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

ERIC JENG, an individual,

Plaintiff,

vs.

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

Defendant,

and

FAIR MAPS NEVADA,

Intervenor-Defendant.

Case No.: 23 OC 000137 1B

Dept. No.: II

ERIC JENG, an individual,


Plaintiff,

vs.

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

Case No.: 23 OC 000138 1B

Dept. No.: II

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1 Defendant,
2 and
3 FAIR MAPS NEVADA,
4 Intervenor-Defendant.

5
6 **~~PROPOSED~~ ORDER**

7 These matters came before the Court pursuant to Plaintiff Eric Jeng's
8 Complaints for Declaratory and Injunctive Relief challenging Initiative Petition C-
9 04-2023 (in Case No. 23 OC 000137 1B) and Initiative Petition C-03-2023 (in Case
10 No. 23 OC 000138 1B), Plaintiff's Memorandum of Points and Authorities in Support
11 of the Complaint in each case, Intervenor Fair Maps Nevada's Answering Brief in
12 each case, and Plaintiff's Reply in each case. Also before the Court in each case are
13 Fair Maps Nevada's Motion to Dismiss the Complaint ("Motion to Dismiss") and Fair
14 Maps Nevada's Motion to Strike a portion of Plaintiff's reply brief ("Motion to Strike"),
15 as well as Plaintiff's Oppositions to those motions. Defendant Secretary of State
16 Aguilar has taken no position on any issue in either case. Having considered the
17 parties' filings and the arguments of counsel at the February 15, 2024, hearing, the
18 Court rules as follows:

19 **PROCEDURAL BACKGROUND**

20 Fair Maps Nevada filed Initiative Petitions C-03-2023 and C-04-2023
21 ("Petition" or "Petitions") on November 14, 2023. Each Petition would amend the
22 Nevada Constitution to establish a new, seven-member state body called the
23 "Independent Redistricting Commission," and require that the Commission, rather
24 than the Legislature itself, undertake redistricting of Nevada's state legislative plans
25 and congressional districts after each decennial census. The Petitions impose a host
26 of procedural and substantive requirements that the Commission would be required
27 to follow in carrying out this task. Petition C-04-2023 would additionally require that
28

1 the Commission redraw Nevada's state legislative plans and congressional districts
2 in 2027. The Petitions are otherwise identical. Petition C-03-2023 includes the
3 following description of effect:

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

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

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

23 This amendment will require redistricting following each federal
24 census.

25 Petition C-04-2023's description of effect replaces the last paragraph with the
26 following: "This amendment will require redistricting following the 2026 election and
27 each federal census thereafter."

28 Plaintiff filed a separate Complaint and Memorandum of Points and
29 Authorities in Support of Complaint for Declaratory and Injunctive Relief
30 Challenging each of the Petitions on December 7, 2023. He alleged that each Petition
31 unlawfully mandates an unfunded expenditure in violation of Article 19, Section 6 of
32 the Nevada Constitution. He also contended that each Petition has a description of
33 effect that fails to comply with NRS 295.009(1)(b) and is deficient because it does not
34 explain that the Petition will result in the expenditure of state funds. After
35 intervening, Fair Maps Nevada filed a responsive brief regarding each Petition on

1 December 26, 2023. Plaintiff filed a reply brief regarding each Petition on January 4,
2 2024. Eighteen days later, on January 22, Fair Maps Nevada filed its Motion to
3 Dismiss and Motion to Strike in each case. Plaintiff opposed both motions in both
4 cases on February 8.

5 On February 15, 2024, the Court held an omnibus hearing on all pending
6 matters in both cases. At the conclusion of the hearing, the Court orally denied the
7 Motions to Dismiss and the Motions to Strike, and the Court held on the merits that
8 both Petitions violate Article 19, Section 6's prohibition on unfunded mandates and
9 contain legally deficient descriptions of effect. This written Order follows.

10 **LEGAL STANDARDS**

11 Article 19, Section 6's prohibition on initiative petitions that mandate
12 unfunded expenditures is a "threshold content restriction" and voids any initiative
13 that does not comply. *Educ. Freedom PAC v. Reid*, 138 Nev., Adv. Op. 47, 512 P.3d
14 296, 303 (2022) (quoting *Rogers v. Heller*, 117 Nev. 169, 173 (2001) (per curiam)).
15 Nevada law also allows challenges to an initiative petition where the description of
16 effect is deficient, see NRS 295.061. Both such challenges are "properly evaluated at
17 the preelection stage." *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 890 & n.38, 141
18 P.3d 1224, 1233 & n.38 (2006) (per curiam) (citing *Rogers*, 117 Nev. At 173, 18 P.3d
19 at 1036).

20 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

21 **I. The Motions to Dismiss**

22 Fair Maps Nevada's Motions to Dismiss are denied. Although NRS 295.061(1)
23 directs courts to set matters challenging the legal sufficiency of initiative petitions
24 "for hearing not later than 15 days after the complaint is filed," the Supreme Court
25 has held that deadline "directory," rather than "mandatory," and explained that it
26 would be "harsh and absurd to dismiss a party's challenge to an initiative merely
27 because the district court failed or was not able to set the hearing within 15 days
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1 through no fault of the party filing the complaint.” *Reid*, 512 P.3d at 301. The facts of
2 *Reid* are nearly identical to the facts here: in both cases, the delay was partially
3 attributable to the preemption of an assigned judge under Nev. Sup. Ct. R. 48.1(1)
4 under circumstances where no replacement was readily available. *See id.* at 300. The
5 undersigned set this case for a hearing on the earliest possible date after being
6 assigned to the case in late January. There is therefore no basis for dismissing the
7 challenges.

8 II. The Motions to Strike

9 Fair Maps Nevada’s Motions to Strike a portion of Plaintiff’s replies are denied.
10 Under First Judicial District Court Rule 3.9, “[t]he purpose of a reply is to rebut facts,
11 law, or argument raised in the opposition.” Plaintiff’s replies appropriately raised
12 issue preclusion to rebut Fair Maps Nevada’s arguments that the Petitions would not
13 require an expenditure of government funds, which were directly inconsistent with
14 the holding of *Jackson v. Fair Maps Nevada PAC*, No. 19-OC-209 1B (1st Jud. Dist.
15 Ct. Nev. Jan. 2, 2020), *aff’d*, No. 80563 (Nev. July 24, 2020). Moreover, because
16 Plaintiff had already discussed and relied upon *Jackson* in his Complaints and
17 opening memoranda of law, Fair Maps Nevada had the opportunity to address
18 *Jackson* in its response briefs but chose not to do so.

19 Fair Maps Nevada’s alternative request to file sur-reply briefs is denied as
20 moot. The Court has considered the arguments in the proposed sur-reply briefs and,
21 for the reasons given below, they do not affect the Court’s conclusions in this matter.

22 III. The Petitions violate Article 19, Section 6.

23 Article 19, Section 6 of the Nevada Constitution prohibits initiative petitions
24 that “make[] an appropriation or otherwise require[] the expenditure of money, unless
25 [they] also impose[] a sufficient tax, not prohibited by the Constitution, or otherwise
26 constitutionally provide[] for raising the necessary revenue.” Accordingly, when an
27 initiative “create[es] a new requirement for the appropriation of state funding that
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1 does not now exist and provides no discretion to the Legislature about whether to
2 appropriate or expend the money” but does not provide for raising the necessary
3 revenue, it does not comply with Article 19, Section 6 and is thus void. *Reid*, 512 P.3d
4 at 303–04.

5 The Court concludes that the Petitions violate Article 19, Section 6 because
6 they would require the expenditure of state funds but would not raise any revenue.
7 The Petitions would create a new government body, the Commission, and mandate
8 that it undertake legislative redistricting, subject to detailed procedural and
9 substantive requirements. Complying with these requirements will invariably
10 require government expenditures. And the Petitions undeniably do not raise any
11 revenue.

12 Issue preclusion bars Fair Maps Nevada from denying that the Petitions will
13 require a government expenditure. The First Judicial District Court addressed a
14 materially identical petition in 2020 and held that it “will result in the expenditure
15 of state funds[.]” Order at 4, *Jackson v. Fair Maps Nev. PAC*, No. 19-OC-00209 1B
16 (Nev. 1st Jud. Dist. Ct. Jan. 2, 2020), *aff’d*, 136 Nev. 832, 467 P.3d 635 (2020). Issue
17 preclusion applies where (1) the prior litigation involved “the same fact issue,” even
18 if the legal claims are “substantially different,” provided that (2) the prior ruling was
19 on the merits and became final, (3) the party to be precluded was a party to the prior
20 action, and (4), the issue was “actually and necessarily litigated.” *Five Star Cap. Corp.*
21 *v. Ruby*, 124 Nev. 1048, 1053, 1055, 194 P.3d 709, 712–13 (2008) (quoting *LaForge v.*
22 *State, Univ. & Cmty. Coll. Sys. Of Nev.*, 116 Nev. 415, 420, 421, 997 P.2d 130, 134
23 (2000)).

24 Here, the Petitions are substantively almost identical to the petition at issue
25 in *Jackson*. Fair Maps Nevada’s briefing, including its sur-reply, never articulated
26 any factual distinction between the petition in *Jackson* and the Petitions before the
27 Court now. Fair Maps Nevada therefore waived any such distinction. The ruling in
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1 *Jackson* was on the merits, and it became final when Fair Maps Nevada chose to moot
2 its cross-appeal of that issue by declining to pursue it. *Jackson v. Fair Maps Nevada*,
3 No. 803563 (Nev. July 24, 2020); see *Personhood Nevada v. Bristol*, 126 Nev. 599, 605,
4 245 P.3d 572, 576 (2010). Fair Maps Nevada was a party in *Jackson*. And the issue
5 of whether the petition would require a government expenditure was actually
6 litigated, with the plaintiff in that case raising, and the Court accepting, many of the
7 same arguments made in this case.

8 The Court would conclude that the Petitions violate Article 19, Section 6 even
9 if Fair Maps Nevada were not precluded from arguing that the Petitions do not
10 require the expenditure of state funds. The Court considers it obvious that the
11 creation of a new, seven-member government body tasked with undertaking a
12 mandatory, difficult task will require an expenditure of government funds. And that
13 conclusion is confirmed by Nevada's own past experience with redistricting, the
14 experiences of other states that have authorized redistricting commissions like the
15 one the Petition would create anew in Nevada, and the detailed requirements of the
16 Petition itself. The Court reaches this conclusion as to both Petitions. Petition C-04-
17 2023 would additionally require an extra round of redistricting in 2027, that would
18 not otherwise be mandatory, and therefore requires an additional expenditure of
19 state funds as well.

20 Fair Maps Nevada's argument that the Petitions would merely shift
21 expenditures from the Legislature to the Commission does not resolve this problem.
22 The Commission is an entirely new body whose members cannot be current
23 legislators. And the required expenditure to fund the Commission would be a new,
24 mandatory expenditure. Under Article 19, Section 6, that required expenditure must
25 be offset by new "tax or revenue" raised by the Petitions. *Rogers*, 117 Nev. at 177, 18
26 P.3d at 1038. A reduction in costs elsewhere—such as in the Legislature's operational
27 budget—does not suffice. And regardless, nothing in the Petitions requires the
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1 Legislature to cover the Commission's expenses by reducing its own operational
2 budget.

3 The Court therefore holds that the Petitions violate Article 19, Section 6
4 because they mandate a government expenditure to fund the Commission, without
5 raising the necessary revenue to pay for it.

6 **IV. The Petitions' descriptions of effect are invalid.**

7 For similar reasons, the Petitions' descriptions of effect are unlawful. Under
8 NRS 295.009(1)(b), initiative petitions must "set forth, in not more than 200 words, a
9 description of the effect of the initiative or referendum if the initiative or referendum
10 is approved by the voters." The description of effect "must not be deceptive or
11 misleading," *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 42, 293
12 P.3d 874, 879 (2013), and must "explain the[] ramifications of the proposed
13 amendment" to allow voters to make an informed decision, *Nev. Judges Ass'n v. Lau*,
14 112 Nev. 51, 59, 910 P.2d 898, 903 (1996). To accurately explain the consequences of
15 the initiative, the description must identify "the need for or nature of the revenue
16 source" to fund the proposed initiative. *Reid*, 512 P.3d at 304.

17 The Petitions' original descriptions of effect fail to explain that the Petitions
18 will result in the expenditure of state funds to fund the Commission. As explained
19 above, Fair Maps Nevada is precluded from denying that the Petitions would require
20 a state expenditure, and the Court in any event independently concludes that they
21 would require such an expenditure. The descriptions of effect must reflect that fact.
22 *Id.* Without that information, the descriptions fail to sufficiently "identify what the
23 law proposes and how it intends to achieve that proposal." *Educ. Initiative PAC*, 129
24 Nev. at 42, 293 P.3d at 879. Moreover, the description of effect for Petition C-04-2023
25 is also deficient for failing to explain that the Petition would require mid-cycle
26 redistricting and invalidate the existing legislative plans and congressional districts
27 early, in 2027, when they would otherwise remain in force until 2031.

1 Fair Maps Nevada's proposed amended descriptions of effect do not adequately
2 remedy these problems. These descriptions propose adding one sentence stating that
3 "[t]he existing and ongoing expense" of redistricting "will be shifted to the
4 Commission but will remain based in the legislative branch." This revision does not
5 cure the problem, because it describes a *shift* in expenditures rather than an increase
6 in expenditures, and because nothing in the Petitions requires that the Legislature
7 offset the cost of the Commission by reducing the Legislature's own operational
8 budget. The proposed amended descriptions of effect therefore remain inadequate.
9 And no change to the descriptions of effect could resolve the fact that the Petitions'
10 substance includes an unfunded mandate in violation of Article 19, Section 6.

11 Accordingly, for the reasons set forth above, and good cause appearing,
12 Fair Maps Nevada's Motions to Dismiss and Motions to Strike are **DENIED**;
13 Fair Maps Nevada's alternative request for leave to file a sur-reply brief is
14 **DENIED AS MOOT**; and

15 **IT IS HEREBY ORDERED** and declared that Petition C-03-2023 and
16 Petition C-04-2023 are *void ab initio* because they violate Article 19, Section 6 of the
17 Nevada Constitution, and that their descriptions of effect fail to satisfy the
18 requirements of NRS 295.009(1)(b). The Secretary of State is enjoined from taking
19 any action on the Petitions.

20 Bradley S. Schrager shall serve a notice of entry of the order on all parties and
21 file proof of such service within 7 days after the date the Court sent the order to the
22 attorney.

23 **IT IS SO ORDERED.**

24 Dated this 6th day of March, 2024.
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DISTRICT COURT JUDGE

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2 Respectfully submitted by:

3 **BRAVO SCHRAGER LLP**

4 *Bradley S. Schrager, Esq.*

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