

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAILYPAY, INC., a Delaware Corporation;
NEVADANS FOR FINANCIAL CHOICE, a
Nevada Political Action Committee;
CHRISTINA BAUER, an individual;
ACTIVEHOURS, INC, a Delaware
corporation; STACY PRESS, an individual;
PREFERRED CAPITAL FUNDING -
NEVADA, LLC, a Nevada Limited Liability
Company; AND ALLIANCE FOR
RESPONSIBLE CONSUMER LEGAL
FUNDING, an Illinois Nonprofit Corporation
Appellants,

vs.

FRANCISCO V. AGUILAR, in his official
capacity as Nevada Secretary of State; KATE
FELDMAN, an individual; AND STOP
PREDATORY LENDING NV, a Nevada
nonprofit corporation,
Respondents.

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Lead Case No.: 24 OC 00018
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Case No.: 24 OC 00021 1B
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APPEAL

from the First Judicial District Court of the State of Nevada
The Honorable WILLIAM A. MADDOX, Senior Judge
District Court Lead Case No. 24 OC 00018 1B

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Preferred Capital Funding - Nevada, LLC, a Nevada limited liability company, is not a publicly traded company, and does not have 10% or more of its membership interests owned by a publicly traded company. Preferred Capital Funding - Nevada, LLC's parent company is Preferred Capital Funding of Illinois, LLC, an Illinois limited liability company, which is not a publicly traded company and does not have 10% or more of its membership interests owned by a publicly traded company.

Alliance for Responsible Consumer Legal Funding, an Illinois nonprofit corporation, is not a publicly traded company, does not have 10% or more of its stock owned by a publicly traded company, nor does it have any parent corporations.

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Preferred Capital Funding - Nevada, LLC and Alliance for Responsible Consumer Legal Funding were represented in the District Court by Reisman Sorokac. They are currently represented in this Court by Reisman Sorokac.

DATED this 26th day of August, 2024.

REISMAN SOROKAC

By: /s/ Joshua H. Reisman, Esq.

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment resolving all claims presented to the District Court (defined in Section I (C) below) and from an order refusing to grant an injunction. As such, this Court has jurisdiction pursuant to NRAP 3A(b)(1) and NRAP 3A(b)(3). The District Court entered the final order on April 15, 2024. Appellants (defined in Section I(A) below) timely filed their notice of appeal on May 13, 2024, in accordance with NRAP 4(a)(1).

ROUTING STATEMENT

This case is presumptively retained by this Court pursuant to NRAP 17(a)(2) because it is a case involving a ballot or election question.

STATEMENT OF ISSUES PRESENTED

A. Whether the Initiative¹ embraces more than one subject in violation of NRS 295.009's single-subject requirement.

B. Whether a consumer litigation funding transaction—made pursuant to NRS Chapter 604C—constitutes a "loan" under Nevada law.

C. Whether the Initiative's 36% rate cap on consumer litigation funding is functionally related and germane to the Initiative's purpose of limiting interest rates on consumer loan transactions.

D. Whether the Description of Effect² is legally insufficient under NRS 295.009(1)(b).

E. Whether the Description of Effect is deceptive and misleading, and not a straightforward summary, because it leads voters to believe that the Initiative only impacts consumer *loans*—when, in reality, the proposed legislation also regulates *non-loan* transactions.

¹ "Initiative" is defined in Section I (B) below.

² "Description of Effect" is defined in Section I (B) below.

I. STATEMENT OF THE CASE

A. NRS Chapter 604C and the unique characteristics of consumer litigation funding transactions

Preferred Capital Funding - Nevada, LLC ("Preferred") is a consumer litigation funding company licensed pursuant to NRS Chapter 604C. (*See* Appellants' Appendix Volume I ("AA Vol.") at 146.) Alliance for Responsible Consumer Legal Funding ("ARC," collectively referred to along with Preferred as the "Appellants") is an industry coalition that advocates for the establishment and preservation of consumer litigation funding transactions. *See id.*

Litigation funding transactions provide financial support (for living or other expenses) to plaintiffs in personal-injury cases through a nonrecourse transaction that is contingent upon a plaintiff's potential recovery. (*See* AA Vol. III at 588.) Such transactions are unique to litigation and the needs of the injured during the pendency of their legal claims. *See id.* The plaintiff's own attorney assists in the transaction, which provides an option that allows the injured individual to maximize the value of her legal claim. *See id.* Without readily available funds, for living and other expenses, individuals may be forced to settle their legal claims, early, for far less than their true value. *See id.* The funds received allow plaintiffs to pay their rent and take care of their families while they are unable to work and are still pursuing their claim for just compensation—which can take years to resolve. Consumer

litigation funding is a highly valued option for injured plaintiffs embroiled in litigation. *See id.* at 588-89.

Due to the unique characteristics of consumer litigation funding transactions, Nevada enacted a separate chapter of the Nevada Revised Statutes (Chapter 604C) to separately define and regulate such transactions. (*See* NRS Chapter 604C.) Nevada was clear that consumer litigation funding transactions conforming to NRS Chapter 604C are not loans and are not subject to any of the laws or regulatory provisions governing loans:

Nothing in this Chapter shall be construed to cause any consumer litigation funding transaction conforming to this chapter to be deemed a loan or to be subject to any of the provisions of law governing loans. A consumer litigation funding transaction that complies with this chapter is not subject to any other statutory or regulatory provisions governing loans

NRS 604C.220(2).

Under Chapter 604C, a "[c]onsumer litigation funding transaction" is a "nonrecourse transaction in which: [] [a] consumer litigation funding company provides consumer litigation funding to a consumer . . .; and [t]he consumer assigns to the company a contingent right to receive an amount of the potential proceeds of a settlement, judgment award or verdict obtained in the legal claim of the consumer."

NRS 604C.100. The "Consumer" in this context is "a natural person who[] . . .[h]as a pending legal claim." NRS 604C.060.

"[T]he amount to be paid to the company . . . [is] set as a predetermined amount based upon intervals of time from the funding date through the resolution date." NRS 604C.310(1). "The amount must not exceed the funded amount plus charges not to exceed a rate of 40 percent annually." *Id.* The consumer's attorney must acknowledge that: "To the best of the knowledge of the attorney, the funded amount and any charges and applicable fees relating to the consumer litigation funding have been disclosed to the consumer." NRS 604C.350(2)(a).

"All proceeds of the legal claim [are] disbursed via the trust account of the attorney or a settlement fund established to receive the proceeds of the legal claim on behalf of the consumer." NRS 604C.350(2)(c). "The attorney [] follow[s] the written irrevocable instructions of the consumer with regard to the consumer litigation funding transaction." NRS 604C.350(2)(d). "The attorney is obligated to disburse money from the legal claim and take any other step to ensure that the terms of the consumer litigation funding contract are fulfilled." NRS 604C.350(2)(e). Only attorney and Medicare liens take priority over a consumer litigation funding company's lien. *See* NRS 604C.220(3).

Consumer litigation funding contracts must contain the following "material term" in all capital letters:

THE FUNDED AMOUNT AND AGREED UPON CHARGES SHALL BE PAID ONLY FROM THE PROCEEDS OF YOUR LEGAL CLAIM, AND SHALL BE PAID ONLY TO THE EXTENT THAT THERE ARE AVAILABLE PROCEEDS FROM YOUR LEGAL

CLAIM. YOU WILL NOT OWE (INSERT NAME OF THE CONSUMER LITIGATION FUNDING COMPANY) ANYTHING IF THERE ARE NO PROCEEDS FROM YOUR LEGAL CLAIM, UNLESS YOU HAVE VIOLATED ANY MATERIAL TERM OF THIS CONTRACT OR YOU HAVE KNOWINGLY PROVIDED FALSE INFORMATION OR COMMITTED FRAUD AGAINST (INSERT NAME OF THE CONSUMER LITIGATION FUNDING COMPANY).

NRS 604C.360(4).

Accordingly, in a consumer litigation funding transaction, the funding company is paid only in the event the consumer recovers funds in her case, and only to the extent of the funds available, if any.

B. Petition S-03-2024

On January 24, 2024, Kate Feldman ("Ms. Feldman") filed Initiative Petition S-03-2024 ("Initiative") with the Nevada Secretary of State, Francisco V. Aguilar ("Secretary"). (*See* AA Vol. I at 186-202.)

Read in conjunction, Sections 1 and 2 of the Initiative state, in pertinent part:

The Nevada Revised Statutes are hereby amended by adding . . . Chapter 604D: [the] Preventing Predatory Payday and Other Loans Act [which] . . . shall be liberally construed to achieve its purposes, which are combatting predatory payday lending and other high-cost loans; ensuring that out-of-state lenders cannot flout Nevada law by making payday loans, other loans, or transactions subject to this chapter at unlawful rates to Nevada residents; and protecting law-abiding lenders from unfair competition by predatory, out-of-state entities.

Id. at 187. The Initiative's description of effect ("Description of Effect" or "Description") states: "This measure addresses high-interest lending practices by

establishing maximum interest rates charged to consumers." *Id.* at 197. The Description explains that:

Currently, most consumer loans have no interest rate cap. The proposed cap would set a maximum interest rate of 36% annually on the unpaid balance of the amount financed, and would apply to consumer loans; deferred-deposit transactions ("payday loans"); title loans; and other loan types dependent on future earnings and income. . . .

Id. Accordingly, Section 8 of the Initiative makes (among other transactions) the following consumer loan transactions expressly subject to the chapter: "Deferred deposit loans (also known as payday loans)"; "High-interest loans"; "Title Loans"; "Refund anticipation loans"; "Installment loans"; and "Loans secured by a life insurance or annuity contract[.]" *Id.* at 189-90.

However, Section 8 also expressly makes "[c]onsumer litigation funding transactions, as defined in NRS 604C.100[,] . . . subject to th[e] chapter notwithstanding NRS 604C.220 or any other provision of law." *Id.* at 189. Section 9 then states, in pertinent part, that "[f]or any loan or other transaction subject to this chapter . . . , no . . . person shall market, offer, charge, contract for, collect or receive, directly or indirectly, charges or amounts exceeding a 36% annual percentage rate on the unpaid balance of the amount financed." *Id.* at 190. Section 5 also defines "loan" to potentially include consumer litigation funding transactions. *See id.* at 187-88 (covering "provisions for . . . indirect repayment[,] " "[a]ny . . . assignment . . . or agreement for the payment of unpaid . . . compensation . . . to be earned," and

"transaction[s] . . . without regard to whether the . . . lender has legal recourse against the borrower in the event of non-repayment").

Accordingly, the Initiative's provisions make litigation funding transactions, made pursuant to existing NRS Chapter 604C, subject to a 36% rate cap—overriding NRS 604C.310(1), which currently provides for a "40 percent" cap. *See id.* at 190 (stating that Section 9 applies "notwithstanding any other provisions of the laws of this state . . . that refers to or allows an annual percentage that exceeds 36%").

C. Procedural history and rulings presented for review

After the Initiative was filed, on January 29, 2024, Preferred and ARC filed a Complaint in the First Judicial District Court of the State of Nevada ("District Court") against Ms. Feldman and the Secretary for Declaratory and Injunctive Relief Challenging the Initiative. (See AA Vol. I at 145-204. Preferred and ARC contended that the Initiative embraced more than one subject and matters that are not necessarily connected therewith or pertaining thereto in violation of NRS 295.009(1)(a). *See id.* They also contended that the Description failed to provide a straightforward, succinct and nonargumentative summary of the Initiative, and misrepresented the goals of the Initiative and how it intended to accomplish the same, in violation of NRS 295.009(1)(b). *See id.*

On February 22, 2024, Stop Predatory Lending NV, a Nevada nonprofit corporation ("SPLNV"), intervened in the District Court action by stipulation of the

parties, whereby SPLNV was deemed a defendant in the case. (*See* AA Vol. III at 470-79.) Ms. Feldman, the Secretary and SPLNV are collectively referred to herein as "Respondents."

On March 22, 2024, the District Court held a hearing on Preferred and ARC's Complaint. Following the hearing, the District Court entered an order on April 15, 2024 ("Order"), dismissing the Complaint. (*See* AA Vol. IV at 750-59.) The District Court found that the Initiative "[did] not violate NRS 295.009(1)(a)'s single-subject requirement." *Id.* at 758. In doing so, it determined that the "primary purpose of the [Initiative] is to limit interest rates on consumer loan transactions, and that all components of the [Initiative] are functionally related and germane to that purpose." *Id.* at 754. Additionally, the District Court found that the Description "satisfies Nevada's NRS 295.009 requirement as the plain language of the description is straightforward, succinct, and non-argumentative." *Id.* at 756. Specifically, the District Court found that the Description "proceeds, succinctly and directly, through (1) a general statement of the [Initiative]'s purpose; (2) a neutral and accurate statement of current law regarding interest rate limitations; (3) a description of the transactions to which the proposed cap would apply; and (4) a statement of enforcement aspects of the proposal." *Id.*

Appellants appeal from the District Court's Order and challenge the above rulings.

II. SUMMARY OF THE ARGUMENT

Under Nevada law, "[e]ach petition for initiative or referendum must . . . [e]mbrace but one subject and matters necessarily connected therewith and pertaining thereto." NRS 295.009(1). The District Court reasonably found that the Initiative's primary purpose "is to limit interest rates on consumer loan transactions[.]" (See AA Vol. IV at 754.) At issue, here, is whether Sections 5, 8 and 9 of the Initiative are functionally related and germane to the Initiative's purpose of limiting interest rates on consumer loan transactions.

These Initiative provisions make consumer litigation funding transactions, made pursuant to existing NRS Chapter 604C, subject to a 36% rate cap. Consumer litigation funding transactions are *not loans*; thus, the Initiative's 36% rate cap on litigation funding is *not* functionally related and germane to the Initiative's purpose of limiting interest rates on consumer loan transactions.

First, "Chapter 604C — Consumer Litigation Funding" makes clear that consumer litigation funding transactions *are not loans*. See NRS 604C.220(2). Second, litigation funding under Chapter 604C also does not constitute a loan within the ordinary meaning of the term. The plain meaning of a loan, under this Court's definition in *Kline v. Robinson*, 83 Nev. 244, 249-50, 428 P.2d 190, 194 (1967), includes an obligation to *repay* that which was borrowed. *Black's Law Dictionary's*

definition of a "loan" (and of the terms related thereto) also confirms this interpretation.

A transaction in which the borrower's repayment obligation is subject to a contingency is not a "loan" because the terms of the transaction do not necessarily require the "replacement of the sum borrowed" or that the borrower "return . . . an equivalent amount[.]" *Kline*, 83 Nev. at 249, 428 P.2d at 194. A Chapter 604C consumer litigation funding transaction is not a loan because, to the extent there is an obligation to repay, the obligation is conditional. *See* NRS 604C.100; NRS 604C.360(4). Numerous courts have concluded that similar transactions are *not loans* due to their contingent nature.

A consumer litigation funding transaction is not a loan under NRS Chapter 604C; it is not a loan under this Court's definition in *Kline v. Robinson*; and it is not a loan under the plain meaning of the term. Accordingly, a 36% rate cap on litigation funding is not functionally related and germane to the Initiative's subject of limiting interest rates on consumer loan transactions.

The inclusion of Sections 5, 8 and 9 in an Initiative addressing consumer loan transactions does not provide sufficient notice of the subjects addressed in these sections and of the interests likely to be affected by these sections. The Initiative addresses the primary subject of limiting interest rates on consumer loan transactions but embraces more than one subject by seeking to also regulate non-loan transactions

such as consumer litigation funding. Because the Initiative encompasses more than one subject, it violates NRS 295.009's single-subject requirement and cannot be circulated for signatures by the voters.

NRS 295.009(1)(b) requires each initiative petition to "[s]et forth, in not more than 200 words, a description of the effect of the initiative . . . if the initiative . . . is approved by the voters." A description that fails to inform signers "of the nature and effect" of that which is proposed "is deceptive and misleading[.]" *Coalition for Nev.'s Future v. RIP Commerce Tax, Inc.*, No. 69501, 2016 Nev. Unpub. LEXIS 153, at *5-6, 132 Nev. 956 (May 11, 2016) (published in table format). A deceptive and misleading description of effect fails to satisfy NRS 295.009(1)(b) and renders the initiative petition void.

Here, the Description of Effect leads voters to believe that the Initiative only impacts consumer loans—when, in reality, the proposed legislation also regulates non-loan transactions. The Description of Effect thus fails to inform signers of the true nature and effect of what is being proposed, making the Description deceptive and misleading. The Description will also create voter confusion. Voters will have no idea that the proposed legislation impacts the entire consumer litigation funding industry and thus affects numerous interests: e.g., personal-injury plaintiffs, personal-injury lawyers, consumer litigation funding companies, and insurers.

The Description of Effect is simply not a straightforward summary of what the Initiative is designed to achieve and how it intends to reach those goals. Multiple cases from this Court support this conclusion.

The Description of Effect is deceptive and misleading. It fails to straightforwardly inform signatories that the Initiative impacts the consumer litigation funding industry and proposes to regulate these transactions differently in Nevada—to regulate them as loans and to reduce the rate that currently can be charged under Nevada statutes. Accordingly, the Description fails to satisfy NRS 295.009 (1)(b) and thus renders the Initiative void.

III. ARGUMENT

A. The Initiative's overarching purpose or subject is to limit interest rates on consumer loan transactions.

Under Nevada law, "[e]ach petition for initiative or referendum must . . . [e]mbrace but one subject and matters necessarily connected therewith and pertaining thereto." NRS 295.009(1). A petition meets this single-subject requirement if its provisions "are functionally related and germane to each other in a way that provides sufficient notice of the general subject of, and of the interests likely to be affected by, the proposed initiative." NRS 295.009(2).

In applying these provisions, the "preliminary inquiry . . . is whether the initiative's parts are 'functionally related' and 'germane' to each other." *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 122 Nev. 894, 907, 141 P.3d 1235, 1243

(2006) (en banc). "To answer that question, the court must first determine the initiative's overarching purpose or subject and then determine if each provision is functionally related and germane to that purpose or subject." *Nevadans for Reprod. Freedom v. Washington*, 546 P.3d 801, 806, 140 Nev. Adv. Rep. 28 (2024) (en banc). "A subject is the overall thing being discussed[.]" *Helton v. Nev. Voters First Pac*, 512 P.3d 309, 315 n.5, 138 Nev. Adv. Rep. 45 (Nev. 2022 (en banc) (citing *Black's Law Dictionary* (11th ed. 2019) (defining "subject" as "[t]he matter of concern over which something is created"))).

"To determine the initiative's purpose or subject, th[e] court looks to its textual language and the proponents' arguments." *Las Vegas Taxpayer Accountability Comm. v. City Council of Las Vegas*, 125 Nev. 165, 180, 208 P.3d 429, 439 (2009) (en banc). "The court also will look at whether the description of effect articulates an overarching purpose and explains how provisions relate to a single subject." *Helton*, 512 P.3d at 314.³

Here, the District Court found that "the primary purpose of the Petition is to limit interest rates on consumer loan transactions[.]" (AA Vol. IV at 754.)

³ The standard of review challenging a ballot initiative's compliance with the single-subject rule of NRS 295.009 is de novo. See *Nevadans for Reprod. Freedom*, 546 P.3d at 806 (review is de novo where challenge to a petition was without any factual disputes); *Helton*, 512 P.3d at 313 (challenges to initiatives in the absence of factual disputes is reviewed de novo); *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 41, 293 P.3d 874, 878 (2013) (when district court decision regarding a ballot initiative is made on a pure question of law, appellate review is de novo).

Appellants do not challenge that finding as it is consistent with the Initiative's textual language and the Description of Effect's articulated purpose.

The Initiative tells us:

The Nevada Revised Statutes are hereby amended by adding . . . Chapter 604D: [the] Preventing Predatory Payday and Other Loans Act [which] . . . shall be liberally construed to achieve its purposes, which are combatting predatory payday lending and other high-cost loans; ensuring that out-of-state lenders cannot flout Nevada law by making payday loans, other loans, or transactions subject to this chapter at unlawful rates to Nevada residents; and protecting law-abiding lenders from unfair competition by predatory, out-of-state entities.

(AA Vol. I at 187 (emphasis added).)

Similarly, the Description of Effect states: "This measure addresses high-interest lending practices by establishing maximum interest rates charged to consumers." *Id.* at 197. The Description further explains how the provisions relate to this subject:

Currently, most consumer loans have no interest rate cap. The proposed cap would set a maximum interest rate of 36% annually on the unpaid balance of the amount financed, and would apply to consumer loans; deferred-deposit transactions ("payday loans"); title loans; and other loan types dependent on future earnings and income.

The initiative also prohibits evading the interest rate cap

Id.

Based on the foregoing, the overarching purpose or subject—the overall thing being discussed—is addressing high-interest consumer loans. Accordingly, the

District Court reasonably found that the Initiative's primary purpose "is to limit interest rates on consumer loan transactions[.]" (AA Vol. IV at 754.)

B. The Initiative's regulation of consumer litigation funding is not functionally related and germane to the purpose of limiting interest rates on consumer loan transactions because litigation funding is not a loan transaction.

Once an initiative's purpose or subject is determined, the Court "then determine[s] if each provision is functionally related and germane to each other and the initiative's purpose or subject." *Helton*, 512 P.3d at 314. At issue, here, is whether Sections 5, 8 and 9 of the Initiative are functionally related and germane to the Initiative's purpose of limiting interest rates on consumer loan transactions.

For purposes of the chapter, Section 5 defines "loan" to arguably include consumer litigation funding transactions. (*See* AA Vol. I at 187-88 (covering "provisions for . . . indirect repayment[,]" "[a]ny . . . assignment . . . or agreement for the payment of unpaid . . . compensation . . . to be earned," and "transaction[s] . . . without regard to whether the . . . lender has legal recourse against the borrower in the event of non-repayment"). Section 8 expressly makes "[c]onsumer litigation funding transactions, as defined in NRS 604C.100[,] . . . subject to th[e] chapter notwithstanding NRS 604C.220 or any other provision of law." *Id.* at 189-90. And Section 9 states, in pertinent part, that "[f]or any loan or other transaction subject to this chapter . . ., no . . . person shall market, offer, charge, contract for, collect or

receive, directly or indirectly, charges or amounts exceeding a 36% annual percentage rate on the unpaid balance of the amount financed." *Id.* at 190.

Accordingly, these Initiative provisions make consumer litigation funding transactions, made pursuant to existing NRS Chapter 604C, subject to a 36% rate cap—overriding NRS 604C.310(1), which currently provides for a "40 percent" cap. *See id.* (stating that Section 9 applies "notwithstanding any other provisions of the laws of this state . . . that refers to or allows an annual percentage that exceeds 36%").

However, consumer litigation funding transactions are *not loans*; thus, the Initiative's 36% rate cap on litigation funding is not functionally related and germane to the Initiative's purpose of limiting interest rates on consumer *loan* transactions.

First, "Chapter 604C — Consumer Litigation Funding" makes clear that consumer litigation funding transactions *are not loans*:

Nothing in this Chapter shall be construed to cause any consumer litigation funding transaction conforming to this chapter to be deemed a loan or to be subject to any of the provisions of law governing loans. A consumer litigation funding transaction that complies with this chapter is not subject to any other statutory or regulatory provisions governing loans

NRS 604C.220(2).

Second, litigation funding under Chapter 604C also does not constitute a loan within the ordinary meaning of the term. "A loan . . . is the delivery of a sum of money to another *under a contract to return* at some future time *an equivalent amount* with or without an additional sum agreed upon for its use[.]" *Kline v.*

Robinson, 83 Nev. 244, 249-50, 428 P.2d 190, 194 (1967) (emphasis added) (quoting *Milana v. Credit Discount Co.*, 163 P.2d 869, 871 (Cal. 1945)), *overruled in part, on other grounds, by Pease v. Taylor*, 88 Nev. 287, 295 496 P.2d 757, 763 (1972). "In a loan the initial transaction creates a debit⁴ and credit⁵ relationship which is not terminated *until replacement of the sum borrowed* with agreed interest." *Id.* at 250, 428 P.2d at 194 (emphasis added) (quoting *Milana*, 163 P.2d at 871); *see also Robinson v. Durston*, 83 Nev. 337, 341, 432 P.2d 75, 77 (1967) (adopting the same definition of loan and quoting *Kline* for this definition).

Accordingly, the plain meaning of a loan includes an obligation to repay that which was borrowed. *Black's Law Dictionary's* definition of a "loan" (and of the terms related thereto) confirms this interpretation. *See Loan, Black's Law Dictionary* (12th ed. 2024) ("1. An act of lending; a grant of something for temporary use. . . . 2. A thing lent for the borrower's temporary use; esp., a sum of money lent at interest[.]"); *see also Lend, Black's Law Dictionary* (12th ed. 2024) ("1. To allow the temporary use of (something), sometimes in exchange for compensation, on the *condition* that the thing or its equivalent *be returned*. 2. To provide (money) temporarily on *condition of repayment*, usu. with interest." (emphasis added)); *see*

⁴ The meaning of "debit," as relevant here, is "[a] sum charged as due or owing[.]" *Debit, Black's Law Dictionary* (12th ed. 2024).

⁵ The meaning of "credit," as relevant here, is "[a] deduction from an amount due[.]" *Credit, Black's Law Dictionary* (12th ed. 2024).

also Repayment, Black's Law Dictionary (12th ed. 2024) ("1. The paying back of money or its equivalent, usu. after a loan <repayment of a debt>. 2. An amount of money paid regularly until a debt has been satisfied <mortgage repayments>. . ."); *see also Borrow, Black's Law Dictionary* (12th ed. 2024) ("1. To take something for temporary use. 2. To receive money with the understanding or agreement that it *must be repaid*, usu. with interest. See LOAN." (first emphasis added)); *see also Briscoe v. State*, 541 S.W.3d 867, 873 (Tex. App. 2018) (consulting *Black's Law Dictionary's* (10th ed. 2014) definitions of "loan" and "lend" and concluding: "At a minimum, the plain meaning of loan is the temporary use of another's property or money with an express or implied obligation to return or repay that which was borrowed, and it is that obligation to return or repay that distinguishes a loan from a gift or sale.").⁶

Accordingly, a primary characteristic of a "loan" is an obligation to repay the principal or its equivalent. A transaction in which the borrower's repayment obligation is subject to a contingency is not a "loan" because the terms of the transaction do not necessarily require the "replacement of the sum borrowed" or that

⁶ Notably, this Court has previously consulted *Black's* in determining the ordinary meaning of the term loan. *See Dep't of Bus. & Indus. Fin. Insts. Div. v. TitleMax of Nev., Inc.*, 495 P.3d 506, 511 (2021) ("But the ordinary meaning of the term ['loan'], as relevant here, is 'a sum of money lent at interest,' not the sum of money lent *and* the interest." (quoting *Loan, Black's Law Dictionary* (11th ed. 2019))); *see also id.* (citing *State Dep't of Bus. & Indus. v. Check City P'ship, LLC*, 130 Nev. 909, 913, 337 P.3d 755, 757-58 (2014), as "recognizing that the 'usual and natural reading' of the term [based on *Black's* definitions of loan] is the principal amount borrowed").

the borrower "return . . . an equivalent amount[.]" *Kline*, 83 Nev. at 249-50, 428 P.2d at 194.⁷

A Chapter 604C consumer litigation funding transaction is *not a loan* because, to the extent there is an obligation to repay, the obligation is conditional.⁸ A "consumer litigation funding transaction" is a "***nonrecourse transaction***"⁹ in which:

⁷ See also *Novoselsky v. Comm'r*, Docket No. 22400-13, T.C. Memo 2020-68, 2020 Tax Ct. Memo LEXIS 67, at **13 (T.C. May 28, 2020) ("Because a genuine loan is accompanied by an obligation to repay, loan proceeds do not constitute income to the taxpayer. *Commissioner v. Tufts*, 461 U.S. 300, 307, 103 S. Ct. 1826, 75 L. Ed. 2d 863 (1983). For this rule to apply, however, the obligation to repay 'must be unconditional and not contingent upon some future event.' *Friedrich v. Commissioner*, 925 F.2d 180, 185 (7th Cir. 1991) (citing *United States v. Henderson*, 375 F.2d 36, 39 (5th Cir. 1967)), *aff'g* T.C. Memo. 1989-393.").

⁸ Arguably, *there is no obligation* to repay the funded amount. Instead of incurring a repayment obligation, upon executing the litigation funding contract, the consumer assigns to the funding company the contingent right to receive an amount of potential proceeds obtained from the consumer's legal claim. See NRS 604C.100(2). At the same time the litigation funding contract is executed, the consumer gives her attorney written irrevocable instructions to disburse money from the legal claim and to take any other steps to ensure that the terms of the consumer litigation funding contract are fulfilled. See NRS 604C.350(2)(d) & (e). Following the assignment, the consumer has no payment obligation. This is a further reason why consumer litigation funding transactions are not loans.

⁹ The meaning of "non-recourse" is enunciated well (but in the loan context) in *First Indep. Bank of Nev. v. Mohave State Bank*, No. CV-09-8195-PCT-PGR, 2010 U.S. Dist. LEXIS 34517, at *6-7 (D. Ariz. April 7, 2010):

A non-recourse loan is a "secured loan that allows the lender to attach only the collateral, not the borrower's personal assets, if the loan is not repaid." *Black's Law Dictionary* 1020-21 (9th ed. 2009). A non-recourse loan is implicitly limited to disallowing recourse on the

[] [a] consumer litigation funding company provides consumer litigation funding to a consumer . . . ; and [t]he consumer *assigns* to the company *a contingent right to receive* an amount of the *potential proceeds* of a settlement, judgment award or verdict obtained in the legal claim of the consumer." NRS 604C.100 (emphasis added). Consumer litigation funding contracts must contain the following "material term" in all capital letters:

THE FUNDED AMOUNT AND AGREED UPON CHARGES SHALL BE PAID ONLY FROM THE PROCEEDS OF YOUR LEGAL CLAIM, AND SHALL BE PAID ONLY TO THE EXTENT THAT THERE ARE AVAILABLE PROCEEDS FROM YOUR LEGAL CLAIM. YOU WILL NOT OWE (INSERT NAME OF THE CONSUMER LITIGATION FUNDING COMPANY) ANYTHING IF THERE ARE NO PROCEEDS FROM YOUR LEGAL CLAIM, UNLESS YOU HAVE VIOLATED ANY MATERIAL TERM OF THIS CONTRACT OR YOU HAVE KNOWINGLY PROVIDED FALSE INFORMATION OR COMMITTED FRAUD AGAINST

underlying loan. *People's Heritage Sav. Bank v. Recoll Mgmt., Inc.*, 814 F. Supp. 159, 163 (D. Me. 1993) (holding that the non-recourse provision of the loan participation agreement applied only to the underlying indebtedness and not to the contractual and legal obligations specified in the agreement). Non-recourse "does not mean that the purchaser cannot pursue the seller in the event that the seller has other contractual or common law obligations which have been breached." *Id.* Contractual and common law claims are not barred by a non-recourse loan participation agreement if they have any basis in assertion of breach other than the obligation to pay the underlying loan of the borrower. *Id.* at 163-64. Non-recourse provisions are included in contracts to limit the liability to specified collateral identified in advance, but such terms do not limit the underlying obligation of the agreement.

While a litigation funding transaction is not a loan, similar principles apply.

(INSERT NAME OF THE CONSUMER LIGATION FUNDING COMPANY).

NRS 604C.360(4).

Numerous courts have concluded that similar transactions are *not loans* due to their contingent nature. *See Obermayer Rebmann Maxwell & Hippel LLP v. West*, Civil Action No. 15-81, 2015 U.S. Dist. LEXIS 172922, at **9-12 (W.D. Penn. Dec. 30, 2015) (concluding that "Assignment Agreements creat[ing] contingent, uncertain rights to the proceeds of an underlying lawsuit, recoverable only in the event that a settlement or favorable verdict eventually was reached[,] " did not "amount to usurious loans under New York law"), *aff'd*, 725 Fed. Appx. 153, 2018 U.S. App. LEXIS 4861 (3d Cir. Pa., Feb. 27, 2018) (unpublished); *MoneyForLawsuits V LP v. Rowe*, CASE NO. 4:10-CV-11537, 2012 U.S. Dist. LEXIS 43558, at *33 (E.D. Mich. Jan. 23, 2012) (Komives, Mag. J) ("Because CaseFunding's right to payment was contingent upon success and recovery in the underlying lawsuit, the transactions were not 'loans' and the New York usury statute does not render them invalid."), *adopted by* 2012 U.S. Dist. LEXIS 43633 (E.D. Mich. Mar. 29, 2012), *objection overruled by* 2013 U.S. Dist. LEXIS 16533 (E.D. Mich., Feb. 7, 2013); *aff'd*, 2014 U.S. App. LEXIS 11706 (6th Cir.), 2014 FED App. 449N (6th Cir. Mich., 2014); *Cash4Cases, Inc. v. Brunetti*, 167 A.D.3d 448, 449, 90 N.Y.S.3d 154, 155 (App. Div. 1st Dept. 2018) ("Assignment agreements such as the agreement at issue here are not loans, because the repayment of principal is entirely contingent on the success

of the underlying lawsuit."); *Odell v. Legal Bucks, LLC*, 192 N.C. App. 298, 312-13, 665 S.E.2d 767, 776-77 (2008) (determining that litigation funding transaction was not a loan where "Plaintiff's repayment obligations were ultimately subject to a contingency; namely, whether Plaintiff's recovery on her personal injury claim was sufficient to satisfy all or part of her debt to Defendants"); *see also Novoselsky* 2020 Tax Ct. Memo LEXIS 67, at **22 (concluding that advances received under litigation support agreements were not loans for Federal income tax purposes because "repayment of the advances was not just linked to successful conclusion of the litigation; repayment was not required at all unless the litigation was successful").

A consumer litigation funding transaction is not a loan under NRS Chapter 604C; it is not a loan under this Court's definition in *Kline v. Robinson*; and it is not a loan under the plain meaning of the term. Accordingly, a 36% rate cap on litigation funding is not functionally related and germane to the Initiative's subject of limiting interest rates on consumer loan transactions.

The inclusion of Sections 5, 8 and 9 in an Initiative addressing consumer loan transactions does not provide sufficient notice of the subjects addressed in these sections and of the interests likely to be affected by these sections. Voters will not be aware that consumer litigation funding—which is not currently deemed, and regulated as, a loan in Nevada—is being redefined as a "loan" for purposes of

reducing the existing statutory rate cap of 40% to 36%. Voters will not be aware that the Initiative is affecting the entire industry: the interests of personal-injury plaintiffs, consumer litigation funding companies, personal-injury attorneys, and insurance companies. *See Nevadans for the Prot. of Prop. Rights, Inc.*, 122 Nev. at 909, 141 P.3d at 1245 ("Government actions' related to construction projects, public transportation routes, and the denial of requested zoning changes or special use permits are in no way 'functionally related' or 'germane' to [the primary subject of] eminent domain, and this section clearly fails to provide sufficient notice of the wide array of subjects addressed in section 8 or the interests likely to be affected by it.").

The Initiative addresses the primary subject of limiting interest rates on consumer loan transactions but embraces more than one subject by seeking to also regulate *non-loan* transactions such as consumer litigation funding.¹⁰ Because the Initiative encompasses more than one subject, it violates NRS 295.009's single-subject requirement and cannot be circulated for signatures by the voters.

¹⁰ The Initiative also seeks to regulate earned wage access services. (*See* AA Vol. I at 187-88 (defining a "loan" to include: "Any . . . agreement for the payment of unpaid wages, salary, commissions, compensation or other income, . . . whether earned, to be earned, or contingent upon future earnings, that is made in consideration for . . . the payment of money to . . . the person earning or receiving . . . the wages, salary, commissions, compensation, or other income"). However, earned wage access services are currently not deemed loans under NRS Chapter 604D. *See* NRS 604D.190(1)(a) ("Nothing in this chapter shall be construed to cause: (a) Any earned wage access services provided by a licensee in compliance with this chapter to be deemed: (1) A loan or other form of credit; . . . or (3) . . . to be subject to any of the provisions of law governing loans . . .").

C. The Description of Effect is deceptive and misleading and not a straightforward summary of what the Initiative proposes.

NRS 295.009(1)(b) requires each initiative petition to "[s]et forth, in not more than 200 words, a description of the effect of the initiative . . . if the initiative . . . is approved by the voters." "The importance of the description of effect cannot be minimized, as it is what the voters see when deciding whether to even sign a petition." *Coalition for Nev.'s Future*, 2016 Nev. Unpub. LEXIS 153, at *5. It is "significant as a tool to help 'prevent voter confusion and promote informed decisions.'" *Las Vegas Taxpayer*, 125 Nev. at 183, 208 P.3d at 441 (quoting *Nevadans for Nevada v. Beers*, 122 Nev. 930, 939, 142 P.3d 339, 345 (2006) (quoting *Campbell v. Buckley*, 203 F.3d 738, 746 (10th Cir. 2000))). "[P]etition signers 'must be informed at the time of signing of the nature and effect of that which is proposed.'" *Coalition for Nev.'s Future*, 2016 Nev. Unpub. LEXIS 153, at *5 (quoting *Stumpf v. Lau*, 108 Nev. 826, 833, 839 P.2d 120, 124 (1992), *overruled in part on other grounds by Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 888, 141 P.3d 1224, 1231 (2006)).

The description "'must be a straightforward, succinct, and nonargumentative summary of what the initiative is designed to achieve and how it intends to reach those goals.'" *Nevadans for Reprod. Freedom*, 546 P.3d at 808 (quoting *Helton*, 512 P.3d at 316). It must "accurately identify the consequences of the [initiative's] passage." *Las Vegas Taxpayer*, 125 Nev. at 184, 208 P.3d at 441. The description is

required to "alert voters to the breadth and range of effects that the initiative will have." *Prevent Sanctuary Cities v. Haley*, No. 74966, 2018 Nev. Unpub. LEXIS 442, at *10, 421 P.3d 281, 134 Nev. 998 (May 16, 2018) (published in table format).

It must be determined "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." *Educ. Initiative PAC v. Comm. To Protect Nev. Jobs*, 129 Nev. 35, 48, 293 P.3d 874, 883 (2013) (en banc). "[T]he description of effect must 'not be deceptive or misleading.'" *Educ. Freedom Pac v. Reid*, 512 P.3d 296, 304, 138 Nev. Adv. Rep. 47 (2022) (en banc) (quoting *Educ. Initiative PAC*, 129 Nev. at 42, 293 P.3d at 879). A description that fails to inform signers "of the nature and effect" of that which is proposed "is deceptive and misleading[.]" *Coalition for Nev.'s Future*, 2016 Nev. Unpub. LEXIS 153, at *5-6 (quoting *Stumpf*, 108 Nev. at 833, 839 P.2d at 124). A deceptive and misleading description of effect fails to satisfy NRS 295.009(1)(b) and renders the initiative petition void. *See Educ. Freedom Pac*, 512 P.3d at 304.¹¹

Here, the Initiative's Description of Effect reads as follows:

This measure addresses high-interest *lending* practices by establishing maximum interest rates charged to consumers.

¹¹ Notably, "[w]hen legal, not factual, issues are at play, this court reviews de novo a district court order resolving a request for declaratory relief." *Las Vegas Taxpayer*, 125 Nev. at 172, 208 P.3d at 433.

Currently, most consumer *loans* have no interest rate cap. The proposed cap would set a maximum interest rate of 36% annually on the unpaid balance of the amount financed, and would apply to consumer loans; deferred-deposit transactions ("payday loans"); title loans; and other loan types dependent on future earnings and income.

The initiative also prohibits evading the interest rate cap by structuring transactions to mask their nature as *loans* covered by this measure, or partnering with out-of-state *lenders* to violate the rate cap. The initiative voids transactions that violate the cap, and establishes civil penalties.

(See AA Vol. I at 197 (emphases added).)

The nature and effect of what is being proposed—what the voters will perceive when deciding whether to sign the petition—is legislation that regulates high-interest lending practices by imposing a 36% interest-rate cap on consumer loans. Voters will not possibly realize that the Initiative also redefines "loans" in the state of Nevada to impose the same rate cap on *non-loan* transactions such as consumer litigation funding.

The Description's introductory paragraph specifically states that "[t]his measure addresses high-interest lending practices[.]" *Id.* The Description further states that the rate cap "would apply to consumer loans; deferred-deposit transactions ("payday loans"); title loans; and other loan types dependent on future earnings and income." *Id.* There is no mention of consumer litigation funding transactions, and litigation funding does not qualify as another loan type dependent on future earnings

and income. The language used throughout the Description of Effect is applicable and exclusive *to loans*: "lending" (1x); "loans" (5x); "loan" (1x); and "lenders" (1x).

The Description of Effect leads voters to believe that the Initiative only impacts consumer loans—when, in reality, the proposed legislation also regulates non-loan transactions. The Description of Effect thus fails to inform signers of the true nature and effect of what is being proposed, making the Description deceptive and misleading. *See Coalition for Nev.'s Future*, 2016 Nev. Unpub. LEXIS 153, at *5-6.

The Description will create voter confusion. Voters will have no idea that the proposed legislation impacts the entire consumer litigation funding industry and affects numerous related interests: personal-injury plaintiffs, personal-injury lawyers, consumer litigation funding companies, and insurers. Voters will not understand that the Initiative amends NRS Chapter 604C and Nevada law to redefine litigation funding transactions as loans and to reduce the existing statutory rate cap. These unknown consequences are not merely hypothetical; they are decreed under the Initiative. But voters will not be informed.

The Description of Effect is simply not a straightforward¹² summary of what the Initiative is designed to achieve and how it intends to reach those goals. Multiple

¹² *See* <https://www.merriam-webster.com/dictionary/straightforward> (defining "straightforward" as "1 a: free from evasiveness or obscurity : exact, candid . . . b: clear-cut, precise).

cases from this Court support this conclusion. In *Las Vegas Taxpayer*, for example, the description of effect stated, in part: "*Repeal of Ordinance No. 5830 would prevent the Redevelopment Agency from undertaking further development projects in the Redevelopment Area or incurring further indebtedness to support such additional projects.*" 125 Nev. at 182-83, 208 P.3d at 440 (emphasis in the original). The district court found that the "statement of effect 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.* at 184, 208 P.3d at 441. This Court agreed with the district court that "the description of effect materially fail[ed] to accurately identify the consequences of the referendum's passage." *Id.* As a result, the description did not satisfy NRS 295.009(1)(b).

In *Sch. Over Stadiums v. Thompson*, No. 87613, 2024 Nev. Unpub. LEXIS 393, at *5, 548 P.3d 775 (May 13, 2024) (published in table format), the description of effect stated, in part, that "SB 1 established a financing process to construct a Major League Baseball stadium in Clark County, using up to \$380 million taxpayer dollars." This Court found the description misleading: "the statement that S.B. 1 allows Clark County to use 'up to \$380 million taxpayer dollars' suggests that these are existing State funds being used to build the stadium and does not inform signers that a portion of those funds are to be generated from specified sources[.]" *Id.* at *

6. The Court thus concluded that the description failed to "straightforwardly and succinctly inform signatories about what the referendum proposes and thereby fail[ed] to 'prevent voter confusion and promote informed decisions.'" *Id.* (quotation omitted); *see also Prevent Sanctuary Cities*, 2018 Nev. Unpub. LEXIS 442, at *10-11 (considering statement that "describe[d] the prohibitory effect of the initiative [but not] the impact of the prohibition on existing policies and laws"; and concluding that, "[b]y failing to include such effects, the description of effect [wa]s deceptive and misleading, and therefore fail[ed] to satisfy NRS 295.009(1)(b)").

Here, the Description of Effect is similarly deceptive and misleading. It fails to straightforwardly inform signatories that the Initiative impacts the consumer litigation funding industry and proposes to regulate these transactions differently in Nevada—to regulate them as loans and to reduce the rate that currently can be charged under Nevada statutes. Accordingly, the Description fails to satisfy NRS 295.009(1)(b) and thus renders the Initiative void. *See Educ. Freedom Pac*, 512 P.3d at 304.

IV. CONCLUSION

Appellants Preferred and ARC ask this Court for the following relief in reversing the District Court's Order: (1) find that the Initiative violates the single-subject rule under NRS 295.009; (2) find that the Description of Effect is legally insufficient and violates NRS 295.009(1)(b); (3) enjoin the Respondents from taking

any further action on the Initiative; (4) prohibit Respondents from circulating the Initiative to voters for signature gathering; and (5) if deemed appropriate by the Court, require Respondents to revise the Description of Effect to comply with NRS 295.009, and proceed pursuant to NRS 295.015(2).

CERTIFICATE OF COMPLIANCE

I hereby certify that this 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 this brief has been prepared in a proportionally spaced typeface using Microsoft® Word for Microsoft 365 MSO (Version 2403 Build 16.0.17425.20176) 64-bit in 14 point font size and Times New Roman.

I further certify that this brief complies with the type-volume limitations stated in NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 7,198 words.

Finally, I hereby certify that I have read this Appellants' 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 26th day of August, 2024.

By: /s/ Joshua H. Reisman, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of August, 2024, I have caused a true and correct copy of the foregoing APPELLANTS' OPENING BRIEF to be served upon all counsel of record by electronically filing the document using the Supreme Court of Nevada's electronic filing system.

By: /s/ Cynthia Grinzivich
an Employee of REISMAN SOROKAC