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Education Freedom PAC v. Reid, 138 Nev. Adv. Op. 47 (June 28, 2022)

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Recommended Citation

Martinez, Servando, "Education Freedom PAC v. Reid, 138 Nev. Adv. Op. 47 (June 28, 2022)" (2022).
Nevada Supreme Court Summaries. 1516.
<https://scholars.law.unlv.edu/nvscs/1516>

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STATUTORY LIMITS: APPLICABILITY OF NRS 295.061 IN PROPOSED INITIATIVES FOR LEGISLATIVE BALLOTS

Summary

This appeal comes from a district court order enjoining an initiative petition’s circulation and the initiative’s placement on the ballot. In an opinion drafted by Justice Hardesty, the Court considered whether the district court properly denied EFP’s request to dismiss the complaint because the district court had not set the matter for a hearing within 15 days. The Court acknowledges that, under the Nevada Constitution, an initiative petition cannot require appropriations or expenditures, must adequately inform potential signatories about the petition’s goal, and cannot invade the Legislature’s primary role of proposing and enacting laws. The Court concluded that that the initiative at hand failed to satisfy all three requirements and that the district court properly enjoined respondent Secretary of State from placing the initiative on the ballot and properly declined to dismiss the complaint despite not having set the hearing within that time frame.

Facts and Procedural History

Appellant Education Freedom PAC (EFP) sought to place an initiative on the ballot that would amend the Nevada Constitution to require the Legislature to establish education freedom accounts for parents to use to pay for their child’s education if their child is educated outside of the uniform system of common schools. However, Respondents Reid and Rogers (collectively referred to as Reid) filed a complaint for declaratory and injunctive relief challenging the initiative in the district court. EFP intervened and filed an answer and a brief challenging the district court’s authority to hear the matter given that no hearing had been set within 15 days, as

¹ By Servando Martinez.

is required by Nevada statutory law. After the initial order, the district court entered another order enjoining EFP from circulating the initiative petition for signatures and enjoining respondent from including the initiative on the ballot. The district court came to the conclusion that the dismissal was unnecessary because the hearing was expedited to the best of the court's ability and because the initiative was invalid for three reasons: (1) the initiative is an unfunded mandate, (2) the description of the effect is legally misleading and contains a material omission, and (3) the initiative violates the Nevada Legislature's inherent deliberative functions by commanding the Legislature to enact certain laws. EFP then brought this matter on appeal.

Discussion

The district court properly denied EFP's request to dismiss

The Court began by considering whether the district court properly denied EFP's request to dismiss the complaint because the district court had not set the matter for hearing within 15 days. The Court relied on NRS 295.061, which requires that a party file a complaint challenging an initiative petitions description of effect no later than fifteen days after the petition is filed with the Secretary of State, which Reid did, in fact, do.² The Court further relied on past precedent that states "when a statutory time limit is material, it should be construed as mandatory unless the legislature intended otherwise."³ The Court used *Village League* to conclude that the statute's time requirements were directory, despite the statute's use of the term "shall."⁴ Here, under NRS 295.061(1), the court had fifteen days after Reid filed the February 22 complaint to set a hearing, and the court did not do so. Instead, after the matter was assigned to Senior Judge McGee, he

² NEV. REV. STAT. § 295.061(1).

³ *Village League to Save Incline Assets, Inc. v. State, Bd. of Equalization*, 124 Nev. 1079, 1086, 194 P.3d 1254, 1359 (2008).

⁴ *Id.* at 1260.

promptly entered an order, twenty-nine days after the complaint was filed, directing the court clerk to set a hearing for the next week. The next day, the matter was set for a hearing on March 29. The Court further claimed that the statute’s legislative history is instructive and demonstrates that legislators wanted to ensure that courts still had an adequate opportunity to properly vet challenges to initiatives just that the courts do so on a priority basis. Next, the Court affirmed that public policy supports the conclusion that the hearing-setting requirement is directory. Although the Court concluded that the hearing-setting requirement in NRS 295.061(1) is not mandatory, it nonetheless emphasized that district courts must make every effort to comply with the expedited, statutory time frame for considering initiative challenges because “initiative deadlines in general are relatively short, the district court must expedite any challenges to an initiative.”⁵ Here, special circumstances prevented the district court from timely setting the hearing, and the district court set the hearing as quickly as those circumstances permitted and without excessive delay. Accordingly, because the fifteen-day requirement for setting the hearing is directory, and considering the special circumstances of this case, the Court ruled that the district court did not err in denying EFP's request to dismiss the complaint.

The district court properly enjoined the EFP initiative’s circulation and placement on the ballot

The Court considered the district court's decision to enjoin the circulation of the initiative petition for signatures and to enjoin the Secretary of State from placing the initiative on the ballot. Thus, the Court reviewed this matter de novo.⁶

The initiative fails to comply with constitutional requirements

⁵ Personhood Nev. v. Bristol, 126 Nev. 599, 603, 245 P.3d 572, 575 (2010).

⁶ Educ. Initiative PAC v. Comm. to Protect Nev. Jobs, 129 Nev. 35, 41, 293 P.3d 874, 878 (2013).

EFP argued that its initiative did not need to comply with Article 19, Section 6 of the Nevada Constitution regarding unfunded mandates, and regardless, it complied with that section because the initiative does not include any expenditures or appropriations and leaves it to the Legislature to fund the education freedom accounts.

All initiatives must comply with Article 19, Section 6

EFP further contended that it did not have to comply with the requirement to include funding provisions because it proposed only a constitutional change. The Court, however, disagreed on the basis that Article 19, Section 2 of the Nevada Constitution provides that “subject to the limitations of Section 6 of this Article, the people reserve to themselves the power to propose, by initiative petition, statutes and amendments to this constitution, and to enact or reject them at the polls.”⁷ They also relied on Section 6, which provides that Article 19 “does not permit the proposal of any statute or statutory amendment which makes an appropriation or otherwise requires the expenditure of money, unless such statute or amendment also imposes a sufficient tax, not prohibited by the Constitution, or otherwise constitutionally provides for raising the necessary revenue.”⁸ Using these two sections and past case precedent, the Court analyzed the plain meaning of the constitutional provision before considering the “history, public policy and reason for the provision.”⁹ Stating that a constitutional provision is ambiguous if “it is susceptible to two or more reasonable but inconsistent interpretations,” the Court concluded that Section 6 is ambiguous because it conflicts internally with Section 2, which “is exactly what

⁷ Nev. Const. art. 19, § 2.

⁸ Nev. Const. art. 19, § 6.

⁹ See *Landreth v. Malik*, 127 Nev. 175, 180, 251 P.3d 163, 166 (2011); see also *Orion Portfolio Servs. LLC v. County of Clark ex rel. Univ. Med. Ctr. Of S. Nev.*, 126 Nev. 397, 402, 245 P.3d 527, 531 (2010) (providing that [the court] “must construe multiple statutory provisions as a whole”).

Article 19, Section 6 aims to avoid.”¹⁰ Therefore, the Court concluded that all initiative petitions must comply with Article 19, Section 6’s requirement that initiatives requiring expenditures or appropriations contain a funding provision.

EFP’s initiative is an unfunded mandate

EFP argued that the initiative does not require money to be taken from the treasury and instead only requires the Legislature to make an appropriation after enacting laws to effectuate the education freedom accounts. Because the initiative does not include any explicit expenditure or appropriation, EFP contended it did not need to include a funding provision.

The Court then recognized that an initiative that “makes an appropriation or requires an expenditure of money” is void if it does not also provide for the necessary revenue.¹¹ The Court concluded that the initiative does not comply with Article 19, Section 6 because it creates a new requirement for the appropriation of state funding that does not now exist and provides no discretion to the Legislature about whether to appropriate or expend the money. Thus, the Court determined that the district court properly found it to be void.

The description of effect is misleading

The district court determined that the initiative's failure to comply with Article 19, Section 6 is not the only reason it is void. It concluded that EFP also failed to provide an adequate description of effect for the initiative. The Court here agreed with this

¹⁰ *Id.*

¹¹ *Rogers v. Heller*, 117 Nev. 169, 173, 18 P.3d 1034, 1036 (2001).

description of effect analysis, as used in *Education Initiative PAC*.¹² The Court concluded that because the initiative petition does not include its own funding source, the description of effect is misleading about the impact the proposed change would have on the state's budget. Thus, it found that the district court properly determined that these deficiencies render the initiative void.

The initiative impedes the Legislature's deliberative function

EFP contended that because there are numerous constitutional provisions directing the Legislature to enact laws to effectuate those provisions, an initiative petition proposing a constitutional amendment that directs the Legislature to enact laws is not improper. Thus, EFP further argued that the district court erred in concluding that the initiative petition was void because it would impair the Legislature's inherent deliberative function. The Court here however concluded the opposite, by determining whether Reid's challenge to the initiative is proper for consideration pre-election. The Court primarily relied on their holding in *Herbst Gaming* to acknowledge that there are two types of challenges to an initiative that are appropriate: (1) those based on an argument that the initiative did not meet the procedural requirements for placing an initiative on the ballot, and (2) those based on a contention that "the subject matter is not appropriate for direct legislation under constitutional or statutory limits on the initiative power."¹³

As the Court explained in *Herbst Gaming*, and as relevant here, there are two types of challenges to an initiative that are appropriate for pre-election consideration: (1) those based on an argument that the initiative did not meet the procedural

¹² *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 37, 293 P.3d 874, 876 (2013).

¹³ *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 890-91, 141 P.3d 1224, 1233 (2006).

requirements for placing an initiative on the ballot, and (2) those based on a contention that “the subject matter is not appropriate for direct legislation under constitutional or statutory limits on the initiative power.”¹⁴ Using this precedent, the Court concluded that because Reid's challenge is based on the idea that the Legislature itself would not be permitted to enact the change proposed in the initiative, his challenge falls under the second type of permitted challenge. The Court found that the initiative impedes the Legislature’s inherent discretion in adopting or amending laws and places an unclear change in front of the electorate by not providing how the proposed change will be effectuated. The Court used this analysis to conclude that the district court properly declared the initiative void as impairing the Legislature’s deliberative function.

Conclusion

The Court concluded that the district court did not err in denying EFP's request to dismiss Reid's challenge to the initiative petition based on the court's noncompliance with NRS 295.061(1)'s fifteen-day hearing-setting requirement, as that requirement is directory rather than mandatory, and that the district court did not err in enjoining the circulation of the initiative petition or in enjoining the Secretary of State from placing the initiative on the ballot. The Court determined that the initiative is void and the district court’s injunction was affirmed.

¹⁴ *Id.*

Concurrence in part; dissent in part

However, Justice Herndon and Justice Pickering delivered a concurrence in part and dissent in part, claiming that the funding mandate did not apply, and that the description of effect was sufficient in explaining the initiative's goal.