

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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REV. LEONARD JACKSON,

Appellant,

vs.

FAIR MAPS NEVADA PAC,
NEVADA SECRETARY OF STATE,

Respondents.

CASE NO. 80563

District Court Case No.:
19 OC 00209 1B

Appellant's Opening Brief

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DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the Appellant is an individual, therefore there are no parent corporations or publicly-held companies that own 10% or more of the party's stock.

Kevin Benson appeared for Appellant Rev. Leonard Jackson in proceedings in the District Court and has appeared for Appellant before this Court.

DATED this 27th day of March, 2020.

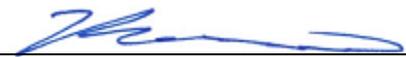
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I. JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRAP 3A(b)(1) because the district court's January 2, 2020 order is a final order resolving all claims between all parties. The January 2, 2020 order was served on January 6, 2020 by U.S. Mail. The notice of appeal was timely filed on February 5, 2020 pursuant to NRAP 4(a).

II. ROUTING STATEMENT

This case involves a ballot question and is therefore presumptively retained by the Supreme Court pursuant to NRAP 17(a)(2).

III. ISSUES ON APPEAL

1. Is it inaccurate and misleading for an initiative petition's description of effect to tell voters that in 2023 it merely "could" replace the electoral maps drawn by the Legislature in 2021, when it is certain that will occur?
2. Did the district court err by failing to make any findings of fact regarding the true effect of the initiative?
3. Did the district court exceed its authority and jurisdiction when it rewrote the initiative's description of effect on behalf of the initiative proponents?

IV. STATEMENT OF THE CASE

This case is a challenge to the description of effect of an initiative petition brought pursuant to NRS 295.061 and 295.009(1)(b). The initiative at issue would amend the Nevada Constitution to create a redistricting commission. Joint Appendix (“JA”) 49. Appellant Rev. Leonard Jackson (“Jackson”) commenced this case on November 26, 2019 by filing his Complaint and Opening Brief in the district court. JA 1.

The Complaint alleged three claims: (1) that the description of effect was false and misleading because it told voters the proposed redistricting commission would be “independent,” when in fact it would not be; (2) that the description of effect was inaccurate and misleading because it told voters that the commission would adopt “fair and competitive” electoral maps, when nothing in the initiative actually required that it do so; and (3) that the description was deficient because it failed to inform voters of important practical effects, including that it would cost taxpayers additional money and it failed to notify taxpayers that the commission would adopt maps in 2023 that would replace the maps the Legislature adopts in 2021. JA 4-6.

Respondent Fair Maps Nevada PAC (“Fair Maps”) filed an Answer to the Complaint and an Answering Brief on December 13, 2019. JA 25-32; 35-46.

Jackson filed a Reply Brief on December 20, 2019. JA 62-73. The district court held a hearing on the Complaint on December 23, 2019. JA 33-34; 74-119.

On January 2, 2020, the district court entered an order granting declaratory and injunctive relief, and containing a new description of effect. JA 127-132. The district court agreed with Jackson that the proposed commission is not “independent,” and that it would be misleading to tell voters that it would adopt “fair and competitive” electoral maps. JA 130. However, the new description of effect set forth in the order states that the proposed commission “could” adopt maps in 2023 that would undo the 2021 maps adopted by the Legislature, rather than accurately and straightforwardly stating that it “will” adopt new maps in 2023. JA 130-31.

The notice of entry of order was served on January 6, 2020 by U.S. Mail. JA 133-34. The notice of appeal was timely filed on February 5, 2020. JA 141.

V. STATEMENT OF RELEVANT FACTS

On November 4, 2019, Respondent Fair Maps Nevada PAC, filed a constitutional initiative petition designated as #C-02-2019 by the Secretary of State. JA 49. The initiative petition seeks to amend the Nevada Constitution to require that redistricting be performed by a commission rather than by the Legislature (“the Initiative”). JA 49. The Initiative proposes to add a new Section 5A to Article 4, Section 5 of the Nevada Constitution, which would be titled:

“Apportionment; Creation of Independent Redistricting Commission.” Initiative, Section 5A.¹ JA 49-50.

The Initiative would create the “Independent Redistricting Commission” (“Commission”) within the legislative branch of state government. Initiative, Section 5A(1). Starting in the year 2023, the Commission would apportion the number of Senators and Assemblymen among the state legislative districts and would apportion the number of representatives to the United States House of Representatives among the congressional districts. *Id.*

The Commission would consist of seven members. Initiative, Section 5A(2). The Senate Majority Leader, Senate Minority Leader, Speaker of the Assembly, and Assembly Minority Leader each appoint one commissioner. *Id.* These four commissioners appoint three additional commissioners, each of whom has not been registered or affiliated with either of the two largest political parties in the State within the last four years, and is not registered or affiliated with the same political party as another commissioner. *Id.*

Additionally, a commissioner cannot, within the four years preceding appointment and during their term on the Commission, be a registered lobbyist, a candidate for partisan office, an elected official to a partisan office, an officer or

¹ Unless otherwise noted, the citations to the text of the Initiative are to the *proposed* constitutional section and subsection numbers in Section 2 of the Initiative.

member of the governing body of a political party, a paid consultant or employee of a partisan elected official, candidate, PAC, or caucus, an employee of the Legislature or the State of Nevada (except employees of the judicial branch, the armed forces, or a state institution of higher education). Initiative, Section 5A(3). Nor may a commissioner be related within the third degree of consanguinity or affinity to any such individual. JA 49-50.

All meetings of the Commission must be open to the public and the Commission shall ensure that the public has the opportunity to view, present testimony, and participate in the hearings before the Commission. All Commission materials shall be public records. Initiative, Section 5A(5). *Id.*

The Commission shall adopt a redistricting plan not later than July 1, 2023, and thereafter not later than 180 from the release of the decennial census. Initiative, Section 5B(2). JA 50.

A final plan requires five affirmative votes, including votes from at least one commissioner from each of the two largest political parties and one commissioner not registered or affiliated with either of those parties. *Id.*

The Commission must draw districts according to certain criteria, and must apply those criteria in the order listed in the Initiative. Initiative, Section 5B(1). These criteria include ensuring that, on a statewide basis, the districts “do not

unduly advantage or disadvantage a political party.” *Id.* The last criteria that the Commission may consider is the number of politically competitive districts. *Id.*

The Description of Effect of the Initiative states in full:

This measure will amend the Nevada Constitution to establish an Independent Redistricting Commission to oversee the mapping of fair and competitive electoral districts for the Nevada Senate, Nevada Assembly, and U.S. House of Representatives.

The Commission will consist of seven Nevada voters, four who will be appointed by the leadership of the Nevada 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 such individuals. All meetings of the Commission shall be open to the public who shall have opportunities to participate in hearings before the Commission.

The Commission will ensure, to the extent possible, that the electoral districts comply with the United States 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 by the Commission beginning in 2023 and thereafter following each federal census.

JA 51.

VI. SUMMARY OF ARGUMENT

The Initiative proposes an amendment to the Nevada Constitution that would create a redistricting commission. The Initiative directs the Commission to adopt a redistricting plan no later than July 1, 2023. The Legislature will perform redistricting in 2021, after the 2020 census.

The Initiative's description of effect contained numerous errors, most of which were addressed by the district court. However, instead of making findings of fact about the true effect of the Initiative, the district court took it upon itself to rewrite the description of effect. The district court's description of effect states that the Commission "could" adopt a redistricting plan in 2023 that would replace the Legislature's 2021 plan. This is inaccurate and misleading because the Commission's 2023 redistricting plan *will* replace the Legislature's 2021 plan. The district court's description of effect therefore violates NRS 295.009(1)(b) because it is not accurate, straightforward, and non-misleading.

The district court also erred by failing to make specific findings of fact regarding the true effect of the Initiative. Such findings of fact are necessary for the district court to determine whether the description of effect complies with NRS 295.009(1)(b). They are also necessary for the petition proponent to redraft the description to comply with the court's order.

Last, the district court erred by rewriting the description of effect itself. The role of the district court is to make findings of fact and determine whether the description complies with the law. The court's role is not to rewrite the description on behalf of the petition proponent. The district court exceeded its jurisdiction and authority when it rewrote the description, therefore that portion of the order must be vacated.

VII. ARGUMENT

1. Standard of Review

The district court's findings of fact will be upheld on appeal unless they are clearly erroneous or are not supported by substantial evidence. *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). Questions of law are reviewed *de novo* (*id.*), including a district court's decision to grant declaratory and injunctive relief which depends on a pure question of law. *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 41, 293 P.3d 874, 878 (2013).

2. Legal standard for an initiative's description of effect

NRS 295.009(1)(b) requires that every initiative “[s]et forth, in not more than 200 words, a description of the effect of the initiative or referendum if the initiative or referendum is approved by the voters.” The purpose of the description of effect is to “prevent voter confusion and promote informed decisions.” *Nevadans for Nev. v. Beers*, 122 Nev. 930, 939, 142 P.3d 339, 345 (2006).

The description of effect must appear on every signature page. NRS 295.009(1)(b). Thus “[t]he importance of the description of effect cannot be minimized, as it is what the voters see when deciding whether to even sign a petition.” *Coal. for Nev.’s Future v. RIP Commerce Tax, Inc.*, No. 69501, 2016 Nev. Unpub. LEXIS 153, at *5 (May 11, 2016) (unpublished decision – NRAP 36(c), citing *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 37, 293 P.3d 874, 876 (2013) and *Las Vegas Taxpayer Accountability Comm. v. City Council*, 125 Nev. 165, 177, 208 P.3d 429, 437 (2009)).

For that reason, the description of effect “must be a straightforward, succinct, and nonargumentative summary of what the initiative is designed to achieve.” *Educ. Initiative*, 129 Nev. at 37, 293 P.3d at 876. The district court must also analyze “whether the information contained in the description is correct and does not misrepresent what the initiative will accomplish and how it intends to achieve those goals.” *Id.*, 129 Nev. at 35. 293 P.3d at 883.

3. The district court’s description of effect is inaccurate and misleading

After finding that the Proponent’s description of effect violated NRS 295.009(1)(b), the district court took it upon itself to rewrite the description of effect. JA 130-31. The district court’s description of effect corrects many of the numerous problems with the original description, but it is still materially inaccurate and misleading, and therefore violates NRS 295.009(1)(b). Specifically, the last

sentence of the district court’s description of effect states in pertinent part: “This amendment requires redistricting after each federal census, beginning in 2023, which **could** replace maps drawn by the Legislature after the 2020 census...” (emphasis added). JA 131.

Fair Maps argued that it is possible that in 2023 the Commission could simply adopt the Legislature’s 2021 redistricting plan, so it won’t *necessarily* create a new plan that will replace the Legislature’s plan. JA 43. This argument must be rejected. While many things are theoretically possible, there is no real possibility that the Commission would adopt the Legislature’s 2021 plan. Accordingly, it is inaccurate and misleading to tell voters that it “could.”

First, the initiative itself states that the Commission “shall” adopt a redistricting plan “[n]ot later than July 1, 2023,” and then sets forth certain criteria that the Commission must consider, which the Legislature is not required to consider. JA 43. Second, the Commission must be composed of two members of each major party and three members who are not members of either major party. JA 42. Finally, the Commission requires a supermajority of five votes to adopt a plan, including at least one from each major party. JA 50.

In other words, the Commission is required to create a redistricting plan using different criteria than the Legislature, it has a different political composition than the Legislature, and it has a different vote threshold to take action. The

combination of these three factors means that the Commission will adopt a redistricting plan that is different from the plan adopted by the 2021 Legislature. Consequently, it is inaccurate to state that the Commission “could” adopt a plan that would replace the Legislature’s plan, because it *will*. It is misleading to voters to imply that there is any realistic possibility that the Commission will simply adopt the Legislature’s redistricting plan.

This is a material inaccuracy because redistricting normally occurs only once a decade, and whatever plan is adopted by the Legislature would control during that time. The Initiative makes a significant change by requiring mid-decade redistricting just two years after the Legislature will redistrict in 2021. As a result, the Legislature’s redistricting plan will only be effective for a single election cycle in 2022. Voters need to be informed that this initiative will “undo” the redistricting plan adopted by the Legislature 2021.

Since this is about redistricting, it is also, of course, about politics. Whether the Initiative is good policy is not the question before the Court. The question is what information do voters need to know to make an informed decision about whether to sign the petition. Voters care about politics, and therefore the political ramifications if the Initiative becomes law is important information for voters.

Our current Democratic Governor is not up for election in 2020. Democrats also have a majority of seats in both houses of the Legislature. Voters of any

political party (or none) will rightfully consider redistricting control when casting their ballots at the 2020 polls. Democratic voters will expect the 2021 Legislature and the Governor to adopt a redistricting plan that will be friendly to Democrats. And Republican voters will cast votes with the understanding that if they flip either house or the Governor's Mansion, they will have control of drawing the maps. In any case, voters should not be misled to believe that a newly created redistricting commission "could" simply adopt the Legislature's 2021 redistricting plan. That is not at all the point of the Initiative, and the likelihood of it occurring is vanishingly small.

If this initiative becomes law, the Commission will adopt a new plan in 2023, which inevitably will be different than the plan passed in 2021, which in turn will have an effect on the politics of the maps. Some voters would welcome that change, but many others would not. Knowing of that consequence will undoubtedly influence voters' decision whether to support the Initiative or not. It is therefore imperative that the Description accurately describes this consequence so that voters can make an informed decision about whether to support the Initiative.

This case is similar to *Las Vegas Taxpayer Accountability Comm. v. City Council*, 125 Nev. 165, 183-84, 208 P.3d 429, 441 (2009). There, the description of effect stated that the referendum would only apply to new redevelopment plans, when it would actually apply to all redevelopment plans. *Id.* This Court affirmed

the district court's ruling that the description "was materially misleading because, by stating that the referendum's passage would halt only new, additional development projects, it failed to inform the voters that the repeal of Ordinance No. 5830 would also affect existing redevelopment projects." *Id.* This Court stated: "[w]e agree with the district court that the description of effect materially fails to accurately identify the consequences of the referendum's passage," and it therefore violated NRS 295.009(1)(b). *Id.* The description was therefore simply wrong. *Id.*

Here, like in *Las Vegas Taxpayer*, the district court's Description of Effect is simply wrong because it tells voters that the Initiative "could" replace the Legislature's 2021 redistricting plan, when it is certain that it will. It is also misleading and argumentative because the use of the word "could" implies that there is significant uncertainty about whether the Commission would undo the Legislature's plan.

In sum, the district court's Description also violates NRS 295.009(1)(b), because it fails to accurately convey to voters the actual effect of the Initiative, and this part of the district court's order must therefore be reversed.

4. The district court erred by failing to make findings of fact.

The role of the district court is to make findings of fact regarding what the actual effect of the petition is, and from those findings make conclusions of law as to whether the description of effect complies with NRS 295.009(1)(b). For

example, in *Las Vegas Taxpayer Accountability v. City Council of Las Vegas*, 125 Nev. 165, 183-84, 208 P.3d 429, 441 (2009), the district court made findings of fact regarding the “true effect” of the referendum, and based on those findings determined that the description of effect was invalid. It was then up to the petition proponents to rewrite the description of effect and amend their petition.

In *Prevent Sanctuary Cities v. Haley*, 421 P.3d 281, 2018 Nev. Unpub. LEXIS 442, Case No. No. 74966 (Nev. 2018) (unpublished – NRAP 36), the district court found that the initiative violated both the single subject rule and that its description of effect was invalid. However, because it found that the petition violated the single subject rule, the district court did not make specific factual findings regarding the initiative’s true effects. *Id.* at *13-14. This Court affirmed the ruling that the description of effect was invalid, but reversed the single subject ruling. *Id.* at *12-13. It stated that, in light of its reversal on the single subject rule, the petition proponent “should be afforded an opportunity to amend its description of effect to satisfy NRS 295.009(1)(b).” *Id.* at *13. However, a remand was necessary because the district court did not make any factual findings, and “[w]ithout factual findings regarding the initiative’s effect, PSC has been provided no guidance under which it could craft an amended description of effect satisfying NRS 295.009(1)(b)...” *Id.* at *14.

This Court’s ruling in *Prevent Sanctuary Cities*, following the precedent set out in *Las Vegas Taxpayer*, clearly states that the district court must make specific factual findings regarding the “true” effect of the petition. The purpose is two-fold: first, such factual findings form the basis of the district court’s decision regarding whether the description of effect complies with NRS 295.009(1)(b); second, such findings provide guidance to the petition proponent in redrafting and amending the description of effect.

In this case, the district court erred by failing to make any findings of fact regarding the true effect of the Initiative. The order instead states that “[t]he description of effect does not adequately explain to voters what is meant by the term ‘independent’ or the phrase ‘fair and competitive.’”. JA 130. The order does not contain any actual findings of fact regarding the true effect of the petition, i.e., that the Commission it proposes is not “independent,” nor is it required to draw “fair and competitive” electoral districts, among other things.

Jackson demonstrated that the so-called “independent” commission Fair Maps proposes is any but “independent.” *See* JA 10-14; 63-65. Jackson explained in detail how the proposed commission lacks essentially all of the elements that truly independent commissions have, such as: independent and guaranteed funding, a third-party, non-legislative body that selects individuals or pools of individuals to serve on the commission, and prohibitions on political and personal gain from

service on the commission. *Id.* The district court failed to determine whether the proposed commission would actually be independent. *See* JA 127-131.

These findings of fact are important in this case for both the description of effect and the Initiative itself. For example, if the use of the term “independent” is false and misleading in the description of effect, it is likewise false and misleading in the Initiative itself. The Initiative, in bold type on the first page, purports to create the “Independent Redistricting Commission.” JA 49.

The district court erred in this case because it failed to make any factual findings, and instead simply stated that the Description “could be” confusing or misleading. JA 138. Like in *Prevent Sanctuary Cities*, this case should be remanded so that the district court can make factual findings regarding the true effect of the Initiative.

5. The district court lacks jurisdiction to rewrite the description of effect.

Fair Maps argued that the district court should not just determine whether the Initiative’s description of effect was valid or not, but the district court should *itself rewrite* the description of effect to make it valid. JA 44-45. Jackson objected to this, and argued that the district court has no jurisdiction to rewrite the description of effect. JA 69-70; 91-92. Nevertheless, the district court’s order states that it “identifies a new description of effect that satisfies the legal standard required by NRS 295.061(3).” JA 130-31. It then sets forth its own description of effect. *Id.*

This Court’s recent decision in *Prevent Sanctuary Cities* shows that the district court’s role is not to rewrite the description of effect. This Court remanded for the district court to make findings of fact because without them “PSC has been provided no guidance under which it could craft an amended description of effect satisfying NRS 295.009(1)(b)...” *Id.* at *14 (emphasis added). It also noted that “the district court did not provide a **recommendation** for resolving the description's insufficiency...” *Id.* As this Court discerned, it is the obligation of the petition proponent to amend the description of effect; doing so is not the district court’s role.

NRS 295.061(3) provides: “If a description of the effect of an initiative or referendum required pursuant to NRS 295.009 is challenged successfully pursuant to subsection 1 and such description is amended in compliance with the order of the court, the amended description may not be challenged.” The purpose of this statute is to prevent successive challenges to amended descriptions of effect, which could tie a petition up in litigation. However, it does not authorize the district court to itself redraft the description. “[I]n compliance with the order of the court” does not mean that the district court redrafts the description and orders it to be used. Instead, as this Court explained in *Las Vegas Taxpayer* and *Prevent Sanctuary Cities*, it means that the district court makes findings of fact regarding the true

effect of the petition, which the petition proponent then uses to create an amended description that complies with the order.

This rule benefits petition proponents because it gives them the flexibility to redraft the description of effect in a matter that addresses the specific findings of the district court, but does not bind them to using the exact language written by the court. By contrast, if the district court writes the new description of effect, a petition proponent may disagree with part of it that is not germane to the court's findings, or the proponent may simply wish to write it more artfully. But using anything other than the district court's language, verbatim, risks another challenge that would not be barred by NRS 295.061(3). In other words, when the district court rewrites the description of effect, it effectively locks the petition proponent into using its language. By contrast, if it is clarified that the proponent rewrites the description, the proponent is free to redraft the description in the way the proponent prefers, and so long as the new description complies with the order of the court, it is protected from another challenge by NRS 295.061(3).

For these reasons, the district court erred because it had no authority or jurisdiction to rewrite the description of effect. Its order must therefore be vacated.

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VIII. CONCLUSION

For the foregoing reasons, Appellant Jackson respectfully requests this Court vacate the district court's order and remand for the district court to make findings of fact regarding the true effects of the Initiative and enter judgment on those findings.

DATED this 27th day of March, 2020.

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ATTORNEY CERTIFICATE

Pursuant to NRAP 28.2, undersigned counsel certifies that:

1. This Opening 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 using Microsoft Word in Times New Roman in size 14 point font.

2. I further certify that this Opening 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 approximately 4,184 words, which is less than the 14,000 word count available for an opening brief.

3. Finally, I certify that I have read this Opening 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 Opening Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion regarding matters in the record to be supported by a reference to the page of the record on appeal where the matter relied upon is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying Opening Brief is not in compliance.

DATED this 27th day of March, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Benson Law, LLC and that on the 26th day of March, 2020, a true and correct copy of the above **APPELLANT’S OPENING BRIEF** was e-filed and e-served on all registered parties to the Nevada Supreme Court’s electronic filing system as listed below:

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