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David J. Rigdon
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ELECTION LAW – INITIATIVE PETITIONS

Summary

Appeal by The Education Initiative P.A.C. (“PAC”) from a District Court judgment in favor of Respondent, Committee to Protect Nevada Jobs (“Committee”), finding an initiative petition’s description of effect to be incomplete, deceptive, and misleading, and enjoining the Secretary of State from presenting the petition to the legislature.

Disposition/Outcome

The Court reversed the District Court’s grant of declaratory relief, invalidating the initiative petition and its decision to enjoin the Secretary of State from presenting the petition to the 2013 Legislature for consideration.

Factual and Procedural history

Appellant, PAC, seeks to enact a law known as “The Education Initiative” (“Initiative”) using Nevada’s ballot initiative process in order to provide a new funding source for the state’s K-12 education needs. The proposed law would impose a two-percent margin tax on all Nevada businesses with gross receipts greater than \$1 million. After filing the proposed initiative with the Secretary of State, the PAC began circulating petitions to gather the required number of signatures needed to place the proposal before the 2013 Legislature and, if necessary, on the 2014 general election ballot.

Respondent, Committee, filed a complaint for declaratory and injunctive relief in the First Judicial District Court challenging the Initiative. Specifically, the Committee sought a declaration that the Initiative (1) violated N.R.S. 295.009’s single-subject rule, and (2) its description of effect was misleading in multiple respects. The Committee asked the District Court to enjoin the Secretary of State from presenting the Initiative to the 2013 Legislature as the first step towards placing it on the 2014 general election ballot.

The District Court rejected the Committee’s single-subject rule challenge, but agreed that the Initiative’s description of effect was incomplete, deceptive, and misleading. As a result, the District Court granted the Committee’s requested relief in part, enjoining the Secretary of State from presenting the Initiative to the Legislature, but rejecting the Committee’s request that the PAC be enjoined from continuing to gather signatures.

Discussion

Justice Hardesty wrote the unanimous opinion of the Court sitting en banc.

¹ By David H. Rigdon

The Court began by reviewing the history of the initiative petition process and noted that since 1912 Nevada's Constitution has secured to the citizens of this state "the power to propose, by initiative petition, statutes and amendments to statutes . . . and to enact or reject them at the polls."² The constitution authorizes the Legislature to "provide by law for procedures to facilitate" the people's power to legislate by initiative.³ In 2005, the Legislature enacted N.R.S. 295.009 which made two key modifications to the initiative process: (1) the proposed law must embrace only "one-subject,"⁴ and (2) when gathering petition signatures the proponent's petition must include, in 200 words or less, a description of the effect of the initiative if approved by the voters.⁵

The Court noted that in reviewing whether a ballot initiative proponent has complied with N.R.S. 295.009 "it is not the function of th[e] court to judge the wisdom" of the proposed initiative.⁶ Additionally, when a district court's decision to grant declaratory and injunctive relief depends on a pure question of law, the Court will review it de novo.⁷

The Initiative's Description of Effect

Pursuant to N.R.S. 295.009(1)(b), the PAC included with its petition the following description of the initiative:

This statutory initiative proposes to impose a 2-percent margin tax on business entities doing business in Nevada. Exemptions include: natural persons not engaged in business; entities with total revenue of \$1,000,000 or less; passive entities; Section 501(c) organizations. Margin is the lesser of: (1) 70 percent of entity's total revenue from its entire business; or (2) entity's total revenue from its entire business, minus (at its election) the cost of goods it has sold or amount of compensation it has paid to owners and employees. An entity's taxable margin, against which the tax is imposed, is that part of its margin apportioned to Nevada. Revenues from the tax would be deposited in the State Distributive School Account in the State General Fund, and used for the support of K-12 education. The 2-percent modified business tax now paid by financial institutions would temporarily be increased to 2.29 percent, and potentially to 2.42 percent, to provide money for the Department of Taxation to begin to administer the margin tax. Liability for the margin tax would begin to accrue on January 1, 2014, if the initiative is approved by the Legislature, or January 1, 2015, if approved by voters.⁸

² NEV. CONST. art. 19, § 2(1).

³ NEV. CONST. art. 19, § 5.

⁴ NEV. REV. STAT. § 295.009(1)(a).

⁵ NEV. REV. STAT. § 295.009(1)(b).

⁶ Nev. Judges Ass'n v. Lau, 112 Nev. 51, 57, 910 P.2d 898, 902 (1996).

⁷ Nevadans for Nev. v. Beers, 122 Nev. 930, 942, 142 P.3d 339, 347(2006).

⁸ 129 Nev. Adv. Op. 5 at 7-8.

In challenging the Initiative the Committee argued that the PAC's description was inadequate because it both failed to include certain information and because the information it did include was misleading. Specifically the Committee argued that the description misstated how certain tax revenues would be used, neglected to mention that even unprofitable businesses will be required to pay the tax, failed to state that business subject to the tax might incur compliance costs, omitted the meaning of key terms such as "total revenue" and "cost of goods it has sold," did not state that if enacted, the law will not be capable of amendment or repeal for at least three years, and failed to include any explanation as to why the modified business tax might increase from 2.29 percent to 2.42 percent.

Previously the Court has declared that a description of effect must be "straightforward, succinct, and nonargumentative,"⁹ and it must not be deceptive or misleading.¹⁰ However, the description of effect does not need to explain "hypothetical" effects of an initiative.¹¹ In addition, it is the opponent of a ballot initiative who bears the burden of showing that the initiative's description of effect fails to satisfy the standard.¹²

In analyzing the Committee's challenge the court found that the purpose of requiring a description of effect is to broadly inform a petition signer about the initiative and to "prevent voter confusion and promote informed decisions."¹³ During the legislative deliberations that led to the enactment of N.R.S. 295.009(1)(b), legislators raised concerns regarding who would write the description of effect and who would determine its accuracy. In an initial draft of the bill the Legislature included the word "accurate" in front of "description of the effect."¹⁴ Subsequent testimony addressing the proposal highlighted that the Legislature could not constitutionally require an accurate forecast of all an initiative's potential effects in 200 words or less.¹⁵ The final compromise was that the initiative's proponent was given the duty of writing the description of effect, and the word "accurate" was deleted from the description of effect requirement.¹⁶

The Court found that the 200-word limit imposed on the description necessarily means that the proponent cannot be constitutionally required to explain every detail or effect that the initiative might have, especially where, as in this case, the actual text of the initiative is 25 pages in length. To reach a different conclusion would place a significant barrier on the people's power to legislate by initiative. It would also effectively bar all but the simplest of ballot

⁹ *Las Vegas Taxpayer Comm. v. City Council*, 125 Nev. 165, 183, 209 P.3d 429, 441 (2009) (quoting *Herbst Gaming, Inc. v. Sec'y of State*, 122 Nev. 877, 889, 141 P.3d 1224, 1232 (2006)).

¹⁰ *Stumpf v. Lau*, 108 Nev. 826, 833, 839 P.2d 120, 124 (1992) (overruled on other grounds by *Herbst Gaming*, 122 Nev. at 888, 141 P.3d at 1231).

¹¹ *Herbst Gaming*, 122 Nev. at 889, 141 P.3d at 1232.

¹² *Las Vegas Taxpayer Comm.*, 125 Nev. at 176, 208 P.3d at 436.

¹³ *Nevadans for Nev. V. Beers*, 122 Nev. 930, 939-40, 142 P.3d 339, 345 (2006).

¹⁴ A.B. 185, 73d Leg. § 1 (Nev. 2005) (first reprint)

¹⁵ *See Hearing on A.B. 185 Before the Senate Legislative Operations and Elections Comm.*, 73d Leg., at 7-8 (Nev. May 10, 2005).

¹⁶ NEV. REV. STAT. § 295.009(1)(b); NEV. REV. STAT. § 295.061(1).

measures. Such a bar would be incompatible with the Nevada Constitution's requirement that legislation regulating the initiative process "facilitate" the people's exercise of the legislative power.¹⁷

The Court also made clear that statutory interpretation principles do not apply when examining a description of effect. Given the limited function ascribed to an initiative's description of effect, the fact that the descriptions are only relevant at the early stages of the initiative process, and the limitations of the 200-word requirement, the Court found that "it is inappropriate to parse the meanings of the words and phrases used in a description of effect as closely as we would statutory text."¹⁸ Thus when reviewing a description of effect, a district court must take a holistic approach to determine whether the description represents a straightforward, succinct, and nonargumentative summary of the initiative's purpose,¹⁹ how that purpose is achieved,²⁰ and whether the information contained in the description is correct and does not misrepresent its purpose.²¹

Using the holistic approach, the Court concluded that the Committee's arguments regarding the insufficiency of the description of effect "lack merit" and reversed the District Court's action invalidating the initiative on that basis.

The Single-Subject Requirement

N.R.S. 295.009(1)(a) requires that a law proposed by initiative embrace only "one subject and matters necessarily connected therewith and pertaining thereto." The Legislature has clarified that an initiative satisfies this requirement when its parts are "'functionally related' and 'germane' to each other and the initiative's purpose or subject."²² The Court determined that, in this case, the Initiative's primary purpose is "clearly to fund education".²³

The Committee argued that the Initiative violates the single-subject rule because it seeks to implement both a new margin tax and temporarily increase the existing modified business tax. The Court found that since the Initiative is constitutionally required to be self-funding,²⁴ and that to implement the new margin tax will require expenditures by the Department of Taxation prior to any revenues being collected, the temporary increase in the modified business tax to fund those initial expenses is functionally related and germane to the Initiative's clear purpose of funding education. Thus the District Court properly rejected the Committee's single-subject rule challenge.

¹⁷ NEV. CONST. art. 19, § 5.

¹⁸ 129 Nev. Adv. Op. 5 at 18.

¹⁹ Las Vegas Taxpayers Comm. V. City Council, 125 Nev. 165, 183, 208 P.3d 429, 441 (2009).

²⁰ *Id.*

²¹ *Stumpf v. Lau*, 108 Nev. 826, 833, 839 P.2d 120, 124 (1992).

²² Las Vegas Taxpayers Comm. 125 Nev. at 180; 208 P.3d at 439 (quoting NEV. REV. STAT. § 295.009(2)).

²³ 129 Nev. Adv. Op. 5 at 21.

²⁴ NEV. CONST. art. 19, § 6.

Conclusion

Given that descriptions of effect are utilized only in the early stages of the initiative process and are limited to 200-words the Court held that they need not articulate every detail and possible effect of the initiative. Instead, they need only provide a straightforward, succinct, and nonargumentative summary of what the initiative is designed to achieve and how it intends to do so. Because the description of effect for the Initiative in this case complied with these requirements, the Court held that the District Court erred in concluding that the description of effect was “incomplete, deceptive, [and] misleading.”

In addition, since the provisions of the Initiative are functionally related and germane to its clear purpose of funding public education, the Court held that the District Court properly rejected the Committee’s single-subject rule challenge.

The Court reversed the District Court’s grant of declaratory relief invalidating the Initiative and its decision to enjoin the Secretary of State from presenting it to the 2013 Legislature and placing it on the 2014 general election ballot.