and appropriation or
3 expenditure, but rather, leaves the mechanics of its enforcement with government officials, it
4 does not involve and appropriation or expenditure.” See *Herbst Gaming, Inc. v. Heller*, 122
5 Nev. 877, 141 P.3d 1224, 1233.

6 The Initiative does not mandate an expenditure or appropriation, nor does it require an
7 expenditure of money. Indeed, nothing in the text of the Initiative would require a Nevada
8 official to appropriate funds to, or to expend new funds.

9 The Initiative simply requires voters to present a valid identification when voting and
10 provides a list of approved photo identifications. Nothing in the text of the initiative requires
11 Nevada officials to appropriate funds to or to expend new funds. Additionally, the initiative
12 will only require mail-in ballots to have a block next to the voter’s signature for the voter to add
13 digits from their driver’s license number, social security number, or a number provided by the
14 county clerk. None of these changes mandates an appropriation or expenditure.

15 Additionally, the issue of whether the enactment of the Initiative meets federal
16 constitutional requirements is not relevant to the Court’s analysis of whether the Initiative
17 requires an appropriation or expenditure. First, the Initiative does not require an appropriation
18 or expenditure by a governmental official. Second, “the substantive validity of an initiative
19 should be challenged if and when the initiative becomes law. See *Herbst Gaming, Inc. v.*
20 *Heller*, 117 Nev. 169, 141 P.3d 1224, 1233.

21 In *Herbst*, the Supreme Court specifically found that “pre-election challenges to an
22 initiatives’ substantive constitutionality are not ripe” for judicial review. *Id.* “A primary focus
23 in such cases has been the degree to which the harm alleged by the party seeking review is
24 sufficiently concrete, rather than remote or hypothetical, to yield a justiciable controversy.” *Id.*
25 Alleged harm that is speculative or hypothetical is insufficient: an existing controversy must be
26 present. *Id.* Pre-election challenges lack a concrete factual context in which a provision may be
27 evaluated, and any harm is highly speculative since the measure may not even pass at election

1 time.

2 Accordingly, the Initiative does not seek to have an appropriation or expenditures of
3 funds in violation of the unfunded mandate provision. Additionally, whether there is an issue
4 regarding the Initiative meeting federal constitutional requirements is not ripe for this Court's
5 review because the Initiative should be challenged, if at all, when the initiative becomes lase.

6 ***C. NRS 295.061 does not preclude Petitioner from Challenging the Description of Effect.***

7
8 The Court finds that NRS 295.061 is not applicable to the pending initiative. It is public
9 policy for the Court to render a decision on merits of the parties' claims and defenses, and thus
10 the Court makes no findings as to whether NRS 295.061 is applicable.

11 **D. Res judicata and Collateral Estoppel do not apply.**

12 For Res Judicata and Collateral Estoppel to be applicable, the Court must review and
13 consider four factors. The four factors that are required are (1) the issue decided in the prior
14 litigation must be identical to the issue presented in the current action; (2) the initial ruling must
15 have been on the merits and have become final; ... (3) the party against whom the judgment is
16 asserted must have been a party or in privity with a party to the prior litigation, and (4) the issue
17 was actually and necessarily litigated.

18 The Court does not find that the factors for precluding a claim under Res Judicata and
19 Collateral Estoppel are found in this pending case, and thus, deny Repair the Vote's request to
20 preclude this matter from being heard on the merits. It is public policy for the Court to render a
21 decision on merits of the parties' claims and defenses, and thus the Court concludes that the two
22 initiatives before the Court are not the same, and thus, neither Res Judicata or Collateral
23 Estoppel applies.

24 **ORDER**

25 This Court, having reviewed the pleadings and papers filed herein, accepted arguments
26 from the parties, and good cause appearing, Order as Follows:

27 1. The Court does finds that NRS 295.061 is not applicable to preclude Plaintiff from

1
2 challenging the Description of Effect.

3 2. Res Judicata and Collateral Estoppel does not preclude Plaintiff from bringing a
4
5 challenge to the initiative.

6 3. The Description of Effect satisfies the requirement of NRS 295.009 as it is
7 substantively correct, does not misrepresent what the initiative will accomplish, and is
8 straightforward, succinct, and is a nonargumentative summary of what the Initiative is designed
9 to achieve.

10 4. The language of the proposed constitutional amendment does not create an
11 appropriation or unfunded expenditure, and therefore does not violate Article 19, Section 6 of
12 the Nevada Constitution.

13 5. Plaintiff's request for declaratory and injunctive relief are DENIED. The matter is
14
15 dismissed with prejudice.
16 DATED: March 6, 2024.

17
18 *William A. Maddox*
DISTRICT COURT JUDGE

19 Submitted by

20 /s/ David C. O'Mara, Esq.

21 DAVID C. O'Mara, Esq.
22 Attorney for Repair the Vote
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