

# Resolution

Assembly Joint Resolution No. 5—Assemblyman  
Elliot Anderson

Joint Sponsor: Senator Woodhouse

FILE NUMBER 34

ASSEMBLY JOINT RESOLUTION—Proposing to amend the Nevada Constitution to remove the constitutional provisions governing the election and duties of the Board of Regents of the State University and to authorize the Legislature to provide by statute for the governance, control and management of the State University and for the reasonable protection of individual academic freedom.

**Legislative Counsel’s Digest:**

Article 11 of the Nevada Constitution, which is known as the Education Article, requires the Nevada Legislature to provide for the establishment of a State University that is controlled by a Board of Regents whose duties are prescribed by law. (Nev. Const. Art. 11, § 4) The Education Article also: (1) requires the Legislature to provide for the election of the members of the Board of Regents of the State University and to define their duties by law; and (2) authorizes the Board of Regents to control and manage the affairs of the State University and its funds under such regulations as may be provided by law. (Nev. Const. Art. 11, §§ 7, 8)

As required by the Education Article, the Legislature has provided by law for: (1) the establishment of the State University, which is known as the University of Nevada; and (2) the election of the members of the Board of Regents. (NRS 396.020, 396.040) Additionally, the Legislature has: (1) provided by law for the establishment of the Nevada System of Higher Education, which consists of the State University and other educational institutions, programs and operations; and (2) authorized the Board of Regents to administer the System and to prescribe rules for its governance and management. (NRS 396.020, 396.110, 396.230, 396.280, 396.300, 396.420, 396.440, 396.550)

This resolution proposes to amend the Nevada Constitution to remove the constitutional provisions governing the Board of Regents and to authorize the Legislature to provide by statute for the governance, control and management of the State University. (Nev. Const. Art. 11, §§ 4, 7) However, although this resolution removes the status of the Board of Regents as a constitutional body under the Nevada Constitution, this resolution does not change the status of the Board of Regents as a statutory body under existing statutory provisions, which authorize the Board of Regents to administer the Nevada System of Higher Education and prescribe rules for its governance and management. In addition, this resolution does not repeal, either expressly or by implication, any of those existing statutory provisions relating to the Board of Regents, including the existing statutory provisions that provide for the election of the members of the Board of Regents.

Under the Education Article, the Legislature is authorized to encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, ethical and other educational improvements. (Nev. Const. Art. 11, § 1) In public institutions of higher education, rules which provide for the reasonable protection of individual academic freedom are intended to encourage the pursuit of knowledge and the search for academic truth and enlightenment. (*Urofsky v. Gilmore*, 216 F.3d 401, 410-11 (4th Cir. 2000); *Demers v. Austin*, 746 F.3d 402, 411-12 (9th Cir. 2014))

This resolution proposes to amend the Nevada Constitution to authorize the Legislature to provide by statute for the reasonable protection of individual academic

freedom for students, faculty and other academic personnel of the public institutions of higher education in this State in order to facilitate the policies of encouraging by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, ethical and other educational improvements. (Nev. Const. Art. 11, § 4)

Under the federal Morrill Land Grant Act of 1862, each state was provided with certain federal land grants to be sold to support and maintain at least one college in the state that teaches both agriculture and mechanic arts, including military tactics, so long as the state agrees to certain terms and conditions regarding the preservation and use of the proceeds derived from the sale of the federal land grants. (Act of July 2, 1862, ch. 130, §§ 1-8, 12 Stat. 503-05, as amended and codified at 7 U.S.C. §§ 301 et seq.) To secure the benefits offered by the federal law, the Framers of the Nevada Constitution approved Section 8 of the Education Article to provide for the preservation and use of the proceeds derived from the sale of the federal land grants. (*Debates & Proceedings of the Nevada State Constitutional Convention of 1864*, at 586 and 589-91 (Andrew J. Marsh off. rep. 1866))

This resolution proposes to amend Section 8 of the Education Article to: (1) remove references to the Board of Regents; (2) delete obsolete provisions; (3) clarify citations to the pertinent federal law, including all amendments thereto; and (4) specify that the proceeds derived under the federal law must be invested by the State of Nevada in the manner required by law. (Nev. Const. Art. 11, § 8)

If this resolution is passed by the 2017 Legislature, it must also be passed by the next Legislature and then approved and ratified by the voters in an election before the proposed amendments to the Nevada Constitution become effective.

EXPLANATION – Matter in *bolded italics* is new; matter between brackets ~~omitted material~~ is material to be omitted.

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WHEREAS, Article 11 of the Nevada Constitution, which is known as the Education Article, requires the Legislature to provide for the establishment of a State University that is controlled by a Board of Regents whose duties are prescribed by law (Nev. Const. Art. 11, § 4); and

WHEREAS, The Education Article also requires the Legislature to provide for the election of the members of the Board of Regents and to define their duties by law (Nev. Const. Art. 11, § 7); and

WHEREAS, The Education Article authorizes the Board of Regents to control and manage the affairs of the State University and its funds under such regulations as may be provided by law (Nev. Const. Art. 11, §§ 7, 8); and

WHEREAS, When drafting the Education Article, the Framers of the Nevada Constitution purposefully added constitutional language to ensure that the powers and duties of the Board of Regents and its members “shall be prescribed by the Legislature,” in order to “not leave it to be inferred, perhaps, that they have absolute control” over the State University (*Debates & Proceedings of the Nevada State Constitutional Convention of 1864*, at 586 (Andrew J. Marsh off. rep. 1866) (statement of Delegate George A. Nourse)); and

WHEREAS, The Framers believed that the Board of Regents’ control and management of the affairs of the State University should be governed by laws enacted by the Legislature (*Debates & Proceedings of the Nevada State Constitutional Convention of 1864*, at 585-87 (Andrew J. Marsh off. rep. 1866)); and

WHEREAS, The Framers did not create the Board of Regents as a constitutional body in the Education Article to give the Board of Regents unchecked autonomy from legislative oversight and control (*Debates & Proceedings of the Nevada State Constitutional Convention of 1864*, at 585-91 (Andrew J. Marsh off. rep. 1866)); and

WHEREAS, As required by the Education Article, the Legislature has provided by law for the establishment of the State University, known as the University of Nevada, and has provided by law for the election of the members of the Board of Regents (NRS 396.020, 396.040); and

WHEREAS, The Legislature has provided by law for the establishment of the Nevada System of Higher Education, which consists of the State University and other educational institutions, programs and operations, and for the Board of Regents to administer the System and to prescribe rules for its governance and management (NRS 396.020, 396.110, 396.230, 396.280, 396.300, 396.420, 396.440, 396.550); and

WHEREAS, In cases before the Nevada Supreme Court, the Board of Regents has asserted that its “unique constitutional status” gives it “virtual autonomy and thus immunity” from particular laws and policies enacted by the Legislature (*Board of Regents v. Oakley*, 97 Nev. 605, 607 (1981)); and

WHEREAS, Although the Nevada Supreme Court has rejected the Board of Regents' broad assertion of autonomy and immunity from laws and policies enacted by the Legislature, the Nevada Supreme Court has recognized that the Board of Regents' constitutional status prevents the Legislature from enacting certain legislation that directly "interferes with the Board's essential management and control of the University." (*Board of Regents v. Oakley*, 97 Nev. 605, 608 (1981); *King v. Board of Regents*, 65 Nev. 533, 564-69 (1948)); and

WHEREAS, Under our Nation's fundamental, well-established and long-standing principles of representative government, the traditional role of the people's elected representatives in the Legislature is to serve as the people's legislative check of accountability to ensure that public bodies, agencies and officers in the other branches of government are carrying out their governmental functions for the benefit of the people and in a manner consistent with the laws and policies enacted by the Legislature; and

WHEREAS, The Board of Regents has, at various times, relied on its constitutional status and its authority to control and manage the affairs of the State University as a defensive shield and cloak against the people's legislative check of accountability, and the Board of Regents has, at various times, taken actions that have hindered, thwarted or undermined the Legislature's investigation, review and scrutiny of the institutions, programs and operations of the Nevada System of Higher Education; and

WHEREAS, Like other public bodies, agencies and officers of the State Government, the Board of Regents should be subject to the people's legislative check of accountability through legislative oversight and control, and the Board of Regents' control and management of the affairs of the State University should be governed by all laws enacted by the Legislature; and

WHEREAS, To secure accountability to the people's elected representatives in the Legislature, the Nevada Constitution should be amended to remove the Board of Regents' constitutional status so that the Board of Regents operates only as a statutory public body to ensure that it is subject to the people's legislative check of accountability through legislative oversight and control and to ensure that the Board of Regents' control and management of the affairs of the State University are governed by all laws enacted by the Legislature; and

WHEREAS, Amending the Nevada Constitution to remove the Board of Regents' constitutional status will allow the Legislature to exercise the full extent of its legislative power to review, reform and improve the control and management of the affairs of the State University and, in doing so, the Legislature also will have more options and greater flexibility to review, reform and improve all other institutions, programs and operations of the Nevada System of Higher Education; and

WHEREAS, Amending the Nevada Constitution to remove the Board of Regents' constitutional status will not repeal, either expressly or by implication, the existing statutory provisions which apply to the Board of Regents, the State University and all other institutions, programs and operations of the Nevada System of Higher Education, including, without limitation, the existing statutory provisions that provide for the voters to elect the members of the Board of Regents; now, therefore, be it

RESOLVED BY THE ASSEMBLY AND SENATE OF THE STATE OF NEVADA, JOINTLY, That this resolution may be cited as the Nevada Higher Education Reform, Accountability and Oversight Amendment; and be it further

RESOLVED, That Section 4 of Article 11 of the Nevada Constitution be amended to read as follows:

~~{Sec:}~~ *Sec. 4. 1. The Legislature shall provide for the establishment of a State University which shall embrace departments for Agriculture, Mechanic Arts, and Mining ~~{to be controlled by a Board of Regents whose duties shall be prescribed by Law.}~~ , and other departments deemed appropriate for the State University.*

*2. The Legislature shall provide by law for:*

*(a) The governance, control and management of the State University.*

*(b) The reasonable protection of individual academic freedom for persons who are enrolled in or who are employees or contractors of the State University and other public institutions of higher education in this State in order to facilitate the policies of Section 1 of this Article to encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, ethical and other educational improvements.*

And be it further

RESOLVED, That Section 8 of Article 11 of the Nevada Constitution be amended to read as follows:

~~{Sec:}~~ *Sec. 8. The ~~{Board of Regents shall, from the interest accruing from the first funds which come under their control, immediately organize and maintain the said Mining department in such manner as to make it most effective and useful, Provided, that all the}~~ proceeds of the public lands donated by Act of Congress approved July ~~{second AD. Eighteen hundred and sixty Two,}~~ 2, 1862, *ch. 130, 12 Stat. 503, and thereafter amended by Act of Congress*, for a college for the benefit of Agriculture ~~{[,] the Mechanics}~~ and *Mechanic Arts, ~~{and}~~ including Military tactics , shall be invested by the ~~{said Board of Regents}~~ State of Nevada in the manner required by law* in a separate fund to be appropriated exclusively for the benefit of the first named departments to*

the *State* University as set forth in Section ~~Four above;~~ *4 of this Article*. And the Legislature shall provide that if through neglect or any other contingency, any portion of the fund so set apart ~~, shall be~~ *is* lost or misappropriated, the State of Nevada shall replace said amount so lost or misappropriated in said fund so that the principal of said fund shall remain forever undiminished. ~~{}.~~

And be it further

RESOLVED, That Section 7 of Article 11 of the Nevada Constitution be repealed.

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Legislative Counsel Bureau's Draft Ballot Question Language  
for Assembly Joint Resolution No. 5 of the 79<sup>th</sup> Session  
for Consideration by the  
Legislative Commission



## QUESTION NO. 1

Amendment to the *Nevada Constitution*

Assembly Joint Resolution No. 5 of the 79th Session

### CONDENSATION (Ballot Question)

Shall the *Nevada Constitution* be amended to: (1) remove provisions governing the election and duties of the Board of Regents and its control and management of the State University and require the Legislature to provide by law for the State University's governance, control, and management and the reasonable protection of individual academic freedom at Nevada's public higher education institutions; and (2) revise the administration of certain federal land grant proceeds dedicated for the benefit of certain departments of the State University?

Yes       No

### EXPLANATION & DIGEST

**EXPLANATION**—The *Nevada Constitution* requires the Legislature to provide for the establishment of a State University that is controlled by an elected Board of Regents whose duties are prescribed by law. Additionally, the *Nevada Constitution* provides for the Board of Regents to control and manage the affairs and funds of the State University under regulations established by law. This ballot measure, also known as “The Nevada Higher Education Reform, Accountability and Oversight Amendment,” would remove the constitutional provisions governing the election and duties of the Board of Regents and its control and management of the affairs and funds of the State University and would require the Legislature to provide by law for the governance, control, and management of the State University. This ballot measure would not repeal any existing statutory provisions governing the Board of Regents, including those that provide for the election of Board members, but it would make the Board a statutory body whose structure, membership, powers, and duties are governed by those existing statutory provisions, subject to any statutory changes made through the legislative process.

The *Nevada Constitution* directs the Legislature to encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, ethical, and other educational improvements. This ballot measure would require the Legislature to provide by law for the reasonable protection of individual academic freedom for students, employees, and contractors of Nevada's public higher education institutions in order to facilitate the policies of the *Nevada Constitution* to encourage the promotion of such educational improvements.

The *Nevada Constitution* provides that certain funding derived by the State of Nevada under a federal law enacted by Congress in 1862 must be invested in a separate fund and dedicated for the benefit of certain departments of the State University, and that if any amount of the separate fund is lost or misappropriated through neglect or any other reason, the State of Nevada must replace the lost or misappropriated amount so that the principal of the fund remains undiminished. This ballot measure would revise these provisions by: (1) clarifying the legal citations to the federal law, including all amendments by Congress; and (2) specifying that the funding derived under the federal law must be invested by the State of Nevada in the manner required by law.

**A “Yes” vote would amend the *Nevada Constitution* by: (1) removing provisions governing the election and duties of the Board of Regents and its control and management of the affairs and funds of the State University and requiring the Legislature to provide by law for the governance, control, and management of the State University; (2) requiring the Legislature to provide by law for the reasonable protection of individual academic freedom at public institutions of higher education in this State; and (3) revising provisions governing the administration of certain funding derived under federal law and dedicated for the benefit of certain departments of the State University.**

**A “No” vote would retain existing provisions of the *Nevada Constitution* governing the election and duties of the Board of Regents and its control and management of the affairs and funds of the State University, would not require the Legislature to provide by law for the reasonable protection of individual academic freedom at public institutions of higher education in this State, and would not revise existing provisions governing the administration of certain funding derived under federal law and dedicated for the benefit of certain departments of the State University.**

**DIGEST**—The *Nevada Constitution* requires the Legislature to provide for the establishment of a State University that is controlled by a Board of Regents whose duties are prescribed by law. (Nev. Const. Art. 11, § 4) The *Nevada Constitution* also requires the Legislature to provide for the election of members of the Board and provides for the Board to control and manage the affairs and funds of the State University under regulations established by law. (Nev. Const. Art. 11, §§ 7, 8)

As required by these constitutional provisions, the Legislature has enacted laws to establish the State University and to provide for the election of the members of the Board of Regents. (NRS 396.020, 396.040) In addition, the Legislature has enacted laws to: (1) establish the Nevada System of Higher Education (NSHE), which consists of the State University and certain other educational institutions, programs, and operations; and (2) provide for the Board of Regents to administer NSHE and to prescribe rules for its governance and management. (NRS 396.020, 396.110, 396.230, 396.280, 396.300, 396.420, 396.440, 396.550)

This ballot measure would remove the constitutional provisions governing the Board of Regents and would require the Legislature to provide by statute for the governance, control, and management of the State University. This ballot measure would not repeal any existing statutory provisions governing the Board of Regents, including those that provide for the election of Board members. Rather, by removing the constitutional provisions governing the Board of Regents, this

ballot measure would make the Board a statutory body whose structure, membership, powers, and duties are governed by those existing statutory provisions, subject to any statutory changes made through the legislative process.

The *Nevada Constitution* directs the Legislature to encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, ethical, and other educational improvements. (Nev. Const. Art. 11, § 1) As a general principle in public institutions of higher education, rules that provide for the reasonable protection of individual academic freedom are intended to encourage the pursuit of knowledge and the search for academic truth and enlightenment. (*Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014)) The United States Supreme Court has suggested—but has not determined—that individual academic freedom “related to academic scholarship or classroom instruction” may be entitled to a heightened level of federal constitutional protection beyond existing free speech protections currently afforded to public employees under the First Amendment to the *United States Constitution*. (*Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006)) However, because the U.S. Supreme Court has not conclusively decided this constitutional issue, neither lower courts nor legal commentators have agreed on the precise level of federal constitutional protection that should be extended to individual academic freedom. (Neal H. Hutchens et al., *Essay: Faculty, the Courts, and the First Amendment*, 120 Penn St. L. Rev. 1027 (2016); Mark Strasser, *Pickering, Garcetti, & Academic Freedom*, 83 Brook. L. Rev. 579 (2018))

This ballot measure would provide for the protection of individual academic freedom under Nevada’s state statutes by requiring the Legislature to provide by law for the reasonable protection of individual academic freedom for students, employees, and contractors of Nevada’s public higher education institutions in order to facilitate the policies of the *Nevada Constitution* to encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, ethical, and other educational improvements. Under the Supremacy Clause of the *United States Constitution*, federal constitutional law is “the supreme Law of the Land.” (U.S. Const. Art. VI, cl. 2) Therefore, to carry out this ballot measure in a manner that is consistent with federal constitutional law, the Legislature would not be authorized to enact state statutes that provide less protection to individual academic freedom than is already afforded by federal constitutional law. However, the Legislature would be authorized to enact state statutes that provide greater protection to individual academic freedom. (*Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov’t*, 120 Nev. 712, 730-31 (2004)) Finally, under a federal law enacted by Congress in 1862, generally known as the federal Morrill Land Grant Act of 1862, each state was provided with certain federal land grants to be sold to support and maintain at least one college in the state that teaches both agriculture and mechanic arts, including military tactics, so long as the state agrees to certain terms and conditions regarding the preservation and use of the proceeds derived from the sale of the federal land grants. (Act of July 2, 1862, ch. 130, §§ 1-8, 12 Stat. 503-05, as amended and codified at 7 U.S.C. §§ 301 et seq.) To secure the benefits offered by the federal law, the *Nevada Constitution* provides that the funding derived by the State of Nevada under the federal law must be invested in a separate fund and dedicated for the benefit of the appropriate departments of the State University, and that if any amount of the separate fund is lost or misappropriated through neglect or any other reason, the State of Nevada must replace the lost or misappropriated amount so that the principal of the fund remains undiminished. (Nev. Const. Art. 11, § 8) This ballot measure would revise these provisions by: (1) clarifying the legal

citations to the federal law, including all amendments by Congress; and (2) specifying that the funding derived under the federal law must be invested by the State of Nevada in the manner required by law. However, because the State of Nevada must administer the funding in the manner required by the federal law, this ballot measure would not change the purpose or use of the funding under the federal law. (*State of Wyoming v. Irvine*, 206 U.S. 278, 282-84 (1907))

## ARGUMENTS FOR PASSAGE

Although some other states have elected boards with constitutional status that control and manage particular institutions and programs of public higher education, Nevada is the only state in which a single elected board with constitutional status controls and manages the affairs and funds of the State's entire system of public higher education. In past cases before the Nevada Supreme Court, the Board of Regents has asserted that its "unique constitutional status" gives it "virtual autonomy and thus immunity" from certain laws and policies enacted by the Legislature. (*Board of Regents v. Oakley*, 97 Nev. 605, 607 (1981)) Based on legislative testimony, such assertions have given some people the impression that the Board conducts itself as a fourth branch of government, and that the Board too often invokes its constitutional status as a shield against additional legislative oversight and accountability. For example, in 1999 the Legislature exercised its constitutional powers of investigation and appropriation by passing legislation that created and funded an advisory committee to study the issue of locating a four-year state college in Henderson, Nevada. The Board responded by claiming through its counsel that the legislation was unconstitutional as an "extreme usurpation of the Board's authority" because the advisory committee was "created by and reports to the Legislature and not the Board of Regents." (*Opinion of General Counsel to Board of Regents Regarding Whether Assembly Bill No. 220 Infringes on Constitutional Authority of Board* (Aug. 30, 1999))

Thus, the Board has, at various times, made sweeping arguments regarding its authority and autonomy from additional legislative oversight and accountability. However, the *Nevada Constitution* specifies only the Legislative, Executive, and Judicial branches of state government, and the framers of the *Nevada Constitution* made clear their intent that the Board is not entitled to "absolute control" over the management of the State University. (*Debates & Proceedings of the Nevada State Constitutional Convention of 1864*, at 586 (Andrew J. Marsh off. rep. 1866)) Voting in favor of this ballot question will ensure the Legislature's authority over the Board in all matters relating to the State University by making the Board a statutory body like other executive branch agencies, which will allow for additional legislative oversight and accountability to improve the State's entire system of public higher education.

Further, while the *Nevada Constitution* requires the Legislature to provide financial support for the operation of the State University, it also directs the Board to control and manage the funds of the State University. This divide between the Legislature's constitutional power to fund higher education and the Board's constitutional power to direct how those funds are actually spent gives the Board a virtually unparalleled power within state government to control and manage higher education spending without the same level of legislative oversight typically applied to other executive branch agencies. For years, the Legislature has received complaints about the Board's policies and practices, and the Board has taken actions that some believe have hindered, thwarted,

or undermined the Legislature's investigation, review, and scrutiny of the Nevada System of Higher Education (NSHE) controlled by the Board. According to news reports and legislative testimony, NSHE officials were allegedly involved in providing potentially misleading information to a legislative study of higher education funding in 2011–2012. As part of another legislative study of higher education in 2017–2018, testimony indicated NSHE's lack of an overall compensation philosophy contributed to a faculty pay imbalance that will cost approximately \$90 million to address initially and will remain as an ongoing annual financial obligation. Without additional legislative oversight of the Board's financial management decisions in a manner that is comparable to other executive branch agencies, there is a greater potential for continued fiscal irresponsibility within NSHE, which ultimately hurts taxpayers and students by driving up the cost of higher education.

The Legislature has also received complaints that the Board has adopted policies and procedures that are not responsive to the higher education needs of the State. Since at least the 1970s, legislators have heard complaints that the Board's policies regarding the transfer of student credits within NSHE's own system have proved problematic because the policies make it difficult for students to move between the system's institutions, resulting in unnecessary procedural barriers to the completion of degrees. Although the Board has claimed for years that it is committed to fixing this recurring issue—and some progress has been made—a recent NSHE audit shows that approximately 1 in 4 students still do not receive full credit and/or lose 3 or more credits under the system's credit transfer process. If the Board's control and management of the State University were subject to the same level of legislative oversight typically applied to other government agencies, the Legislature would have the power to change by law any of the Board's policies and procedures that it determined were not responsive to the higher education needs of the State. With such power, the Legislature could exercise the full extent of its legislative authority to review, reform, and improve the control and management of NSHE.

Passage of this ballot question will require the Legislature to guarantee under state law the reasonable protection of individual academic freedom for students, faculty, and contractors in NSHE. Even though individual academic freedom is currently afforded some protection under federal constitutional law, numerous courts and legal commentators have observed that the true scope of the federal constitutional protection has been unclear since the U.S. Supreme Court's 2006 decision in *Garcetti v. Ceballos*. By requiring the Legislature to enact state statutes that provide for the reasonable protection of individual academic freedom at NSHE, this ballot question will compel the Legislature to specify the scope of that protection under state law and also consider whether to provide greater protection to individual academic freedom than is already afforded by federal constitutional law. Because the protection of individual academic freedom is essential to the pursuit of knowledge and the search for academic truth and enlightenment, this ballot question will ensure that NSHE continues to foster experimentation, invention, and a robust exchange of ideas.

Finally, this ballot question will clarify and modernize existing provisions of the *Nevada Constitution* relating to the administration of the federal land grant proceeds dedicated for the benefit of certain departments of the State University under the federal Morrill Land Grant Act of 1862. However, because the State of Nevada must administer those proceeds in the manner required by the federal law, this ballot question will not change the purpose or use of those proceeds under the federal law.

Improve our public higher education system by allowing for additional legislative oversight and accountability regarding the system, ensuring state-law protection for individual academic freedom at institutions within the system, and clarifying and modernizing existing provisions relating to the administration of the federal land grant proceeds dedicated for the benefit of certain departments of the State University under the 1862 federal law. Vote “yes” on Question 1.

### **ARGUMENTS AGAINST PASSAGE**

In 1864, the framers of the *Nevada Constitution* made a deliberate choice to give constitutional status to the Board of Regents to guarantee that it had independent powers to control and manage the State University without the threat of political interference by the Legislature and Governor. The Board’s constitutional status and independent powers are not unique. In at least 21 other states, elected or appointed governing boards have been given constitutional status and independent powers to control and manage state universities and other public institutions of higher education, even if those boards do not oversee the entire state system of higher education to the same extent as Nevada’s Board of Regents.

Consistent with the intent of the framers of the *Nevada Constitution*, the Board has not claimed that it is entitled to “absolute control” over the management of the State University, or that it is free from legislative oversight and accountability. (*Debates & Proceedings of the Nevada State Constitutional Convention of 1864*, at 586 (Andrew J. Marsh off. rep. 1866)) The Board recognizes that the *Nevada Constitution* provides it with specific and limited authority over the State University that is independent of the more general control of the Legislature and Governor because the framers wanted to promote and ensure the academic independence of the State University without making it the political “football of the legislature.” (*State ex rel. Mack v. Torreyson*, 21 Nev. 517, 528 (1893) (Bigelow, J., concurring)) When deemed necessary in court cases and legislative inquiries, the Board has legitimately asserted its constitutional status because the Board has a duty to defend the framers’ intent to protect the State University from unwarranted intrusions by the political forces of government.

Proponents of this ballot question want voters to believe that the framers got it wrong, and that by removing the Board’s specific and limited authority from the *Nevada Constitution*—thereby making the Board a statutory body completely subject to the control of the political machinery of government—the Legislature will somehow improve the transparency, efficiency, and effectiveness of Nevada’s higher education system. Unfortunately, passage of Question 1 does not guarantee any of these promised benefits. Question 1 is nothing but the Legislature trying to gain more power and control, and it would only serve to add political pressures to a governance system that is serving this State well.

Under the Board’s leadership, the Nevada System of Higher Education (NSHE) has steadily improved higher education outcomes in Nevada. Recently, both the University of Nevada, Reno and the University of Nevada, Las Vegas were recognized as Very High Research Activity (R1) institutions by the prestigious Carnegie Classification of Institutions of Higher Education. For the last ten years in which data is available, while full-time equivalent student enrollment in the system increased by roughly 8 percent, the number of diplomas and certificates awarded increased by

more than 40 percent. During this period, the amount of state funding for the system—when calculated in real dollars adjusted for inflation—actually decreased. Yet the Board has, through its financial management decisions, effectively navigated the consequences of a severe economic recession and successfully guided NSHE in its academic mission while also improving operational efficiencies for the benefit of Nevada’s taxpayers and adding marketable value for the system’s students. Under the existing constitutional structure, anytime the Legislature has concerns about the Board’s financial policies and practices, the Legislature already has the power to investigate, review, and scrutinize the Board’s financial management decisions, and the Legislature also retains the ultimate power of the purse to determine the amount of state funding that is appropriated for higher education. Consequently, the Board is already subject to considerable legislative oversight and accountability, and it must explain and justify its financial management decisions to the Legislature in a manner similar to other executive branch agencies.

The Board has governed our higher education system for over 150 years as the system has grown in size, prestige, and complexity. If this question passes, it is uncertain whether the Legislature will retain or reshape the governance of our higher education system. The sole focus of the Board is on higher education policy, and it is best equipped to govern NSHE. It does not make sense to risk losing the Board’s independence, institutional knowledge, and expertise with no assurance of what the Legislature may put in its place.

Maintaining the Board’s current status in the *Nevada Constitution* ensures that the Board remains elected, responsible to the voters, and responsive to constituents. The Nevada Supreme Court has recognized that the constitutional status of the Board prevents the Legislature from directly interfering with its essential management and control of the State University, and for good reason. Passage of this ballot question would allow the Legislature to change existing higher education policies and procedures and even allow the Legislature to make members of the Board appointed rather than elected. Previous attempts to change higher education governance have failed because Nevadans recognize the importance of keeping the system in the *Nevada Constitution* as originally drafted.

Further, requiring the Legislature to enact state statutes that provide for the reasonable protection of individual academic freedom is unnecessary and will likely cause confusion because federal constitutional law already provides such protection and the Board of Regents has already adopted policies related to individual academic freedom and responsibility at its institutions. Transferring this duty to the Legislature is not only unnecessary but also takes the definition of individual academic freedom out of the hands of academic professionals and places it with an inherently political body whose partisan nature may be hostile to the concept of professors and others speaking openly and freely about political, ideological, or controversial issues. Instead of facilitating and encouraging individual academic freedom, this insertion of partisanship into the realm of scholarship is more likely to stifle the concept of academic freedom than to protect it.

Finally, the framers of the *Nevada Constitution* named the Board as the proper trustee to administer the federal land grant proceeds dedicated for the benefit of certain departments of the State University under the federal Morrill Land Grant Act of 1862. By removing the Board as the constitutionally designated trustee, this ballot question would allow the Legislature to name any other executive branch agencies or officers as a statutory trustee, whether or not they have any

experience, knowledge, or understanding of the higher education system or its funding needs. Such a deviation from the intent of the framers could be a recipe for fiscal irresponsibility and mismanagement, which could potentially jeopardize the State's compliance with the federal law.

Reject this uncertain and unnecessary change to the constitutional status of the Board of Regents; do not allow the Legislature to inject politics into the protection of individual academic freedom at institutions within NSHE; and retain the existing constitutional provisions relating to the administration of the federal land grant proceeds dedicated for the benefit of certain departments of the State University under the 1862 federal law. Vote "no" on Question 1.

## FISCAL NOTE

### **Financial Impact—Cannot Be Determined**

If approved by the voters, Question 1 removes references to an elected Board of Regents from the *Nevada Constitution* and instead requires the Legislature to provide by law for the governance, control, and management of higher education in this State. This ballot question also requires the Legislature to provide by law for the reasonable protection of individual academic freedom for students, employees, and contractors of Nevada's public higher education institutions.

Future actions, if any, taken by the Legislature regarding the governance, control, and management of higher education cannot be predicted. Additionally, future actions taken by the Legislature to provide for the reasonable protection of individual academic freedom for students, employees, and contractors of Nevada's public higher education institutions cannot be predicted. Thus, the resulting financial impact upon state government, if any, cannot be determined with any reasonable degree of certainty.

Finally, this ballot question clarifies and modernizes existing provisions of the *Nevada Constitution* relating to the administration of the federal land grant proceeds dedicated for the benefit of certain departments of the State University under the federal Morrill Land Grant Act of 1862. However, because the State of Nevada must administer those proceeds in the manner required by the federal law, this ballot question will not change the purpose or use of those proceeds under the federal law. Thus, there is no anticipated financial impact upon state government from these revisions if Question 1 is approved by the voters.



Legislative Counsel Bureau's Draft Ballot Question Language  
for Assembly Joint Resolution No. 5 of the 79<sup>th</sup> Session  
for Consideration by the  
Legislative Commission  
(With Mark Up)

## QUESTION NO. 1

Amendment to the *Nevada Constitution*

Assembly Joint Resolution No. 5 of the 79th Session

### CONDENSATION (Ballot Question)

Shall the *Nevada Constitution* be amended to: (1) remove provisions governing the election and duties of the Board of Regents and its control and management ~~of the affairs and funds~~ of the State University and require the Legislature to provide by law for the State University's governance, control, and management ~~of the State University~~; (2) ~~require the Legislature to provide by law for~~ and the reasonable protection of individual academic freedom ~~for students, employees, and contractors of~~ at Nevada's public higher education institutions; and ~~(3) (2) revise provisions governing~~ the administration of certain ~~funding derived under federal law and federal land grant proceeds~~ dedicated for the benefit of certain departments of the State University?

Yes

No

### EXPLANATION & DIGEST

**EXPLANATION**—The *Nevada Constitution* requires the Legislature to provide for the establishment of a State University that is controlled by an elected Board of Regents whose duties are prescribed by law. Additionally, the *Nevada Constitution* provides for the Board of Regents to control and manage the affairs and funds of the State University under regulations established by law. This ballot measure, also known as “The Nevada Higher Education Reform, Accountability and Oversight Amendment,” would remove the constitutional provisions governing the election and duties of the Board of Regents and its control and management of the affairs and funds of the State University and would require the Legislature to provide by law for the governance, control, and management of the State University. This ballot measure would not repeal any existing statutory provisions governing the Board of Regents, including those that provide for the election of Board members, but it would make the Board a statutory body whose structure, membership, powers, and duties are governed by those existing statutory provisions, subject to any statutory changes made through the legislative process.

The *Nevada Constitution* directs the Legislature to encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, ethical, and other educational improvements. This ballot measure would require the Legislature to provide by law for the reasonable protection of individual academic freedom for students, employees, and contractors of Nevada's public higher education institutions in order to facilitate the policies of the *Nevada Constitution* to encourage the promotion of such educational improvements.

The *Nevada Constitution* provides that certain funding derived by the State of Nevada under a federal law enacted by Congress in 1862 must be invested in a separate fund and dedicated for the benefit of certain departments of the State University, and that if any amount of the separate fund is lost or misappropriated through neglect or any other reason, the State of Nevada must replace the lost or misappropriated amount so that the principal of the fund remains undiminished. This ballot measure would revise these provisions by: (1) clarifying the legal citations to the federal law, including all amendments by Congress; and (2) specifying that the funding derived under the federal law must be invested by the State of Nevada in the manner required by law.

**A “Yes” vote would amend the *Nevada Constitution* by: (1) removing provisions governing the election and duties of the Board of Regents and its control and management of the affairs and funds of the State University and requiring the Legislature to provide by law for the governance, control, and management of the State University; (2) requiring the Legislature to provide by law for the reasonable protection of individual academic freedom at public institutions of higher education in this State; and (3) revising provisions governing the administration of certain funding derived under federal law and dedicated for the benefit of certain departments of the State University.**

**A “No” vote would retain existing provisions of the *Nevada Constitution* governing the election and duties of the Board of Regents and its control and management of the affairs and funds of the State University, would not require the Legislature to provide by law for the reasonable protection of individual academic freedom at public institutions of higher education in this State, and would not revise existing provisions governing the administration of certain funding derived under federal law and dedicated for the benefit of certain departments of the State University.**

**DIGEST**—The *Nevada Constitution* requires the Legislature to provide for the establishment of a State University that is controlled by a Board of Regents whose duties are prescribed by law. (Nev. Const. Art. 11, § 4) The *Nevada Constitution* also requires the Legislature to provide for the election of members of the Board and provides for the Board to control and manage the affairs and funds of the State University under regulations established by law. (Nev. Const. Art. 11, §§ 7, 8)

As required by these constitutional provisions, the Legislature has enacted laws to establish the State University and to provide for the election of the members of the Board of Regents. (NRS 396.020, 396.040) In addition, the Legislature has enacted laws to: (1) establish the Nevada System of Higher Education (NSHE), which consists of the State University and certain other educational institutions, programs, and operations; and (2) provide for the Board of Regents to administer NSHE and to prescribe rules for its governance and management. (NRS 396.020, 396.110, 396.230, 396.280, 396.300, 396.420, 396.440, 396.550)

This ballot measure would remove the constitutional provisions governing the Board of Regents and would require the Legislature to provide by statute for the governance, control, and management of the State University. This ballot measure would not repeal any existing statutory provisions governing the Board of Regents, including those that provide for the election of Board members. Rather, by removing the constitutional provisions governing the Board of Regents, this

ballot measure would make the Board a statutory body whose structure, membership, powers, and duties are governed by those existing statutory provisions, subject to any statutory changes made through the legislative process.

The *Nevada Constitution* directs the Legislature to encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, ethical, and other educational improvements. (Nev. Const. Art. 11, § 1) As a general principle in public institutions of higher education, rules that provide for the reasonable protection of individual academic freedom are intended to encourage the pursuit of knowledge and the search for academic truth and enlightenment. (*Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014)) The United States Supreme Court has suggested—but has not determined—that individual academic freedom “related to academic scholarship or classroom instruction” may be entitled to a heightened level of federal constitutional protection beyond existing free speech protections currently afforded to public employees under the First Amendment to the United States Constitution. (*Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006)) However, because the U.S. Supreme Court has not conclusively decided this constitutional issue, neither lower courts nor legal commentators have agreed on the precise level of federal constitutional protection that should be extended to individual academic freedom. (Neal H. Hutchens et al., *Essay: Faculty, the Courts, and the First Amendment*, 120 Penn St. L. Rev. 1027 (2016); Mark Strasser, *Pickering, Garcetti, & Academic Freedom*, 83 Brook. L. Rev. 579 (2018))

This ballot measure would ~~require~~ provide for the protection of individual academic freedom under Nevada’s state statutes by requiring the Legislature to provide by law for the reasonable protection of individual academic freedom for students, employees, and contractors of Nevada’s public higher education institutions in order to facilitate the policies of the *Nevada Constitution* to encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, ethical, and other educational improvements. Under the Supremacy Clause of the United States Constitution, federal constitutional law is “the supreme Law of the Land.” (U.S. Const. Art. VI, cl. 2) Therefore, to carry out this ballot measure in a manner that is consistent with federal constitutional law, the Legislature would not be authorized to enact state statutes that provide less protection to individual academic freedom than is already afforded by federal constitutional law. However, the Legislature would be authorized to enact state statutes that provide greater protection to individual academic freedom. (*Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov’t*, 120 Nev. 712, 730-31 (2004))

~~Under~~ Finally, under a federal law enacted by Congress in 1862, generally known as the federal Morrill Land Grant Act of 1862, each state was provided with certain federal land grants to be sold to support and maintain at least one college in the state that teaches both agriculture and mechanic arts, including military tactics, so long as the state agrees to certain terms and conditions regarding the preservation and use of the proceeds derived from the sale of the federal land grants. (Act of July 2, 1862, ch. 130, §§ 1-8, 12 Stat. 503-05, as amended and codified at 7 U.S.C. §§ 301 et seq.) To secure the benefits offered by the federal law, the *Nevada Constitution* provides that the funding derived by the State of Nevada under the federal law must be invested in a separate fund and dedicated for the benefit of the appropriate departments of the State University, and that if any amount of the separate fund is lost or misappropriated through neglect or any other reason, the State of Nevada must replace the lost or misappropriated amount so that the principal of the fund

remains undiminished. (Nev. Const. Art. 11, § 8) This ballot measure would revise these provisions by: (1) clarifying the legal citations to the federal law, including all amendments by Congress; and (2) specifying that the funding derived under the federal law must be invested by the State of Nevada in the manner required by law. However, because the State of Nevada must administer the funding in the manner required by the federal law, this ballot measure would not change the purpose or use of the funding under the federal law. (State of Wyoming v. Irvine, 206 U.S. 278, 282-84 (1907))

## ARGUMENTS FOR PASSAGE

Although some other states have elected boards with constitutional status that control and manage particular institutions and programs of public higher education, Nevada is the only state whose higher education system is governed by an in which a single elected board with constitutional status. The controls and manages the affairs and funds of the State's entire system of public higher education. In past cases before the Nevada Supreme Court, the Board of Regents has asserted that its "unique constitutional status" gives it "virtual autonomy and thus immunity" from certain laws and policies enacted by the Legislature. (Board of Regents v. Oakley, 97 Nev. 605, 607 (1981)) Based on legislative testimony, such assertions have given some people the impression that the Board of Regents regularly refers to conducts itself as the "a fourth branch of government," relying on its unique and that the Board too often invokes its constitutional status to claim that it can operate free from legislative control. as a shield against additional legislative oversight and accountability. For example, in 1999 the Legislature exercised its constitutional powers of investigation and appropriation by passing legislation that created and funded an advisory committee to study the issue of locating a four-year state college in Henderson, Nevada. The Board responded by claiming through its counsel that the legislation was unconstitutional as an "extreme usurpation of the Board's authority" because the advisory committee was "created by and reports to the Legislature and not the Board of Regents." (Opinion of General Counsel to Board of Regents Regarding Whether Assembly Bill No. 220 Infringes on Constitutional Authority of Board (Aug. 30, 1999))

Thus, the Board has, at various times, made sweeping arguments regarding its authority and autonomy from additional legislative oversight and accountability. However, the Nevada Constitution specifies only the Legislative, Executive, and Judicial branches of state government, and the framers of the Nevada Constitution made clear their intent for the Legislature to oversee the control and that the Board is not entitled to "absolute control" over the management of the State University. (Debates & Proceedings of the Nevada State Constitutional Convention of 1864, at 586 (Andrew J. Marsh off. rep. 1866)) Voting in favor of this ballot question will clarify ensure the Legislature's authority over the Board and result in improved in all matters relating to the State University by making the Board a statutory body like other executive branch agencies, which will allow for additional legislative oversight and accountability. to improve the State's entire system of public higher education.

Further, while the *Nevada Constitution* requires the Legislature to provide financial support for the operation of the State University, it also directs the Board of Regents to control and manage the funds of the State University. This disconnect between the Legislature's constitutional power to fund higher education and governance of higher education allows the Board's constitutional power to direct how those funds are actually spent gives the Board, which controls approximately 15 percent of the State's budget, to avoid the fiscal a virtually unparalleled power within state government to control and manage higher education spending without the same level of legislative oversight typically applied to other government executive branch agencies. In the past, For years, the Legislature has received complaints about the Board's policies and practices, and the Board has taken actions that some believe have hindered, thwarted, or undermined the Legislature's investigation, review, and scrutiny of the Nevada System of Higher Education (NSHE) controlled by the Board. According to news reports and legislative testimony, NSHE has deliberately provided officials were allegedly involved in providing potentially misleading information in order to receive more funding, according to legislative testimony. It has also been shown that years of poor internal hiring decisions caused to a legislative study of higher education funding in 2011–2012. As part of another legislative study of higher education in 2017–2018, testimony indicated NSHE's lack of an overall compensation philosophy contributed to a faculty pay imbalance, which that will cost approximately \$90 million each year to address. The lack of to address initially and will remain as an ongoing annual financial obligation. Without additional legislative oversight coupled with of the Board's financial management decisions in a manner that is comparable to other executive branch agencies, there is a greater potential for continued fiscal irresponsibility within NSHE, which ultimately hurts taxpayers as well as and students by driving up the cost of higher education.

The disconnect between funding and governance also results in The Legislature has also received complaints that the Board adopting has adopted policies and procedures that are not responsive to the higher education needs of the State. Recent legislative testimony indicates the college programs currently offered are not aligned with workforce needs, and some employers are forced to recruit college graduates from outside of the State to fulfill these needs. Representatives of the business community have also stated that issues with Since at least the 1970s, legislators have heard complaints that the Board's policies regarding the transfer of student credits within NSHE discourages companies from financially supporting employee participation in continuing education. NSHE's own system have proved problematic because the policies make it difficult for students to move between the system's institutions, resulting in unnecessary procedural barriers to the completion of degrees. Although the Board has claimed for years that it is committed to fixing these issues, the problems remain unsolved. this recurring issue—and some progress has been made—a recent NSHE audit shows that approximately 1 in 4 students still do not receive full credit and/or lose 3 or more credits under the system's credit transfer process. If the Board's control and management of the State University were subject to the same level of legislative oversight typically applied to other government agencies, the Legislature would have the power to change by law any of the Board's policies and procedures that it determined were not responsive to the higher education needs of the State. With such power, the Legislature could exercise the full extent of its legislative authority to review, reform, and improve the control and management of NSHE.

It is also important to note that passage Passage of this ballot question will require the Legislature to guarantee by under state law the reasonable protection of individual academic freedom for

students, faculty, and contractors in NSHE. ~~Guaranteeing such academic freedom warrants inclusion in the Nevada Constitution as opposed to simply being a Board policy that can be changed at any time. Passage of this question~~ Even though individual academic freedom is currently afforded some protection under federal constitutional law, numerous courts and legal commentators have observed that the true scope of the federal constitutional protection has been unclear since the U.S. Supreme Court's 2006 decision in *Garcetti v. Ceballos*. By requiring the Legislature to enact state statutes that provide for the reasonable protection of individual academic freedom at NSHE, this ballot question will compel the Legislature to specify the scope of that protection under state law and also consider whether to provide greater protection to individual academic freedom than is already afforded by federal constitutional law. Because the protection of individual academic freedom is essential to the pursuit of knowledge and the search for academic truth and enlightenment, this ballot question will ensure that NSHE continues to foster experimentation, invention, and a robust exchange of ideas.

Finally, this ballot question will clarify and modernize existing provisions of the Nevada Constitution relating to the administration of the federal land grant proceeds dedicated for the benefit of certain departments of the State University under the federal Morrill Land Grant Act of 1862. However, because the State of Nevada must administer those proceeds in the manner required by the federal law, this ballot question will not change the purpose or use of those proceeds under the federal law.

Improve our public higher education system by ~~increasing~~ allowing for additional legislative oversight and accountability ~~and regarding the system,~~ ensuring state-law protection for individual academic freedom: at institutions within the system, and clarifying and modernizing existing provisions relating to the administration of the federal land grant proceeds dedicated for the benefit of certain departments of the State University under the 1862 federal law. Vote "yes" on Question 1.

## ARGUMENTS AGAINST PASSAGE

In 1864, the framers of the Nevada Constitution made a deliberate choice to give constitutional status to the Board of Regents to guarantee that it had independent powers to control and manage the State University without the threat of political interference by the Legislature and Governor. The Board's constitutional status and independent powers are not unique. In at least 21 other states, elected or appointed governing boards have been given constitutional status and independent powers to control and manage state universities and other public institutions of higher education, even if those boards do not oversee the entire state system of higher education to the same extent as Nevada's Board of Regents.

Consistent with the intent of the framers of the Nevada Constitution, the Board has not claimed that it is entitled to "absolute control" over the management of the State University, or that it is free from legislative oversight and accountability. (*Debates & Proceedings of the Nevada State Constitutional Convention of 1864*, at 586 (Andrew J. Marsh off. rep. 1866)) The Board recognizes that the Nevada Constitution provides ~~the Board of Regents~~ it with specific and limited authority over the State University that is independent of the more general control of the Legislature and Governor: ~~because the framers wanted to promote and ensure the academic independence of the~~

State University without making it the political “football of the legislature.” (*State ex rel. Mack v. Torreyson*, 21 Nev. 517, 528 (1893) (Bigelow, J., concurring)) When deemed necessary in court cases and legislative inquiries, the Board has legitimately asserted its constitutional status because the Board has a duty to defend the framers’ intent to protect the State University from unwarranted intrusions by the political forces of government.

Proponents of this ballot question want voters to believe that the framers got it wrong, and that by removing ~~this limited, independent~~ the Board’s specific and limited authority ~~and~~ from the *Nevada Constitution*—thereby making the Board ~~of Regents~~ a statutory body completely subject to the control of the political ~~branches~~ machinery of government—the Legislature will ~~increase somehow improve~~ the transparency, efficiency, and effectiveness of Nevada’s higher education system. Unfortunately, passage of Question 1 does not guarantee any of these promised benefits. Question 1 is nothing but the Legislature trying to gain more power and control, and it would only serve to add political pressures to a governance system that is serving this State well.

The Board of Regents and NSHE have Under the Board’s leadership, the Nevada System of Higher Education (NSHE) has steadily improved higher education outcomes in Nevada. Recently, both the University of Nevada, Reno and the University of Nevada, Las Vegas were recognized as Tier 1 + Very High Research Activity (R1) institutions by the prestigious Carnegie Classification of Institutions of Higher Education. For the last ten years, in which data is available, while full-time equivalent student enrollment in the system increased by roughly 8 percent, the number of diplomas and certificates awarded increased by nearly 30 percent, despite a slight decrease in enrollment, more than 40 percent. During this period, the amount of state funding for the system—when calculated in real dollars adjusted for inflation—actually decreased. Yet the Board has, through its financial management decisions, effectively navigated the consequences of a severe economic recession and successfully guided NSHE in its academic mission while also improving operational efficiencies for the benefit of Nevada’s taxpayers and adding marketable value for the system’s students. Under the existing constitutional structure, anytime the Legislature has concerns about the Board’s financial policies and practices, the Legislature already has the power to investigate, review, and scrutinize the Board’s financial management decisions, and the Legislature also retains the ultimate power of the purse to determine the amount of state funding that is appropriated for higher education. Consequently, the Board is already subject to considerable legislative oversight and accountability, and it must explain and justify its financial management decisions to the Legislature in a manner similar to other executive branch agencies.

The Board has governed our higher education system for over 150 years as the system has grown in size, prestige, and complexity. If this question passes, it is uncertain whether the Legislature will retain or reshape the governance of our higher education system. The sole focus of the Board of Regents is on higher education policy, and it is best equipped to govern NSHE. It does not make sense to risk losing the Board’s independence, institutional knowledge, and expertise with no assurance of what the Legislature may put in its place.

Maintaining the Board’s current status in the *Nevada Constitution* ensures that the Board remains elected, responsible to the voters, and responsive to constituents. The Nevada Supreme Court has recognized that the constitutional status of the Board of Regents prevents the Legislature from



directly interfering with its essential management and control of the State University, and for good reason. Passage of this ballot question would allow the Legislature to change existing higher education policies and procedures and even allow the Legislature to make members of the Board appointed rather than elected. Previous attempts to change higher education governance have failed because Nevadans recognize the importance of keeping the system in the *Nevada Constitution* as originally drafted.

The Further, requiring the Legislature to enact state statutes that provide for the reasonable protection of individual academic freedom is unnecessary and will likely cause confusion because federal constitutional law already provides such protection and the Board of Regents has already adopted policies related to individual academic freedom and responsibility at its institutions. Transferring this duty to the Legislature is not only unnecessary but also takes the definition of individual academic freedom out of the hands of academic experts, professionals and places it with an inherently political body whose partisan nature may be hostile to the concept of professors and others speaking openly and freely about political, ideological, or controversial issues. Instead of facilitating and encouraging individual academic freedom, this insertion of partisanship into the realm of scholarship is more likely to stifle the concept of academic freedom than to protect it.

Finally, the framers of the Nevada Constitution named the Board as the proper trustee to administer the federal land grant proceeds dedicated for the benefit of certain departments of the State University under the federal Morrill Land Grant Act of 1862. By removing the Board as the constitutionally designated trustee, this ballot question would allow the Legislature to name any other executive branch agencies or officers as a statutory trustee, whether or not they have any experience, knowledge, or understanding of the higher education system or its funding needs. Such a deviation from the intent of the framers could be a recipe for fiscal irresponsibility and mismanagement, which could potentially jeopardize the State's compliance with the federal law.

Reject this uncertain and unnecessary change to the constitutional status of the Board of Regents; -do not allow the Legislature to inject politics into the protection of individual academic freedom at institutions within NSHE; and retain the existing constitutional provisions relating to the administration of the federal land grant proceeds dedicated for the benefit of certain departments of the State University under the 1862 federal law. Vote “no” on Question 1.

## FISCAL NOTE

### **Financial Impact—Cannot Be Determined**

If approved by the voters, Question 1 removes references to an elected Board of Regents from the *Nevada Constitution* and instead requires the Legislature to provide by law for the governance, control, and management of higher education in this State. This ballot question also requires the Legislature to provide by law for the reasonable protection of individual academic freedom for students, employees, and contractors of Nevada's public higher education institutions.

Future actions, if any, taken by the Legislature regarding the governance, control, and management of higher education cannot be predicted. Additionally, future actions taken by the Legislature to provide for the reasonable protection of individual academic freedom for students, employees, and contractors of Nevada's public higher education institutions cannot be predicted. Thus, the resulting financial impact upon state government, if any, cannot be determined with any reasonable degree of certainty.

Finally, this ballot question clarifies and modernizes existing provisions of the Nevada Constitution relating to the administration of the federal land grant proceeds dedicated for the benefit of certain departments of the State University under the federal Morrill Land Grant Act of 1862. However, because the State of Nevada must administer those proceeds in the manner required by the federal law, this ballot question will not change the purpose or use of those proceeds under the federal law. Thus, there is no anticipated financial impact upon state government from these revisions if Question 1 is approved by the voters.

Legislative Counsel Bureau's Draft Ballot Question Language  
for Assembly Joint Resolution No. 5 of the 79<sup>th</sup> Session for  
Consideration by the Public During the  
Public Comment Period

## QUESTION NO. 1

Amendment to the *Nevada Constitution*

Assembly Joint Resolution No. 5 of the 79th Session

### CONDENSATION (Ballot Question)

Shall the *Nevada Constitution* be amended to: (1) remove provisions governing the election and duties of the Board of Regents and its control and management of the affairs and funds of the State University and require the Legislature to provide by law for the governance, control, and management of the State University; (2) require the Legislature to provide by law for the reasonable protection of individual academic freedom for students, employees, and contractors of Nevada's public higher education institutions; and (3) revise provisions governing the administration of certain funding derived under federal law and dedicated for the benefit of certain departments of the State University?

Yes

No

### EXPLANATION & DIGEST

**EXPLANATION**—The *Nevada Constitution* requires the Legislature to provide for the establishment of a State University that is controlled by an elected Board of Regents whose duties are prescribed by law. Additionally, the *Nevada Constitution* provides for the Board of Regents to control and manage the affairs and funds of the State University under regulations established by law. This ballot measure, also known as “The Nevada Higher Education Reform, Accountability and Oversight Amendment,” would remove the constitutional provisions governing the election and duties of the Board of Regents and its control and management of the affairs and funds of the State University and would require the Legislature to provide by law for the governance, control, and management of the State University. This ballot measure would not repeal any existing statutory provisions governing the Board of Regents, including those that provide for the election of Board members, but it would make the Board a statutory body whose structure, membership, powers, and duties are governed by those existing statutory provisions, subject to any statutory changes made through the legislative process.

The *Nevada Constitution* directs the Legislature to encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, ethical, and other educational improvements. This ballot measure would require the Legislature to provide by law for the reasonable protection of individual academic freedom for students, employees, and contractors of Nevada's public higher education institutions in order to facilitate the policies of the *Nevada Constitution* to encourage the promotion of such educational improvements.

The *Nevada Constitution* provides that certain funding derived by the State of Nevada under a federal law enacted by Congress in 1862 must be invested in a separate fund and dedicated for the benefit of certain departments of the State University, and that if any amount of the separate fund is lost or misappropriated through neglect or any other reason, the State of Nevada must replace the lost or misappropriated amount so that the principal of the fund remains undiminished. This ballot measure would revise these provisions by: (1) clarifying the legal citations to the federal law, including all amendments by Congress; and (2) specifying that the funding derived under the federal law must be invested by the State of Nevada in the manner required by law.

**A “Yes” vote would amend the *Nevada Constitution* by: (1) removing provisions governing the election and duties of the Board of Regents and its control and management of the affairs and funds of the State University and requiring the Legislature to provide by law for the governance, control, and management of the State University; (2) requiring the Legislature to provide by law for the reasonable protection of individual academic freedom at public institutions of higher education in this State; and (3) revising provisions governing the administration of certain funding derived under federal law and dedicated for the benefit of certain departments of the State University.**

**A “No” vote would retain existing provisions of the *Nevada Constitution* governing the election and duties of the Board of Regents and its control and management of the affairs and funds of the State University, would not require the Legislature to provide by law for the reasonable protection of individual academic freedom at public institutions of higher education in this State, and would not revise existing provisions governing the administration of certain funding derived under federal law and dedicated for the benefit of certain departments of the State University.**

**DIGEST**—The *Nevada Constitution* requires the Legislature to provide for the establishment of a State University that is controlled by a Board of Regents whose duties are prescribed by law. (Nev. Const. Art. 11, § 4) The *Nevada Constitution* also requires the Legislature to provide for the election of members of the Board and provides for the Board to control and manage the affairs and funds of the State University under regulations established by law. (Nev. Const. Art. 11, §§ 7, 8)

As required by these constitutional provisions, the Legislature has enacted laws to establish the State University and to provide for the election of the members of the Board of Regents. (NRS 396.020, 396.040) In addition, the Legislature has enacted laws to: (1) establish the Nevada System of Higher Education (NSHE), which consists of the State University and certain other educational institutions, programs, and operations; and (2) provide for the Board of Regents to administer NSHE and to prescribe rules for its governance and management. (NRS 396.020, 396.110, 396.230, 396.280, 396.300, 396.420, 396.440, 396.550)

This ballot measure would remove the constitutional provisions governing the Board of Regents and would require the Legislature to provide by statute for the governance, control, and management of the State University. This ballot measure would not repeal any existing statutory provisions governing the Board of Regents, including those that provide for the election of Board members. Rather, by removing the constitutional provisions governing the Board of Regents, this

ballot measure would make the Board a statutory body whose structure, membership, powers, and duties are governed by those existing statutory provisions, subject to any statutory changes made through the legislative process.

The *Nevada Constitution* directs the Legislature to encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, ethical, and other educational improvements. (Nev. Const. Art. 11, § 1) As a general principle in public institutions of higher education, rules that provide for the reasonable protection of individual academic freedom are intended to encourage the pursuit of knowledge and the search for academic truth and enlightenment. (*Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014)) This ballot measure would require the Legislature to provide by law for the reasonable protection of individual academic freedom for students, employees, and contractors of Nevada's public higher education institutions in order to facilitate the policies of the *Nevada Constitution* to encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, ethical, and other educational improvements.

Under a federal law enacted by Congress in 1862, each state was provided with certain federal land grants to be sold to support and maintain at least one college in the state that teaches both agriculture and mechanic arts, including military tactics, so long as the state agrees to certain terms and conditions regarding the preservation and use of the proceeds derived from the sale of the federal land grants. (Act of July 2, 1862, ch. 130, §§ 1-8, 12 Stat. 503-05, as amended and codified at 7 U.S.C. §§ 301 et seq.) To secure the benefits offered by the federal law, the *Nevada Constitution* provides that the funding derived by the State of Nevada under the federal law must be invested in a separate fund and dedicated for the benefit of the appropriate departments of the State University, and that if any amount of the separate fund is lost or misappropriated through neglect or any other reason, the State of Nevada must replace the lost or misappropriated amount so that the principal of the fund remains undiminished. (Nev. Const. Art. 11, § 8) This ballot measure would revise these provisions by: (1) clarifying the legal citations to the federal law, including all amendments by Congress; and (2) specifying that the funding derived under the federal law must be invested by the State of Nevada in the manner required by law.

## **ARGUMENTS FOR PASSAGE**

Nevada is the only state whose higher education system is governed by an elected board with constitutional status. The Board of Regents regularly refers to itself as the “fourth branch of government,” relying on its unique constitutional status to claim that it can operate free from legislative control. However, the *Nevada Constitution* specifies only the Legislative, Executive, and Judicial branches of state government, and the framers of the *Nevada Constitution* made clear their intent for the Legislature to oversee the control and management of the State University. Voting in favor of this question will clarify the Legislature's authority over the Board and result in improved oversight and accountability.

Further, while the *Nevada Constitution* requires the Legislature to provide financial support for the operation of the State University, it also directs the Board of Regents to control and manage

the funds of the State University. This disconnect between the funding and governance of higher education allows the Board, which controls approximately 15 percent of the State's budget, to avoid the fiscal oversight typically applied to other government agencies. In the past, NSHE has deliberately provided misleading information in order to receive more funding, according to legislative testimony. It has also been shown that years of poor internal hiring decisions caused a faculty pay imbalance, which will cost approximately \$90 million each year to address. The lack of oversight coupled with fiscal irresponsibility ultimately hurts taxpayers as well as students by driving up the cost of higher education.

The disconnect between funding and governance also results in the Board adopting policies and procedures that are not responsive to the higher education needs of the State. Recent legislative testimony indicates the college programs currently offered are not aligned with workforce needs, and some employers are forced to recruit college graduates from outside of the State to fulfill these needs. Representatives of the business community have also stated that issues with the transfer of student credits within NSHE discourages companies from financially supporting employee participation in continuing education. Although the Board has claimed for years that it is committed to fixing these issues, the problems remain unsolved.

It is also important to note that passage of this question will require the Legislature to guarantee by law reasonable protection of academic freedom for students, faculty, and contractors in NSHE. Guaranteeing such academic freedom warrants inclusion in the *Nevada Constitution* as opposed to simply being a Board policy that can be changed at any time. Passage of this question will ensure that NSHE continues to foster experimentation, invention, and a robust exchange of ideas.

Improve our higher education system by increasing oversight and accountability and ensuring academic freedom. Vote "yes" on Question 1.

### **ARGUMENTS AGAINST PASSAGE**

The *Nevada Constitution* provides the Board of Regents with limited authority over the State University that is independent of the control of the Legislature and Governor. Proponents of this ballot question want voters to believe that removing this limited, independent authority and making the Board of Regents completely subject to the control of the political branches of government will increase the transparency, efficiency, and effectiveness of Nevada's higher education system. Unfortunately, passage of Question 1 does not guarantee any of these promised benefits. Question 1 is nothing but the Legislature trying to gain more power and control, and it would only serve to add political pressures to a governance system that is serving this State well.

The Board of Regents and NSHE have steadily improved higher education outcomes in Nevada. Recently, both the University of Nevada, Reno and the University of Nevada, Las Vegas were recognized as Tier 1 institutions by the prestigious Carnegie Classification of Institutions of Higher Education. For the last ten years, the number of diplomas and certificates awarded increased by nearly 30 percent, despite a slight decrease in enrollment.

The Board has governed our higher education system for over 150 years as the system has grown in size, prestige, and complexity. If this question passes, it is uncertain whether the Legislature will retain or reshape the governance of our higher education system. The sole focus of the Board of Regents is on higher education policy, and it is best equipped to govern NSHE. It does not make sense to risk losing the Board's independence, institutional knowledge, and expertise with no assurance of what the Legislature may put in its place.

Maintaining the Board's current status in the *Nevada Constitution* ensures that the Board remains elected, responsible to the voters, and responsive to constituents. The Nevada Supreme Court has recognized that the constitutional status of the Board of Regents prevents the Legislature from directly interfering with its essential management and control of the State University, and for good reason. Passage of this ballot question would allow the Legislature to change existing higher education policies and procedures and even allow the Legislature to make members of the Board appointed rather than elected. Previous attempts to change higher education governance have failed because Nevadans recognize the importance of keeping the system in the *Nevada Constitution* as originally drafted.

The Board of Regents has already adopted policies related to academic freedom and responsibility at its institutions. Transferring this duty to the Legislature is not only unnecessary but also takes the definition of academic freedom out of the hands of academic experts.

Reject this uncertain and unnecessary change to the constitutional status of the Board of Regents. Vote "no" on Question 1.

## FISCAL NOTE

### **Financial Impact—Cannot Be Determined**

If approved by the voters, Question 1 removes references to an elected Board of Regents from the *Nevada Constitution* and instead requires the Legislature to provide by law for the governance, control, and management of higher education in this State. This ballot question also requires the Legislature to provide by law for the reasonable protection of individual academic freedom for students, employees, and contractors of Nevada's public higher education institutions.

Future actions, if any, taken by the Legislature regarding the governance, control, and management of higher education cannot be predicted. Additionally, future actions taken by the Legislature to provide for the reasonable protection of individual academic freedom for students, employees, and contractors of Nevada's public higher education institutions cannot be predicted. Thus, the resulting financial impact upon state government, if any, cannot be determined with any reasonable degree of certainty.



# PUBLIC COMMENT

## Question 1

*Assembly Joint Resolution No. 5 of the 79<sup>th</sup> Session*

From: BallotQuestionFeedbackForm  
To: [Guinan, Patrick](#); [Thornton, Diane](#)  
Subject: Public Comment for 2020 Ballot Questions  
Date: Tuesday, May 19, 2020 3:21:08 PM

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# Email from Shera Alberti-Annunzio

## AJR 2 Comments

## AJR 5 Comments

As a 4th generation Nevadan, a UNR graduate and upcoming UNR faculty retiree I feel having NSHE directed by a separate elected board I.E. Board of Regents (BOR) is critical to the continued success of higher education in Nevada. We can't afford to have the system directed by an appointed board, subject to the whims of the administration in office, constantly changing every time a new governor or legislature swings right or left. Although I don't always agree with the BOR I do believe having an elected board makes them more responsible to the public and less likely to be making decisions based on the opinion and/or direction of the individual who appointed them. We have a small state with a limited number of institutions that work fairly well together, despite their challenges individually. Please do not move this forward as a BDR for the sake of our institutions and higher education in our state.

## SJR 1 Comments

## SJR 3 Comments

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## Contact Information

*Address: City: Reno  
State: NV  
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Email:*

From: BallotQuestionFeedbackForm  
To: [Guinan, Patrick](#); [Thornton, Diane](#)  
Subject: Public Comment for 2020 Ballot Questions  
Date: Tuesday, May 19, 2020 3:39:38 PM

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# Email from brian bonnenfant

## AJR 2 Comments

## AJR 5 Comments

Being that legislative sessions are conducted biennially, and that NSHE operates annually, passage of the resolution would necessitate either a "NSHE" legislative interim committee every other year, or a drastic change to annual legislative sessions in order to create legislative oversight of ongoing NSHE operations. Changing to annual legislative sessions is discussed in almost every session, and passage of this resolution would provide the impetus. An eventual switch to annual legislative sessions, brought about by the passage of this resolution, would therefore trigger major fiscal implications for Nevada taxpayers. I believe voters need to understand the implications of handing a major responsibility of massive, ongoing operations to a branch of government that meets and legislates only five months out of 24.

## SJR 1 Comments

## SJR 3 Comments

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## Contact Information

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*Email: [bonnen@unr.edu](mailto:bonnen@unr.edu)*

**From:** BallotQuestionFeedbackForm  
**To:** [Guinan, Patrick](#); [Thornton, Diane](#)  
**Subject:** Public Comment for 2020 Ballot Questions  
**Date:** Tuesday, May 19, 2020 3:45:08 PM

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# Email from Jay Cafferata

## AJR 2 Comments

While I am in support of the language of the "for" side of the ballot language - the against language has many inaccuracies and misleading statements. ARGUMENTS AGAINST PASSAGE At the elections in both 2000 and 2002, Nevada voters amended the Nevada Constitution by approving an initiative petition—proposed by the people of Nevada—that defines marriage as being only between a man and a woman. This ballot question—proposed by the Legislature—asks voters to change the Nevada Constitution based on a narrowly decided U.S. Supreme Court case. This language implies there was an error on the part of the Supreme Court – disparaging the value and respect of the Supreme Court and should be eliminated from this passage. The decision is the law of the United States of America. The Nevada Constitution should reflect the will of the people of Nevada and not be changed in reaction to a court decision that can be overturned. Any law can be overturned – historically, laws such as slavery and prohibition were over turned – this language is inflammatory and should be removed. It doesn't clarify the issue at hand. Recognizing same-sex marriage in the Nevada Constitution raises serious questions about the right to religious freedom guaranteed to every Nevadan. This is no longer an issue to be decided by Nevada – it has been decided at the Supreme court level – this is an example of trying to re-legislate the law that stands. And religious freedom is protected in the new language – this is inflammatory language and should be removed. Historically, marriage has been viewed as a religious institution typically recognizing only the union between one man and one woman. Historically, marriage was an exchange of property – female property. And many religions recognized polygamy for centuries - one man and many women. Other religions recognize child marriages, arranged marriages and forced marriage. And not all religions recognize marriage as this text suggests. Religious institutions do not make the laws in the state of Nevada. This is not about the law – it is about religious institutions and should be removed. The phrase “religious institutions” is vague and misleading – which religious institutions are involved – the same ones that created the crusades, the inquisition, the holocaust, the removal of indigenous people from their land in Nevada? This is inflammatory language and should be removed. For many people, this traditional definition of marriage remains a core part of their religious beliefs. Same-sex marriage is incompatible with these beliefs and undermines the sanctity of traditional marriage. Many people is misleading – some people believe this. The law recognizes everyone's right to practice any religion they prefer. Marriage is governed by laws that do not include the religious acceptance of that marriage. It is a legal relationship not tied to religion. The constitution of Nevada is about the law of marriage – not religion. This should be removed. There is no need to change the traditional definition of marriage to include same-sex couples. Domestic partnerships are a viable option for same-sex couples in Nevada. These partnerships were enacted under the current constitutional provisions and already afford many of the rights of marriage, including community property, inheritance without a will, and hospital visitation. As stated here many of the rights but not all the rights – thus creating

second class citizenship. This is clearly discriminatory against certain Nevadans and should be removed. The State has the ability to expand these rights, and therefore, approval of Question 2 is not necessary. Uphold the traditional definition of marriage as a union between one man and one woman that exists in the Nevada Constitution. Vote “no” on Question 2. There is no traditional definition of marriage – this should be removed. The fiscal note indicates that there will be no impact – however, if this language is not removed from the constitution, there will be additional costs. The state of Nevada paid over 1 million dollars to defend the one man to one woman marriage law before the Supreme Court’s decision. This will prevent any additional tax payer dollars spent on this issue that has been decided by the highest court in the land.

## **AJR 5 Comments**

I support the comments made by the Nevada Faculty Alliance (NFA) is the independent statewide association of faculty at all eight institutions of the Nevada System of Higher Education (NSHE) as the proposed changes to the language of both for and against the current language.

## **SJR 1 Comments**

## **SJR 3 Comments**

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## **Contact Information**

*Address: City: Carson City*

*State: NV*

*Zip: 89701*

*Email:*

**From:** [Patrick Carter](#)  
**To:** [King, Julianne](#)  
**Cc:** [Guinan, Patrick](#); [Thornton, Diane](#)  
**Subject:** Re: Draft Ballot Question (AJR 5) - Request for Review and Comment  
**Date:** Thursday, May 7, 2020 9:58:26 AM  
**Attachments:** [image002.png](#)

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Thank you for reaching out. I have a few thoughts/suggestions to make it more balanced.

Two statements seem overreaching in summary:

Is there any backup for this statement:

“The disconnect between funding and governance also results in the Board adopting policies and procedures that are not responsive to the higher education needs of the State.”

Or this statement:

“Representatives of the business community have also stated that issues with the transfer of student credits within NSHE discourages companies from financially supporting employee participation in continuing education.”

I think “enduring academic freedom” should be removed from this statement. There is no indication that there is currently a problem with “ensuring academic freedom”. In fact, our faculty are concerned with less freedom if this passes. You can contact any faculty senate chair at any institution for additional guidance.

“Improve our higher education system by increasing oversight and accountability and ensuring academic freedom. Vote “yes” on Question 1.”

I think this could be clarified by adding a few words:

“Passage of this ballot question would allow the Legislature to change existing higher education policies and procedures and even allow the Legislature to make members of the Board appointed rather than elected.”

Should add “by simply changing statues”

Thank you,  
Dr. Patrick Carter

Sent from my iPad

**From:** Kent Ervin  
**Sent:** Wednesday, May 20, 2020 2:46 PM  
**To:** Guinan, Patrick ; [Thornton, Diane](#)  
**Subject:** Comments on AJR5 ballot question language

Dear Ms. Thornton and Mr. Guinan:

On behalf of the Nevada Faculty Alliance, I am forwarding our comments on the draft ballot language for Question 1 (AJR5). I am attaching our letter and two supporting documents from the American Association of University Professors, our national affiliate.

Thank you for your consideration of our recommended changes to the ballot language.

Best regards,

Dr. Kent M. Ervin  
Vice President & Legislative Liaison, Nevada Faculty Alliance





## NEVADA FACULTY ALLIANCE

840 S. Rancho Dr., Suite 4-571  
Las Vegas, Nevada 89106

Date: May 20, 2020  
To: Legislative Commission  
Legislative Counsel Bureau  
From: Kent Ervin, Legislative Liaison, Nevada Faculty Alliance  
Subject: Comments on draft ballot language for Question No. 1 (AJR 5)

The Nevada Faculty Alliance (NFA) is the independent statewide association of faculty at all eight institutions of the Nevada System of Higher Education (NSHE). We work to empower our faculty members to be wholly engaged in our mission to help students succeed. The NFA is affiliated with the American Association of University Professors (AAUP), the national organization of faculty advocating for academic freedom and shared governance in higher education.

At this time the NFA does not have an official position FOR or AGAINST the AJR5 ballot measure. We do strongly support increased accountability for the Board of Regents, NSHE administrators, and institutional administrators. However, while some of our members believe AJR5 will improve the accountability of NSHE, others believe it may endanger academic freedom or make our mission harder to achieve. Regardless, we have an interest in having the ballot language being completely accurate and honest, with arguments both FOR and AGAINST that allow well-informed choices. We offer these recommendations for changes to the draft ballot language in that spirit.

### **ACADEMIC FREEDOM**

Before addressing the specific ballot question language, we need to note that both the FOR and AGAINST sections display a fundamental misunderstanding of the meaning of “academic freedom.” The AAUP’s [1940 Statement on Principles of Academic Freedom and Tenure](#) (attached) is the primary source for the definition of academic freedom, adopted by a large number of professional and scholarly societies. We are also attaching a letter from AAUP which further explains the concept of academic freedom as contained in the 1940 Statement.

The ballot question proposes an interpretation of academic freedom that is overly broad. The question states that the Nevada constitution shall be amended to “require the Legislature to provide by law for the reasonable protection of individual academic freedom.” While it is promising that the state constitution would uphold academic freedom, it undermines the



autonomy of colleges and universities to designate the interpretation of academic freedom to the legislature. The ballot question does not align with the principles of the 1940 Statement of Principles on Academic Freedom and Tenure, endorsed by the AAUP and American Council on Education, in order to ensure that academic freedom remains in the hands of academics. The 1940 Statement clearly defines academic freedom as a protection in which “teachers are entitled to freedom in the classroom in discussing their subject” and the “full freedom in research and in the publication of the results.” This definition of academic freedom developed by faculty establishes clear boundaries of academic freedom without leaving interpretation up to a legislature.

Additionally, the ballot question proposes a list of constituencies protected by academic freedom that is overly broad. The question states that the protections of academic freedom shall be provided for “students, employees, and contractors of Nevada’s public higher education institutions.” Unfortunately, the inclusion of so many constituencies on this list reflects a misunderstanding of the core principles of academic freedom. As described in the 1940 Statement, academic freedom is afforded to teachers because higher education is “for the common good” and “the common good depends upon the free search for truth and its free exposition.” This means that the protections of academic freedom are extended to faculty in order to safeguard teaching and research taking place within a community of experts producing peer-reviewed work, which in turn benefits society. Constituencies like students and nebulous “contractors” do not work within the same conditions as faculty producing knowledge for the public good, and therefore the protections of academic freedom do not extend to them. An amendment proposing to enshrine academic freedom protections into the constitution should limit itself to covering only faculty and the ballot question language should educate the public about why this is the case.

Academic freedom is foundational to higher education and the language of the ballot question should uphold, not weaken, the foundation academic freedom provides to quality research and teaching.

## **SPECIFIC RECOMMENDATIONS ON THE DRAFT BALLOT QUESTION LANGUAGE**

### **Explanation, Paragraph 1**

The introductory Explanation paragraph specifically singles out the existing statutory provisions for the election of the members of the Board of Regents, but does not have a balancing statement that the election of Board members could be eliminated from statute in the future if the measure passes. Either the phrase “including those that provide for the elections of Board members” should be deleted, or the paragraph should include a balanced description as follows:

**EXPLANATION**—The *Nevada Constitution* requires the Legislature to provide for the establishment of a State University that is controlled by an elected Board of Regents whose duties are prescribed by law. Additionally, the *Nevada Constitution* provides for the Board

of Regents to control and manage the affairs and funds of the State University under regulations established by law. This ballot measure, also known as “The Nevada Higher Education Reform, Accountability and Oversight Amendment,” would remove the constitutional provisions governing the election and duties of the Board of Regents and its control and management of the affairs and funds of the State University and would require the Legislature to provide by law for the governance, control, and management of the State University. This ballot measure would not repeal any existing statutory provisions governing the Board of Regents, including those that provide for election of Board members. ~~, but~~ *However,* it would make the Board a statutory body whose *existence*, structure, membership, powers, and duties are governed by those existing statutory provisions, subject to any *future* statutory changes made through the legislative process, *including the possibility of making Board members appointed instead of elected.*

#### **Digest, Paragraph 4:**

To typical voters, this paragraph misleads by emphasizing that current statutory provisions are not directly repealed by the amendment, rather than the actual effect of the amendment to enable future changes. The phrase that indicates that existing statutory provisions for the elections of the Regents would not be directly repealed by the measure is not balanced by a similarly clear statement that the election provisions could be repealed in the future if the measure is passed. The appended sentence below clarifies the actions that the legislature could take upon passage.

This ballot measure would remove the constitutional provisions governing the Board of Regents and would require the Legislature to provide by statute for the governance, control, and management of the State University. This ballot measure would not repeal any existing statutory provisions governing the Board of Regents, including those that provide for the election of Board members. Rather, by removing the constitutional provisions governing the Board of Regents, this ballot measure would make the Board a statutory body whose structure, membership, powers, and duties are governed by those existing statutory provisions, subject to any statutory changes made through the legislative process. *If the ballot measure passes, a future legislature and governor could enact laws that would modify the Board of Regents, including for example by making its members appointed rather than elected by voters, restructuring the Board, or eliminating the Board entirely.*

#### **Digest, Paragraph 5:**

As a concept “academic freedom” is based on first amendment free-speech rights and has primarily been applied to faculty members at institutions of higher education. The added sentence below clarifies the source of academic freedom, and clarifies that it normally applies to faculty members engaged in scholarly and academic activities. The first court case citation in this paragraph is a narrow ruling that academic freedom does not restrict prohibitions of viewing sexually explicit materials on work computers, and thus is not relevant to defining

academic freedom in general. It should be deleted or replaced with more general court cases about academic freedom. The final added sentence below clarifies that the amendment also expands the scope of academic freedom beyond faculty members involved in teaching, scholarship, and research.

The *Nevada Constitution* directs the Legislature to encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, ethical, and other educational improvements. (Nev. Const. Art. 11, § 1) As a general principle in public institutions of higher education, rules that provide for the reasonable protection of individual academic freedom are intended to encourage the pursuit of knowledge and the search for academic truth and enlightenment. *Academic freedom has been established by the courts as a right based on the First Amendment of the United States Constitution for faculty members in institutions of higher education to have freedom of speech in teaching, scholarship, and research without inappropriate restrictions by university or college administrators or the government* (~~*Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000)~~; *for example, Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014)) This ballot measure would require the Legislature to provide by law for the reasonable protection of individual academic freedom for students, employees, and contractors of Nevada’s public higher education institutions in order to facilitate the policies of the *Nevada Constitution* to encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, ethical, and other educational improvements. *The ballot measure expands the traditional and legal scope of academic freedom for faculty to include all employees, contractors, and enrolled students of Nevada’s public institutions of higher education.*

#### **ARGUMENTS FOR PASSAGE, Paragraph 1:**

There are multiple false and misleading statements imbedded this paragraph, detailed below. If such inaccuracies are left in the ARGUMENTS FOR PASSAGE, it will only fuel opponents’ arguments to the voters.

“Nevada is the only state whose higher education system is governed by an elected board with constitutional status.”

- The Nevada constitution refers only to a “State University”, not a “higher education system”. The “system” of higher education in Nevada including two universities, a state college, several community colleges, and other divisions is a statutory creation as is the name “Nevada System of Higher Education” (NRS 396.020). Because AJR5 does not change the definition or scope of the State University in the Constitution, the ballot language should mainly refer to the State University in the context of its direct effects.
- Nevada is not at all unique in its constitutional provision of a governing board for higher education as this sentence falsely and misleadingly states. Three states in addition to Nevada have constitutionally defined governing boards overseeing one or more public universities whose members are elected per constitutional provisions: [Colorado](#), [Michigan](#), and [Nebraska](#). Colorado’s and Nebraska’s constitutionally elected Boards of Regents each oversee two or more universities and a medical school, i.e., they govern

“higher education systems” with explicit constitutional status. Michigan’s constitution defines separate elected boards for three state universities. Twenty-one other states have constitutionally defined governing boards for one or more public universities whose members are appointed by governors, legislatures, or some other means: [Alabama](#), [Alaska](#), [Arizona](#), [California](#), [Florida](#), [Georgia](#), [Hawaii](#), [Idaho](#), [Kansas](#), [Louisiana](#), [Minnesota](#), [Mississippi](#), [Missouri](#), [Montana](#), [New Mexico](#), [New York](#), [North Dakota](#), [Oklahoma](#), [South Dakota](#), [Virginia](#), and [Wyoming](#). Adding sufficient qualifiers to make Nevada the “only” state with a certain governing structure for higher education would mislead voters, especially if the distinction is statutory and not constitutional.

“The Board of Regents regularly refers to itself as the ‘fourth branch of government,’ relying on its unique constitutional status to claim that it can operate free from legislative control.”

- This sentence falsely states that the Board “regularly refers to itself” as the “fourth branch of government” and that the Board claims it can operate free from legislative control.
- To our knowledge, no Board, Regent, or system administrator has claimed that the legislature has no control over the university system through its funding authority or its constitutional authority to prescribe the duties of the Board. This would require documentation.
- There is no instance in the 155-year record of the Board of Regents where the Board as a body has declared itself as the “fourth branch of government”. Indeed, a [search](#) of the archives of Board meeting minutes shows only one instance when “fourth branch” was even mentioned—in a 2011 discussion between a single regent and the Chancellor ([Board minutes, 6/16-17/2011](#)).
- A [Google search](#) of the Nevada legislature’s web site produced multiple comments (mostly negative) about the university’s status as a “fourth branch of government” by legislators themselves, non-university-affiliated lobbyists, or Legislative Counsel Bureau legal staff, but only one instance of a Regent using the term, Regent Allison Stephens at the first AJR5 hearing in response to testimony by the resolution sponsor. (Assembly Committee on Legislative Operations and Elections, March 2, 2017, Page 15) .
- In testimony to the Legislature in 1999, the general counsel for the university system, Mr. Tom Ray, explicitly stated that the Board was **not** a fourth branch of government and that it was subject to the laws of the state except for its constitutionally defined duties: “[Mr. Ray] stressed the board was not a fourth branch of government, but was a constitutional body. Another argument was the relationship between the Board of Regents and the legislature. Mr. Ray stated the laws of the state applied to the Board of Regents in its conduct as much as any other board, commission, or department. However, a law governing the daily operation of the UCCSN was an “unconstitutional encroachment” on the board.”  
<https://www.leg.state.nv.us/Session/70th1999/Minutes/AM-CA-990408-Meeting%2013.html>
- The public record shows this statement to be an exaggeration. Even if representatives of NSHE have misused the phrase “fourth branch of government” in talking privately

with legislators, that has no legal standing.

“However, the *Nevada Constitution* specifies only the Legislative, Executive, and Judicial branches of state government, and the framers of the *Nevada Constitution* made clear their intent for the Legislature to oversee the control and management of the State University.”

- The first clause of the sentence only addresses the invalid straw-man argument in the prior sentence. Regarding the second clause, the primary source for intent of the framers of the constitution is the constitutional language itself, which says “The Legislature shall provide for the establishment of a State University . . . to be controlled by a Board of Regents whose duties shall be prescribed by Law.” Prescribing the duties of a governing board of a public university is different from overseeing its control and management. If intent for the Legislature to oversee the control and management of the State University were clear in the Constitution, there would be no need for an amendment to say that.

“Voting in favor of this question will clarify the Legislature’s authority over the Board and result in improved oversight and accountability.”

- Removing the Board entirely from the Constitution does not clarify the Legislature’s authority over the Board, it simply eliminates Board from having any constitutional status whatsoever.
- Whether voting for the measure would result in improved oversight and accountability is an opinion that should be buttressed with actual actions the Legislature could take to improve oversight and accountability that it could not do without the amendment.

The opening paragraph also fails to clearly state what actions the Legislature could take upon passage of AJR5. These include various reform proposals that have been considered recently by the Legislature (e.g., [AB331\(2017\)](#), [AB390\(2017\)](#), [AB407\(2017\)](#), [AB350\(2019\)](#), [SB354\(2019\)](#)) To correct these flaws and make a stronger FOR argument, we recommend revision of paragraph 1 as follows:

~~Nevada is the only state whose higher education system is governed by an elected board with constitutional status. The Board of Regents regularly refers to itself as the “fourth branch of government,” relying on its unique constitutional status to claim that it can operate free from legislative control. However, the Nevada Constitution specifies only the Legislative, Executive, and Judicial branches of state government, and the framers of the Nevada Constitution made clear their intent for the Legislature to oversee the control and management of the State University.~~ Voting in favor of this question ~~will clarify the Legislature’s authority over the Board and result in improved oversight and accountability~~ **will remove the Board of Regents from having constitutional status and will transfer the duty and authority to provide for the governance, control and management of the State University to the Legislature. Direct authority over public institutions of higher education by the Legislature will improve oversight and**

*accountability. With passage of this ballot measure, the Legislature and Governor could enact laws in the future to control and manage the operations and functions of Nevada's public universities and colleges for the benefit of the state.*

*With passage of this ballot measure, the Legislature would more easily be able to reform the public institutions of higher education in Nevada, including reform ideas that have been considered by past Legislatures: for example, creating separate governing boards for the universities, state college, or community colleges to serve the institutions' unique interests or providing for the appointment of governing board members with expertise in higher education rather than having politically motivated candidates elected by voters. Any such proposals would be fully vetted through the regular legislative process, but would not be subject to litigation based on the constitutional status of the Board.*

## **ARGUMENTS FOR PASSAGE paragraph 2**

This paragraph has also multiple misleading, false, or unsupported statements.

“This disconnect between the funding and governance of higher education allows the Board, which controls approximately 15 percent of the State’s budget, to avoid the fiscal oversight typically applied to other government agencies.”

- The 15% number probably refers to the state general fund budget rather than the entire state budget.
- The final phrase of this sentence falsely implies that funds provide from the state budget to the Board are not subject to fiscal oversight by the State. NSHE is subject to the Budget Act (NRS 353) with regard to state-appropriated funds and NSHE makes biennial budget requests through the Governor’s Finance Office as do other state agencies, which are then considered by the Legislature. Laws concerning expenditures of state funds that apply to all agencies apply to NSHE as well.

“In the past, NSHE has deliberately provided misleading information in order to receive more funding, according to legislative testimony.”

- The legislative testimony at the AJR5 hearings concerned the alleged misrepresentation of an NSHE consultant’s report to the Legislature by a former Chancellor, apparently based primarily on news reports (Assembly Committee on Legislative Operations and Elections, [Minutes of 3/2/2017](#), p. 18). If this allegation is true, it would have been knowingly false testimony to the legislature, which is illegal regardless of the present ballot measure. No charges were brought in the case. There was no testimony that the misleading information was offered “in order to receive more funding”. The funding formula under consideration at the time in question did not change the amount of funding for higher education, only its distribution. Regardless, it is misleading for the misdeeds of one person to be used to paint a broad defamation of NSHE as a whole.

“It has also been shown that years of poor internal hiring decisions caused a faculty pay imbalance, which will cost approximately \$90 million each year to address.”

- The “faculty pay imbalance” is the serious problem of salary compression at NSHE which has been caused by the 10+ years of no funding of professional merit raises by the Legislature since the Great Recession, not “poor internal hiring decisions”. The \$90M figure is based on a report provided to the [AB202 \(2017\) Committee to Conduct a Study Concerning the Cost and Affordability of Higher Education](#), which established the cause as the lack of in-rank salary advancement at NSHE, not poor hiring decisions. The AB202 Committee [recommended](#) that a bill draft request “should address problems with compression in faculty salaries, due to the lack of an in-rank salary advancement system, in order to promote the recruitment and retention of high-quality faculty for the Nevada System of Higher Education (NSHE).” Furthermore the \$90M was the full amount to mitigate a decade of lack of funding of merit raises, not a cost “each year”.

“The lack of oversight coupled with fiscal irresponsibility ultimately hurts taxpayers as well as students by driving up the cost of higher education.”

- The increasing cost of public higher education for students is a direct result of the decreasing state funding vs. student fees and tuition over the past 10-15 years, a phenomenon that is not unique to Nevada. This was also established in testimony to the AB202 Committee. Under the Constitution, the Legislature has the responsibility to provide for funding of the State University and this amendment would not change that. Since the Legislature has not provided the funding to correct the \$90M salary compression issues, one cannot logically claim that shortfall as evidence of fiscal irresponsibility by the Regents causing costs to increase.

To correct these misstatements and provide a stronger and more accessible argument for oversight by the Legislature, we recommend changing paragraph 2 as follows:

Further, while the *Nevada Constitution* requires the Legislature to provide financial support for the operation of the State University, it ~~also~~ directs the Board of Regents to control and manage the funds of the State University. ~~This disconnect between the funding and governance of higher education allows the Board, which controls approximately 15 percent of the State’s budget, to avoid the fiscal oversight typically applied to other government agencies. In the past, NSHE has deliberately provided misleading information in order to receive more funding, according to legislative testimony. It has also been shown that years of poor internal hiring decisions caused a faculty pay imbalance, which will cost approximately \$90 million each year to address. The lack of oversight coupled with fiscal irresponsibility ultimately hurts taxpayers as well as students by driving up the cost of higher education.~~ *This is a disconnect between funding responsibility and oversight authority. For example, the Board of Regents currently solely determines student fees and tuition. The Regents have increased student fees and tuition at a faster rate than inflation while the proportion of state funding of public higher education has decreased. Voting for the ballot measure would*

*allow future legislatures to directly set the cost of public higher education for students as part of its duty to provide for the control, operation, and management of the State University. It would also allow the Legislature to oversee and control the use of non-state funds, such as dormitory rents, parking fees, and income from athletics events.*

### **ARGUMENTS FOR PASSAGE, paragraph 3**

This paragraph makes broad claims about problems with the administration of NSHE, which are only opinions, but does not state how the ballot measure could or would address such problems. The added sentence below attempts to make such a connection, without which the paragraph is unpersuasive and should be deleted. Opponents will be able to refute these claims with information about NSHE's programs and results that directly address the stated problems.

The disconnect between funding and governance also results in the Board adopting policies and procedures that are not responsive to the higher education needs of the State. Recent legislative testimony indicates the college programs currently offered are not aligned with workforce needs, and some employers are forced to recruit college graduates from outside of the State to fulfill these needs. Representatives of the business community have also stated that issues with the transfer of student credits within *the Nevada System of Higher Education* (NSHE) discourages companies from financially supporting employee participation in continuing education. Although the Board has claimed for years that it is committed to fixing these issues, the problems remain unsolved. *Passage of this ballot measure would give the representatives of the Legislature, who are accountable to the people through elections, the constitutional duty to provide by law for the governance, control, and management of the State University, as well as to provide funds needed for operation of the State University.*

### **ARGUMENTS FOR PASSAGE, paragraph 4**

This paragraph incorrectly states that academic freedom is simply a Board policy that can be changed at any time. Academic freedom is a constitutional free speech right that has been confirmed by federal courts and is clearly defined in the [1940 Statement of Principles on Academic Freedom and Tenure](#) by the American Association of University Professors, the parent organization of the Nevada Faculty Alliance (see above and attached documents). The paragraph also fails to promote the expansion of academic freedom to students, employees besides academic faculty, and contractors. We recommend the following edits to strength the arguments in this paragraph.

~~It is also important to note that passage~~ *Passage* of this question will *also* require the Legislature to guarantee by law *the* reasonable protection of academic freedom for students, faculty, and contractors in *NSHE public institutions of higher education in Nevada*. Guaranteeing ~~such~~ academic freedom warrants inclusion in the *Nevada Constitution because of its importance for fostering the robust exchange of ideas and the free pursuit of scholarly and scientific knowledge. Extending reasonable protections of academic freedom to students and all employees and contractors in*



*addition to faculty members will ensure that the entire higher education community will have freedom of speech protected on campus. ~~as opposed to simply being a Board policy that can be changed at any time. Passage of this question will ensure that NSHE continues to foster experimentation, invention, and a robust exchange of ideas.~~*

#### **Additional ARGUMENTS FOR PASSAGE**

A primary effect of AJR5 would be to empower the Legislature to enact statutes to override the internal regulations of the Board of Regents. This should be addressed in the arguments. We recommend the addition of the following statement.

*With its current constitutional status, the Board is the final authority on both academic matters involving students and employment matters for the professional staff. For example, the Board has permitted collective bargaining for faculty but also sets the rules for collective bargaining, a conflict of interest for management negotiators. Other state employees have collective bargaining rights in statute and can appeal disputes with their agencies to an independent Government Employee-Management Relations Board, while NSHE professional staff can only appeal to the Board, their own employer. Removal of the Board's constitutional status by passage of this amendment would allow the Legislature to enact laws specifically relating to faculty employment issues as well as academic issues.*

The draft ARGUMENTS FOR PASSAGE neglect to address the provision in the amendment updating the language about use of land-grant funds. We recommend adding the following statement.

*The ballot measure will also update the constitutional language regarding the use of land-grant funds from the Morrill Acts, signed into law by President Abraham Lincoln to ensure a perpetual endowment for the support of designated state universities. Land-grant university status continues to be important for the dissemination of knowledge to advance the economic development of the state through Cooperative Extension and Agricultural Experiment Station programs.*

#### **ARGUMENTS AGAINST PASSAGE**

The draft ARGUMENTS AGAINST PASSAGE have fewer errors and misstatements than the draft ARGUMENTS FOR PASSAGE. However, they mostly make the argument that the status quo is fine and no changes are needed, rather than clearly delineating the potential negative impacts of the measure.

#### **ARGUMENTS AGAINST PASSAGE, paragraph 1.**

Because proponents of AJR5 argue that the governance structure for higher education in Nevada is unusual, this introductory paragraph should indicate that a constitutionally defined governing board is common among states, as follows:

The *Nevada Constitution* provides the Board of Regents with limited authority over the

State University that is independent of the control of the Legislature and Governor. *This is a common governance structure—Nevada is one of 25 states with governing boards for one or more state universities defined in their constitution; four of those states including Nevada specify in their constitutions that the board members are to be elected by the people.* Proponents of this ballot question want voters to believe that removing the limited, independent authority and making the Board of Regents completely subject to the control of the political branches of government will increase the transparency, efficiency, and effectiveness of Nevada’s higher education system. Unfortunately, passage of Question 1 does not guarantee any of these promised benefits. Question 1 is nothing but the Legislature trying to gain more power and control, and it would only serve to add political pressures to a governance system that is serving this State well.

### **ARGUMENTS AGAINST PASSAGE, paragraph 2.**

The Carnegie designation for [UNLV](#) and [UNR](#) is “Very High Research Activity” more commonly referred to as R1 or Highest Research, not “Tier 1”. According to NSHE annual [operating budget reports](#), from 2008-2009 to 2018-2019, average annual full-time-equivalent student enrollment at all NSHE institutions increased from 65,665 to 71,016, which is an 8% increase not a “slight decrease”. Awards data for 2018-2019 are not yet available, but the increase in awards of degrees and certificates at NSHE from 2008-2009 to 2017-2018 is 42.8% according to [NSHE’s Data Dashboard](#). During the ten-year period, total funding from the state general fund for NSHE changed from \$625,504,459 in 2008-2009 to \$655,333,247 in 2018-19, an increase of 4.8% in absolute dollars but a decrease of 15.8% in real dollars after adjustment using the [Higher Education Price Index](#). This doesn’t include the effect of the very large budget cuts of 2010-2015 after the Great Recession. We recommend the following changes in this paragraph:

The Board of Regents and *the Nevada System of Higher Education (NSHE)* have steadily improved higher education outcomes in Nevada. Recently, both the University of Nevada, Reno and the University of Nevada, Las Vegas were recognized as ~~Tier 1~~ *Very High Research Activity (R1)* institutions by the prestigious Carnegie Classification of Institutions of Higher Education. For the last ten years, the number of diplomas and certificates awarded *by NSHE universities and colleges* increased by ~~nearly 30 percent, despite a slight decrease in enrollment, over 40% while overall enrollment has increased by 8%. During the same period funding from the state increased by only 5%--a decrease of 16% in real dollars after adjusting for inflation. With this measure the legislature is seeking greater control over NSHE without having a record of fulfilling its constitutional duty to fund higher education adequately, leading to necessary increases in student fees and tuition.~~

### **ARGUMENTS AGAINST PASSAGE, paragraph 3**

This paragraph lacks specificity with regard to the changes that could occur upon passage. It is written as if only the Legislature would gain power over the Board of Regents, but actually as a non-constitutional entity the Board would be more directly under the control of the Governor in the Executive Branch. In 2006, voters [rejected a constitutional amendment ballot measure](#)

that would have changed the makeup of the Board of Regents to include a majority of appointed members [[AJR11](#)(2003)]. The current ballot measure appears to be a “second bite at the apple” to effect the same change while hiding the intent. [Senate Bill 354](#) of the 2019 legislative session showed that intent among a 15-6 majority of Senators including Senator Joyce Woodhouse, the sponsor of SB354 and the cosponsor of AJR5. The other sponsor for AJR5, former Assemblyman Elliot Anderson argued against SB354 during its [hearing](#) in the Assembly on the basis that it would cause AJR5 to lose in the election, rather than on the merits of elected vs appointed Regents.

We recommend that paragraph 3 be split into three paragraphs covering these issues:

Maintaining the Board’s current status in the Nevada Constitution ensures that the Board remains elected, responsible to the voters, and responsive to constituents. The Nevada Supreme Court has recognized that the constitutional status of the Board of Regents prevents the Legislature *and Governor* from directly interfering with its essential management and control of the State University, and for good reason. Passage of this ballot question would allow the Legislature to change existing higher education policies and procedures and ~~even~~ *would* allow the Legislature to make members of the Board appointed rather than elected. *Under the Constitution currently, the Legislature already has the full authority to prescribe the duties of the Board of Regents. For example, as part of governing the singular State University mentioned in the Constitution, the Legislature has given the duty to the Board to operate two universities, a state college, three community colleges, research institutes, and public service divisions. Through its funding authority, the Legislature controls which programs are supported by taxpayer dollars. Passage of this ballot measure would give undue additional control to the Legislature over academic policies and procedures, which would be highly difficult for a part-time citizen Legislature that meets only biennially to review and manage. Such matters are better left to a governing Board that meets more frequently and whose members have time to develop expertise in higher education. Students would be harmed if the Legislature passes academic polices, perhaps at the request of constituents, with unintended consequences that could not be undone until the next legislative session.*

*Without the independence guaranteed by its constitutional status, the Board and NSHE could become like any other state agency under the oversight of the Governor. Then the Governor could force NSHE to keep its biennial budget requests confidential under the State Budget Act, limiting the public debate on the funding of higher education and reducing transparency and accountability. The Governor could order NSHE administrators to present only the Governor’s approved budget proposals to the Legislature, as is the case with the appointed heads of other state agencies who serve in the executive branch.*

Previous attempts to change higher education governance have failed because Nevadans recognize the importance of keeping the ~~system~~ *elected Board of Regents* in the Nevada Constitution as originally drafted. *In 2006, the voters of Nevada rejected Question 9 which would have changed the makeup of the Board of Regents to include a majority of appointed members. The current ballot measure is an attempt to allow such a change*

*indirectly. Indeed, in 2019 the Nevada State Senate passed a bill sponsored by the legislative cosponsor of this ballot measure that would have reduced the number of elected Regents from thirteen to five and added appointed Regents, effective upon passage of this ballot measure. That bill did not pass in the Nevada Assembly, in part due to fears expressed by the other original legislative sponsor of this ballot measure that it would make it “difficult, if not impossible, to pass” because the electorate is “hostile” to this sort of proposal and because “the people will not vote to get rid of their ability to select their own representatives.” Voting against this ballot measure is a vote to keep the right to elect Regents as guaranteed in the Constitution, which is the ultimate way to hold the Board of Regents accountable.*

#### **ARGUMENTS AGAINST PASSAGE, paragraph 4**

This paragraph misleads by implying the source of academic freedom is in the policies of the Board of Regents rather than an established first-amendment right confirmed by the courts and defined clearly in the [1940 Statement of Principles on Academic Freedom and Tenure](#) by the American Association of University Professors. It understates the potential danger of giving future partisan and ideological legislators the authority to define what “reasonable protection of academic freedom” means, especially for groups it has not been applied to in case law (students, non-faculty employees, and contractors). The constitutional status of the Board of Regents helps to insulate the governance of higher education from political interference, as has happened in recent years in Kentucky [1,2,3] and South Carolina [4,5,6]. We recommend replacement of this paragraph as follows:

~~The Board of Regents has already adopted policies related to academic freedom and responsibility at its institutions. Transferring this duty to the Legislature is not only unnecessary but also takes the definition of academic freedom out of the hands of academic experts.~~ *Academic freedom is a constitutional right under the free speech clause of the amendment of the United States Constitution. Academic freedom is essential for the free pursuit of knowledge in institutions of higher education. While it may seem like a good thing to require the Legislature to protect academic freedom, there is inherent danger in giving future partisan and ideological politicians the authority to define “reasonable protection of academic freedom”. This constitutional language could lead to litigation if a future Legislature attempts to define it narrowly in terms of classroom speech by a faculty member or overly broadly as the religious liberty of students to challenge subject matter or the right to discriminate on the basis of personal beliefs. The ballot measure unwisely expands academic freedom, a concept traditionally understood to apply to faculty engaged in teaching, scholarship, and research, to also apply to all enrolled students, other employees, and even contractors. What that means is unknown and is likely to lead to litigation due to conflicting requirements of free speech and the ability of teachers to appropriately moderate discussion in the classroom. The removal of the Board of Regents from the constitution further undermines academic freedom because it could lead to appointed Regents serving at the pleasure of the Governor or Legislature. In states where governing boards of higher education can be removed by the appointing authority, partisan political concerns can unduly influence higher education. In Kentucky and South Carolina in*

*recent years, for example, the governor or legislature dismissed or attempted to dismiss governing boards or presidents of a state university.*

#### **Additional ARGUMENTS AGAINST PASSAGE**

The legal status of the Board's internal regulations, the [Board of Regents Handbook](#), would be placed into doubt upon passage of AJR5. This should be addressed. We recommend the following addition:

*There is good reason for the Board to be the final authority on academic matters involving students and employment matters involving professional staff. Higher education is a specialized function of government which a part-time Legislature is poorly equipped to manage. The internal regulations of the Board comprise hundreds of pages of the NSHE Code, which is incorporated in contracts with the professional staff of NSHE, and official NSHE and institutional policies. Upon passage of this measure, the legal and contractual status of the Code would immediately be placed in uncertainty and could be subject to litigation. The Board regularly updates and modifies the Code to meet changing circumstances, but the process for state agencies to modify their regulations in the Nevada Administrative Code takes many months or years.*

Finally, the draft ARGUMENTS AGAINST PASSAGE neglect to address the provision in the amendment updating the language about use of land-grant funds. The language is archaic and probably is no longer needed in the constitution as opposed to being in statute (NRS 396.330-380) and controlled by federal law and contract. Inclusion the ballot measure also perpetuates the legacy of the [forcible appropriation of the lands of indigenous peoples by the federal government](#), which [yielded](#) \$107,364 worth of land grants to the state university of Nevada or about \$2.3M in today's dollars. We recommend adding the following statement:

*The ballot measure also retains the language, with technical changes, from the original 1864 constitution accepting federal land grants for the State University through the Morrill Acts prior to the first meeting of the Legislature of Nevada, but removes the Board of Regents from the constitution as the trustee of the perpetual land-grant endowment. Without the Board of Regents as the constitutional trustee, this archaic language is no longer required in the constitution and could have been deleted. Passage of this ballot measure reaffirms and perpetuates in the Nevada Constitution the shameful legacy of the expropriation of lands from indigenous peoples by the federal government, however noble the purpose to support higher education and economic development through land grants.*



VIA ELECTRONIC MAIL

May 19, 2020

Professor Adrian Havas  
President  
Nevada Faculty Alliance  
840 S. Rancho Drive, Suite 4-571  
Las Vegas, Nevada 89106

Dear Professor Havas:

In your capacity as president of the Nevada Faculty Alliance, you have asked the American Association of University Professors to advise you regarding the conception of academic freedom formulated by the AAUP and widely accepted in American higher education.

The Association's foundational document on the topic is the attached 1940 *Statement of Principles on Academic Freedom and Tenure*, jointly formulated by the AAUP and the Association of American Colleges and Universities (AAC&U) and endorsed by more than 250 educational and scholarly organizations. According to the 1940 *Statement*, "[i]nstitutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition." To this end, college and university professors must be "entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties" and to "freedom in the classroom in discussing their subject," provided they are "careful not to introduce into their teaching controversial matter which has no relation to their subject." In addition, "[c]ollege and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline," with the caveat that

their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.<sup>1</sup>

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<sup>1</sup> The AAUP has long maintained that faculty members who make public statements and note their institutional affiliations do not need to state explicitly that they are not institutional spokespersons unless there is good reason to believe that they will be perceived as such.

Professor Havas

May 19, 2020

Page 2

The AAUP's conception of academic freedom has undergone subsequent development and elaboration. In 2003, the Association issued the statement *Academic Bill of Rights* (<https://www.aaup.org/report/academic-bill-rights>). The statement contains the following comments on academic freedom:

A fundamental premise of academic freedom is that decisions concerning the quality of scholarship and teaching are to be made by reference to the standards of the academic profession, as interpreted and applied by the community of scholars who are qualified by expertise and training to establish such standards.

It concludes that

[t]he AAUP has consistently held that academic freedom can only be maintained so long as faculty remain autonomous and self-governing. We do not mean to imply, of course, that academic professionals never make mistakes or act in improper or unethical ways. But the AAUP has long stood for the proposition that violations of professional standards, like the principles of neutrality or nonindoctrination, are best remedied by the supervision of faculty peers. It is the responsibility of the professoriate, in cooperation with administrative officers, to ensure compliance with professional standards.

I hope you find these comments and the attached documents helpful. Please do contact me again if you have further questions.

Sincerely,

A handwritten signature in black ink that reads "Anita Levy". The signature is written in a cursive, flowing style.

Anita Levy, Ph.D.  
Associate Secretary

Enclosures (by electronic mail)

Submitted by:  
Kent Ervin, Legislative Liaison, Nevada Faculty Alliance

American Association of University Professors. (2015). *Policy Documents and Reports* (11<sup>th</sup> ed.)  
“1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive  
Comments.” <https://www.aaup.org/file/1940%20Statement.pdf>



From: BallotQuestionFeedbackForm  
To: [Guinan, Patrick](#); [Thornton, Diane](#)  
Subject: Public Comment for 2020 Ballot Questions  
Date: Wednesday, May 20, 2020 11:43:27 AM

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# Email from Patrick File

## AJR 2 Comments

## AJR 5 Comments

I am a faculty member at the University of Nevada, Reno teaching and researching the First Amendment, free expression, and press freedom at the Reynolds School of Journalism. In general, I cosign the thorough arguments for greater clarity and accuracy in the Draft Ballot Language submitted by my colleagues Kent Ervin of the Nevada Faculty Alliance and Amy Pason of the UNR Faculty Senate. I write here to briefly echo and reinforce some of their chief concerns about the draft language's discussion of the proposed amendment's relationship to and affect on academic freedom. The ballot question language should draw a clearer distinction between the constitutionally protected free speech rights of any individual on an NSHE campus and the more narrow concept of academic freedom, which traditionally has been associated with the right to academic inquiry and instruction extended to University faculty via the First Amendment. I also agree with Ervin/NFA that the reference to *Urofsky v. Gilmore* is tenuous and/or irrelevant. Similarly, references in the arguments for and against passage to the status of academic freedom at NSHE institutions--as currently "simply being a Board policy"--misleadingly ignore the fact that academic freedom is a Constitutional right, and therefore not just subject to the whim of the Board of Regents. Indeed, as both Ervin/NFA and Pason point out, ample evidence shows that a constitutional requirement that the state legislature, a political body that is not subject to the same open government requirements as the Board of Regents, "provide ... for the reasonable protection of individual academic freedom" is highly likely to lead to protracted politicized wrangling over the concept and its boundaries, and is also likely to cost taxpayer dollars through litigation when parties inevitably feel censored, sidelined, or excluded by the legislature's definition. The concerns raised by Ervin/NFA and Pason are valid, and the Legislative Commission should pay heed to the specific examples that Pason notes in her 9th point in response to the draft "arguments for passage" (relating to the tendentious targeting of specific academic programs), and strongly consider adopting Ervin's proposed substitute language for "arguments against passage, paragraph 4." Additionally, I share my colleagues' concerns about the assertions that the Board of Regents "regularly refers to itself as 'the fourth branch of government'" and "deliberately provided misleading information in order to receive more funding" in the arguments for passage section. These should be bolstered with concrete evidence or dropped altogether. (If these passages were submitted in a paper in one of my classes, my comments in the margin would say something like, "Assertion is not argument. Provide evidence or support.") Similarly, the reference to the "clear intent" of "the framers of the Nevada Constitution" lacks any basis in concrete evidence of the actual intent of the Constitution's authors, and is therefore invalid, as Ervin/NFA deftly explains. Indeed, as written, this passage risks coming across as an evidence-free partisan appeal to voters who align themselves with a philosophy of "constitutional originalism"--the type of appeal that is hopefully beneath the evidence-based

and bipartisan Legislative Commission. Thank you for your important work toward providing the voters of our state with clear and accurate information! Patrick File, Ph.D.

## **SJR 1 Comments**

## **SJR 3 Comments**

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## **Contact Information**

*Address:*

*City:*

*State:*

*Zip:*

*Email:*

**From:** BallotQuestionFeedbackForm  
**To:** [Guinan, Patrick](#); [Thornton, Diane](#)  
**Subject:** Public Comment for 2020 Ballot Questions  
**Date:** Wednesday, May 20, 2020 8:04:11 AM

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# Email from David Hanigan

## AJR 2 Comments

## AJR 5 Comments

It is not clear what issue this is intended to solve and amounts to a power grab by the legislative branch. If the reagents are not doing their job well, they can be pushed out through elections. The legislature controls the funding mechanism already. Blaming faculty pay imbalance on the BOR is incorrect as it is the legislature who has refused to fund merit pools and other raises for faculty for a decade. The rest of the arguments for seem to be against the BOR themselves, which, again, are elected. Two Carnegie R1 institutions in the state are a testament to the system as is.

## SJR 1 Comments

## SJR 3 Comments

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## Contact Information

*Address:*  
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*State:*  
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*Email:*

**From:** BallotQuestionFeedbackForm  
**To:** [Guinan, Patrick](#); [Thornton, Diane](#)  
**Subject:** Public Comment for 2020 Ballot Questions  
**Date:** Tuesday, May 19, 2020 3:21:22 PM

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# Email from Thomas Harrison

## AJR 2 Comments

## AJR 5 Comments

It is a bad idea to put NSHE under the legislature. The stat institutions need an independent and elected body to address the unique issues of higher education.

## SJR 1 Comments

## SJR 3 Comments

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## Contact Information

*Address: City: Reno  
State: Nv  
Zip: 89509  
Email:*

From: BallotQuestionFeedbackForm  
To: [Guinan, Patrick](#); [Thornton, Diane](#)  
Subject: Public Comment for 2020 Ballot Questions  
Date: Tuesday, May 19, 2020 4:49:23 PM

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# Email from DOROTHY HUDIG

## AJR 2 Comments

## AJR 5 Comments

Opposed to AJR5. The Board of Regents serves a worthwhile function as long-term standing body that regulates the academic units and NSHE budget. Their terms are long and many regents serve multiple terms. The Regents are strong advocates for higher education. The legislature has higher turnover and many functions. The legislators will lack the time needed to govern NSHE and the depth of understanding that years of service creates. Just read the NSHE By-laws -- That alone is time-consuming and requires explanations.

## SJR 1 Comments

## SJR 3 Comments

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## Contact Information

*Address: City: RENO*

*State:*

*Zip: 89503*

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From: BallotQuestionFeedbackForm  
To: [Guinan, Patrick](#); [Thornton, Diane](#)  
Subject: Public Comment for 2020 Ballot Questions  
Date: Wednesday, May 20, 2020 12:47:44 PM

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# Email from Roberta Kaufman

## AJR 2 Comments

## AJR 5 Comments

Whether in the FOR or AGAINST language of the ballot, academic freedom must be clearly understood. For example, students who disrupt the flow of ideas in a course of study under the guise of “academic freedom” are more likely insolent rather than adhering to standards of discourse where agreeing and disagreeing may occur. Academic freedom does not deny or negate student, contractors or non faculty rights. Academic freedom reinforces the obligation and responsibility of faculty to continually research, inform and challenge the intellectual understanding of a society.

## SJR 1 Comments

## SJR 3 Comments

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## Contact Information

*Address:*  
*City:*  
*State:*  
*Zip:*  
*Email:*

From: BallotQuestionFeedbackForm  
To: [Guinan, Patrick](#); [Thornton, Diane](#)  
Subject: Public Comment for 2020 Ballot Questions  
Date: Tuesday, May 19, 2020 3:27:53 PM

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# Email from Jennifer Lanterman

## AJR 2 Comments

## AJR 5 Comments

The Board of Regents has steadily worked to enhance the performance and prestige of Nevada's universities, as evidenced by UNR and UNLV both achieving Carnegie Classification R1 status and UNR earning the Engaged designation, and NSHE already has provisions in place to protect faculty and student academic freedom. The proposed removal of NSHE and the Board of Regents from the Nevada Constitution subjects higher education to the whims of politicians, which has never worked out well for education. There is no way to know whether or not politicians will seize upon higher education as a scapegoat or a piggy bank when it is politically convenient, an unfortunate phenomenon we have observed around the country (see, for example, Alaska and Wisconsin). Furthermore, the resolution contains concerning language about the legislature, a body of partisan politicians, providing for "reasonable protection of individual academic freedom." Exactly who among these politicians who cannot consistently agree upon women's reproductive rights and equitable voting access is going to determine what constitutes "reasonable" protections? A good many of the problems in higher education are attributable to the politicization of education. I am exceedingly uncomfortable with the prospect of entrusting politicians with the prerogative to determine what faculty and students can express verbally and in writing, and what recourse is available to them when they feel their academic freedom has been violated. In the interest of intellectual inquiry and rigor, I urge you to vote no on this bill.

## SJR 1 Comments

## SJR 3 Comments

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## Contact Information

*Address:*  
*City: Reno*  
*State: NV*  
*Zip:*  
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From: BallotQuestionFeedbackForm  
To: [Guinan, Patrick](#); [Thornton, Diane](#)  
Subject: Public Comment for 2020 Ballot Questions  
Date: Tuesday, May 19, 2020 4:57:38 PM

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# Email from C. Martin

## AJR 2 Comments

## AJR 5 Comments

I am adamantly opposed and request the legislature's opposition to: bill draft AJR 5, the ballot initiative to remove NSHE from the Nevada Constitution. The Nevada Constitution provides the Board of Regents with limited authority over the State University that is independent of the control of the Legislature and Governor. Proponents of this ballot question want voters to believe that removing this limited, independent authority and making the Board of Regents completely subject to the control of the political branches of government will increase the transparency, efficiency, and effectiveness of Nevada's higher education system.

Unfortunately, passage of Question 1 does not guarantee any of these promised benefits.

Question 1 is nothing but the Legislature trying to gain more power and control, and it would only serve to add political pressures to a governance system that is serving this State well. The Board of Regents and NSHE have steadily improved higher education outcomes in Nevada.

Recently, both the University of Nevada, Reno and the University of Nevada, Las Vegas were recognized as Tier 1 institutions by the prestigious Carnegie Classification of Institutions of Higher Education. For the last ten years, the number of diplomas and certificates awarded increased by nearly 30 percent, despite a slight decrease in enrollment. The Nevada

Constitution provides the Board of Regents with limited authority over the State University that is independent of the control of the Legislature and Governor. Proponents of this ballot question want voters to believe that removing this limited, independent authority and making the Board of Regents completely subject to the control of the political branches of government will increase the transparency, efficiency, and effectiveness of Nevada's higher education

system. Unfortunately, passage of Question 1 does not guarantee any of these promised benefits. Question 1 is nothing but the Legislature trying to gain more power and control, and it would only serve to add political pressures to a governance system that is serving this State well. The Board of Regents and NSHE have steadily improved higher education outcomes in Nevada.

Recently, both the University of Nevada, Reno and the University of Nevada, Las Vegas were recognized as Tier 1 institutions by the prestigious Carnegie Classification of Institutions of Higher Education. For the last ten years, the number of diplomas and certificates awarded increased by nearly 30 percent, despite a slight decrease in enrollment.

The Nevada Constitution provides the Board of Regents with limited authority over the State University that is independent of the control of the Legislature and Governor.

Proponents of this ballot question want voters to believe that removing this limited, independent authority and making the Board of Regents completely subject to the control of the political branches of government will increase the transparency, efficiency, and effectiveness of Nevada's higher education system.

Unfortunately, passage of Question 1 does not guarantee any of these promised benefits. Question 1 is nothing but the Legislature trying to gain more power and control, and it would only serve to add political pressures to a



governance system that is serving this State well. The Board of Regents and NSHE have steadily improved higher education outcomes in Nevada. Recently, both the University of Nevada, Reno and the University of Nevada, Las Vegas were recognized as Tier 1 institutions by the prestigious Carnegie Classification of Institutions of Higher Education. For the last ten years, the number of diplomas and certificates awarded increased by nearly 30 percent, despite a slight decrease in enrollment. The Board of Regents has already adopted policies related to academic freedom and responsibility at its institutions. Transferring this duty to the Legislature is not only unnecessary but also takes the definition of academic freedom out of the hands of academic experts. Reject this uncertain and unnecessary change to the constitutional status of the Board of Regents. Vote “no” on Question 1.

## **SJR 1 Comments**

## **SJR 3 Comments**

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## **Contact Information**

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*City: Elko*  
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*Zip: 89801*  
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From: BallotQuestionFeedbackForm  
To: [Guinan, Patrick](#); [Thornton, Diane](#)  
Subject: Public Comment for 2020 Ballot Questions  
Date: Tuesday, May 19, 2020 4:55:55 PM

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# Email from Chris Mays

## AJR 2 Comments

## AJR 5 Comments

As a resident of Nevada I find this resolution as potentially extremely damaging to both the reputation of the education system in this state (an important point of pride for our state), and to the integrity of the state assembly (which should absolutely not be at all involved in making decisions about what is "reasonable" academic freedom, as the supporters put it). More importantly, the supporters of this amendment claim that this amendment would help drive down the cost of higher education, yet by claiming that the Board of Regents is "fiscally irresponsible," the supporters make obvious that this amendment will almost certainly result in \*less\* funding for higher education, thus shifting more of the burden to students, putting more students in debt, and making higher ed less accessible to Nevada residents. Passage of this amendment would almost certainly lower the reputation of the education system in this state even further, which is something we should all want to avoid.

## SJR 1 Comments

## SJR 3 Comments

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From: [Amy Pason](#)  
To: [Thornton, Diane](#); [Guinan, Patrick](#)  
Subject: Public Comment on AJR5  
Date: Tuesday, May 19, 2020 2:05:43 PM  
Attachments: [AJR5 public comment response.docx](#)

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Ms. Thornton and Mr. Guinan:

Kent Ervin, Legislative Liaison for the Nevada Faculty Alliance, alerted me to the public comment request related to the ballot draft language of AJR5. I am emailing to provide my public comment (attached word document--hyperlinks in document to relevant evidence) in an effort to help your team craft the most useful information for voters.

To be clear, I am writing as an individual (constituent in Reno), but for context, I have been following AJR5 during the past legislative session, and have testified during AB202 committee hearings and at last session's joint finance committee reviewing higher education funding. As a faculty member at the University of Nevada, Reno, I have an interest in the outcome of AJR5--in short, I've had a longer interest in this proposal and have some experience with related legislative processes related to higher education.

Thank you in advance for considering the feedback, hope you both are well,  
Amy Pason, Ph.D  
Reno, NV 89509

To Whom It May Concern:

I am writing as a constituent in Reno, who also happens to teach argumentation and debate at the University of Nevada, Reno. I have been following the legislative debate on AJR5 and other legislative work related to higher education as a faculty member and current member of the Faculty Senate at UNR. Given this context, I have a vested interest in the outcome of this vote. As an educator who believes in reasoned debate as the best method for making informed decisions, I wanted to provide feedback on the drafted ballot language. My hope is that the best information is presented to voters to enable them to make informed decisions. Please consider the suggestions below with that intention in mind.

In debate, the affirmative side has a burden of proof to clearly articulate need, what a solution will entail, how it can or would be enacted, and justification for the change. The current information (especially related to affirming this large constitutional change) appears lacking in these areas, and hopefully more information describing the effects of this change would be presented. Given the language of the proposed question, voters (especially those that work in higher education directly affected by the measure) might appreciate information that would answer questions related to the following:

- If we remove provisions governing the election and duties of the Board of Regents and charge the Legislature with these duties, then what would this new governing structure look like? Would the current governing documents of NSHE (such as [the Board of Regents Handbook](#) that includes tenure, academic freedom, fees, financial aid, and other employee policies) be voided and replaced with policies voted on by Legislators? Would the current systems of shared governance that exist at institutions (that includes bylaws and policies that allow for student and faculty senate bodies to give input on NSHE code and directly interface with the Board of Regents) collaborating with the Board of Regents and Chancellor also be replaced? **Explanation, Paragraph 1 (repeated in Digest, Paragraph 4)** does not help clarify these issues as it notes that the ballot measure would not repeal existing provisions (including election of Board members), but then indicates that the change would make the Board subject to statutory changes made in the legislative process. In other words, it seems that the change could allow for the Legislature to determine what governing body and codes would control higher education. With a Legislature that only meets biennially, one could also ask if the Legislature would be able to make decisions related to the function of higher education, especially when current events (as we see now with COVID-19) might need to be acted on in a moment's notice. If indeed this change would allow the Legislature to control or change the current Board governing structures, this should be stated.
- If academic freedom is usually (and legally defined) related to academic faculty and their ability to teach and research without partisan influence or censorship, why does this change include students, employees, or other contractors? If students are allowed "academic freedom," does this mean public institutions would have to allow more groups [such as Turning Point](#) or its more problematic [white supremacist counterparts](#) on campus? Or if state departments were contractors with university research, would their

academic freedom allow censorship of important research that was politically inconvenient as we have recently seen in [Arizona shutting down COVID-19 testing?](#)

- Finally, what specific control or oversight of federally derived funding would the Legislature assume, or does “(3) revise provisions” merely mean updating the language in the Constitution?

In short, the current explanation and digest (and topics presented in Arguments for Passage) are not clarifying in what the potential effects for change could be as well as what change would actually occur with the Legislature to provide “governance, control, and management of the State University.”

As noted above, I believe the ballot explanations are a valuable resource for voters to make informed decisions, and the specific arguments for and against passage should be factually accurate, avoid use of argumentation fallacies, and not include statements that might mislead voters. In reviewing the **Arguments** sections, I found some statements that are problematic and have provided evidence below.

First, the section of **Arguments for Passage** is the most problematic in terms of incorrect or misleading information and should be corrected.

1. “Nevada is the only state whose higher education system is governed by an elected board with constitutional status”

- This is false. Alabama, Michigan, and Nebraska in addition to Nevada all have elected governing boards for public state universities enshrined constitutionally. Additionally, 20 other states have constitutionally defined governing boards of higher education whose members are appointed by governors, selected by legislatures, or some combination. Moreover, the Nevada constitution refers only to a State University not a “higher education system”.

2. “The Board of Regents regularly refers to itself as the “fourth branch of government,” relying on its unique constitutional status to claim that it can operate free from legislative control.”

- This statement is misleading and potentially libelous. As a body, the Board of Regents has never declared itself as a fourth branch of government. In Board of Regents minutes, there is one recorded instance in 2011 of an individual Regent mentioning the fourth branch of government (Board of Regent minutes on 6/16-17/2011). It is doubtful that all of the current Regents would express the same sentiment nor do so “regularly.” The claim of the Regents operating outside of legislative control is also quite misleading. Although the Regents have control of codes and policies that govern our higher education institutions (for example, they do not need to ask the Legislature to approve changes academic calendars, evaluation of degrees and programs, changes in organization of colleges or units, etc.), the Legislature does have input in terms of what state funding is granted to institutions, which budget requests will be granted, cost of living increases as university employees are all state employees. The Board of Regents regularly consults with Legislative bodies in terms of student tuition, financial assistance, and scholarships.

We can only look at programs like the [Guinn Millennial Scholarship](#) to see how Legislative and higher education partnerships are already part of the system, and certainly where the Board of Regents does not act completely free of legislative control.

3. “Voting in favor of this question will clarify the Legislature’s authority over the Board and result in improved oversight and accountability.”

- As noted above, the explanation, digest, and Arguments for Passage do not clarify what organizational structure or oversight the Legislature will have with this change. Rather, the proposal simply eliminates the Board from having constitutional status. More information related to what actions the Legislature could take to improve accountability as result of this proposal should be stated. For example, if this proposal is mostly for oversight of budgetary issues (as many of the arguments here imply), can the citizen legislators who meet biennially ensure the same agility in decision making that institutions must utilized with changing funding related to philanthropy, federal and other grant supported programs, enrollment, or the consequences of pandemics—all that do not work on biennial timelines?

4. “[Board of Regents] to avoid the fiscal oversight typically applied to other government agencies. In the past, NSHE has deliberately provided misleading information in order to receive more funding, according to legislative testimony.”

- This statement is also misleading and potentially libelous. NSHE is subject to the Budget Act (NRS 353) with regard to state appropriated funds, and NSHE makes biennial budget requests as do other state agencies. If misleading information has been provided by NSHE (and this would need evidence), then false testimony at a legislative hearing would be illegal and already covered by other laws.
- If the concern is the that Legislature does not currently have oversight nor directly informed about non-state funding at institutions, especially as related to federal grants and other sources of “soft money” used for individual faculty research, that would still remain unchanged with this proposal as those grants are overseen by specific federal agencies. Funding by federal agencies is public information, thus could be obtained if the Legislature requested. State funding remains essential for the overall operations of the university, but faculty necessarily seek out external funding as needed (for specialized equipment, travel to archives, etc.) to complete the innovative work that benefits the state.

5. “It has also been shown that years of poor internal hiring decisions caused a faculty pay imbalance, which will cost approximately \$90 million each year to address.”

- This is a false statement that also misrepresents the work of the Legislature’s own AB 202 (2017) interim Committee to Conduct a Study Concerning the Cost and Affordability of Higher Education. The \$90 million number was the estimated number by an external organization (Gallagher) hired by NSHE to study salary compression on the amount needed to correct compression issues across the system. This statement overlooks the real impacts of the Great Recession on faculty salaries including state/legislature

mandated furloughs and pay cuts, few cost of living increases funded by the legislature, as well as the legislature discontinuing funding “merit” pools. Without in-rank salary advancements, faculty hired at “market rate” during the Recession, faculty hired after the Recession at new market rates are close in salary to those hired previously. Salary compression should not be understood as “poor internal hiring decisions”—no business would find it responsible, ethical, or possible to hire qualified individuals at less than competitive salaries, but higher education (funded by the Legislature with limits on how to use state funds related to salary) cannot adjust compression in the same way other businesses can. The goal of the AB 202 committee was an attempt to understand and address the inequities that resulted from the Recession—recognizing the issue of salaries is, in part, already the responsibility of the Legislature.

6. “The lack of oversight coupled with fiscal irresponsibility ultimately hurts taxpayers as well as students by driving up the cost of higher education.”

- This claim is misleading and again potentially libelous without documented evidence from audits. As established in testimony to the AB 202 Committee, costs of higher education to students increase when the proportion of state funding decreases—this trend has occurred in Nevada and across the nation. Nevada has continued to fund education at higher rates than other states ([this report ranks Nevada 18<sup>th</sup> in the nation in 2018](#)), but Nevada has overall decreased spending on higher education since 2008. Even with reduced state funding, NSHE has kept tuition and fees costs down for students, with UNR and UNLV being [less expensive than other R1 public institutions](#). I think most faculty can attest that we have been asked to “do more with less” to provide quality education even amidst Recession, and continually keep student needs in the forefront. This statement does not consider the ways that institutions work to keep education affordable and accessible to students (also part of NSHE’s overall mission) through scholarships, grants, and other financial aid assistance and counseling. This statement overlooks the other ways that institutions support students in need through food pantry programs, emergency loans, or other services that are also outside of tax payer or state funding.
- Moreover, the claim of fiscal irresponsibility could also be direct at the Legislature: in the last session, [the Legislature underfunded the cost of living increases approved for all state employees when it came to higher education institutions](#). Institutions exhibited financial responsibility in covering the promised cost of living increases by adjusting their budgets, largely achieved by deferring new or replacement hires. Rather than institutions making “poor hiring decisions,” it is legislative decisions of funding that prevent institutions from hiring at all.

7. “Recent legislative testimony indicates the college programs currently offered are not aligned with workforce needs, and some employers are forced to recruit college graduates from outside of the State to fulfill these needs.”

- This statement is also misleading and would need to be substantiated by more evidence, and does not account for the wide range of education and training offered by different institutions in the state. The [2015 NSHE Strategic Plan](#) identifies the ways that

institutions developed or expanded programs to fit specific workforce needs: community colleges offering welding and machinery to fulfill Tesla Gigafactory needs, expanding public health, nursing, and medicine programs, and offering more dual degree programs to address teacher shortages in the state such as with NevadaTeach at UNR. At the same time, institutions can only meet workforce needs and develop programs based on resources available. Certainly more advanced manufacturing training and innovation is needed, but in the 2019 Legislative session, the supplemental budget request by UNR for this initiative (supported by Governor Sandoval) was rejected. UNR has continued to seek external funding to continue to advance this initiative to address the needs of Nevada.

8. “Representatives of the business community have also stated that issues with the transfer of student credits within NSHE discourages companies from financially supporting employee participation in continuing education.”

- This statement is also misleading and based on minimal evidence. One can review the [Course Catalogs](#) of each institution to see that robust transfer agreements across NSHE institutions are in-place to ensure completion of degrees in timely manners and provide for as maximum transfer credits as possible especially related to general education courses. Transfer agreements with neighboring state institutions are also in place, but might be more limited. Employers might be discouraged to support students taking courses that are not directly relevant to their field or a degree program, and there are some occupation related courses that are not transferrable by design such as specialized certification courses. It is unclear how Legislative oversight would change this situation other than to mandate course or degree requirements, interfering with academic freedom protections.

9. “It is also important to note that passage of this question will require the Legislature to guarantee by law reasonable protection of academic freedom for students, faculty, and contractors in NSHE... as opposed to simply being a Board policy that can be changed at any time.”

- The entirety of this argument is based on false pretenses, thus misleading voters. Academic freedom is a constitutionally protected First Amendment right. Moreover Board policies are vetted through a shared governance system and public meetings—faculty most affected by academic freedom issues have the ability to hold the Board accountable through shared governance already. There is no guarantee that the Legislature would create or define “reasonable protection” in the same ways. We can only look to recent examples to see how “reasonable protection” of academic freedom have been used in other states to actually restrict and trample academic freedom, usually in political and partisan manners. In Arizona, lawmakers [banned courses in ethnic studies and Mexican-American Studies](#) in a way they believe to be “reasonable,” but that have recently been found unconstitutional. Partisan issues also prompted [Department of Education investigations of Middle Eastern Studies](#) programs—attacking the very thing academic freedom is meant to protect. Given the current state of partisan politics, there is every reason to be suspicious of how a changing citizen legislature will want to define



“reasonable protection” every two years, with the increased ability for the Legislature to make changes “at any time” to academic freedom via legislative session bills.

Finally, there is no statement related to how this proposal would change use of land-grant federal funding, thus not justifying that aspect of the proposal.

The **Arguments Against Passage** is less problematic than the Arguments For Passage as noted above, but could still be revised to provide clarity on the issue for voters, and to correct factual inaccuracies.

1. “both the University of Nevada, Reno and the University of Nevada, Las Vegas were recognized as Tier 1 institutions by the prestigious Carnegie Classification of Institutions of Higher Education. For the last ten years, the number of diplomas and certificates awarded increased by nearly 30 percent, despite a slight decrease in enrollment.”

- UNR is classified as a Tier 1 institution based on US World News and Reports categorizations. UNR and UNLV received the Highest Research (R1) designation by the prestigious Carnegie Classification of Institutions of Higher Education. UNR also received the Carnegie Classification for Community Engagement signifying campus and community partnerships and service to communities.
- Statistics related to enrollment and degree completion also should be corrected. According to NSHE annual [operating budget reports](#), from 2008-2009 to 2018-2019, average annual full-time-equivalent enrollment at NSHE increased from 65665 to 71016, which is an 8% increase not a “slight decrease”. There was an increase in awards at NSHE from 2008-2009 to 2017-2018 is 42.8% according to [NSHE’s Data Dashboard](#). This argument might also include how NSHE policies have been focused on accessibility and timely degree completion, such as with the [30 to Complete](#) campaign to make the improvements noted in this paragraph. In other words, hearing concerns from tax payers and legislators (who can hold NSHE accountable) related to student completion, institutions have responded and have continued to excel in serving Nevada.

2. “The sole focus of the Board of Regents is on higher education policy, and it is best equipped to govern NSHE. It does not make sense to risk losing the Board’s independence, institutional knowledge, and expertise with no assurance of what the Legislature may put in its place.”

- This is really at the heart of the issue of this ballot question. Additionally, you might consider noting that the current structure (especially with a Board that meets regularly all through the year every year) allows the Board can be responsive to ever changing needs of faculty and students, and the Chancellor and other NSHE officers regularly meet with Faculty Senate and Student Senate representatives on issues as well as seeking input from all institutions through robust shared governance. There is no guarantee that Legislative control would continue shared governance to the detriment of faculty and students.

3. “Passage of this ballot question would allow the Legislature to change existing higher education policies and procedures and even allow the Legislature to make members of the

Board appointed rather than elected.”

- In this paragraph, more emphasis can be placed on the previous attempts to change higher education that have been rejected such as in 2006 when voters rejected a measure to change the composition of the Board to include appointed members or again in 2019 when the State Assembly did not pass a similar bill sponsored by the State Senate.
- Moreover, the negative consequences of a legislative appointed Board should be highlighted. There is no guarantee that appointed Regents would be better qualified or more suited than those elected by Nevadans, and although some Regents have not been perfect (as can be the case with any elected official), there is more probability that appointed Regents might be selected with partisan rather than educational goals in mind. Or that the Legislature might remove Regents based on partisan whims, as in the case in Kentucky where the governor [dissolved the Board of Education](#). Upheaval of the complex higher education system based on election cycles would undermine the educational and research missions of our institutions.
- It can also be noted that the current structure and relationship between the Board of Regents/NSHE and the Legislature has been productive and collaborative. Again, we can point to the recent AB 202 Committee that worked to research and provide guidance related to salary issues and higher education affordability that was a shared concern of NSHE and legislators. Certainly the legislative record would find ample evidence of other interim committees conveyed to work on higher education policy that have had the support of the Board of Regents.

In sum, the Arguments Against Passage need some factual correction, and could do more to highlight the negative consequences of passing the proposal while also continuing to highlight how the current higher education governing structure works well for Nevada.

In all, the proposed changes of AJR5 cannot be taken lightly, and I hope that the final ballot language will present clear, accurate, and supported arguments so that voters may make informed decisions.

Respectfully,

Amy Pason, Ph.D.  
Reno, NV 89815

From: BallotQuestionFeedbackForm  
To: [Guinan, Patrick](#); [Thornton, Diane](#)  
Subject: Public Comment for 2020 Ballot Questions  
Date: Tuesday, May 19, 2020 4:58:38 PM

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# Email from Barry Perryman

## AJR 2 Comments

## AJR 5 Comments

Although items 1) and 2) in the ballot question make some reasonable sense, item: 3) revise provisions governing the administration of certain funding derived under federal law and dedicated for the benefit of certain departments of the State University?...is obviously a veiled attempt for the legislature to control the proceeds of formula funding programs like the Nevada Agricultural Experiment Station and Cooperative Extension. Putting executive control of these funds into the hands of the legislature will certainly redirect the funds into program areas and NSHE institutions that have no affinity to rural Nevada counties and citizens. In spite of the poor leadership exhibited by the Regents and Chancellor over the past decade or so, they have at least understood that USDA formula funds are earmarked for agriculture and rural Nevada. The legislature is strongly shifted towards urban counties, in particular Clark County. It is a matter of record that Clark County has no interest in respecting the rights of individual rural counties or maintaining rural culture or economies. For this reason alone, the Resolution should be removed from any further discussion and the ballot. This is a bad idea and will only serve to widen the chasm between Clark County and the rest of Nevada.

## SJR 1 Comments

## SJR 3 Comments

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From: BallotQuestionFeedbackForm  
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Subject: Public Comment for 2020 Ballot Questions  
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# Email from Ben Reynolds

## AJR 2 Comments

## AJR 5 Comments

The Board of Regents is at present the best institution of University management. Direct control of university affairs by legislature sets the stage for infringements on academic freedom and removes the autonomy of the university as a distinct institution with distinct interests. I oppose this measure for opening a door for nonacademics to dictate university policy in ways that may not benefit education.

## SJR 1 Comments

## SJR 3 Comments

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May 20, 2020

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**Re: Comments on Draft Language for Assembly Joint Resolution No. 5  
(Question No. 1) on the November 2020 Ballot**

Dear Legislative Counsel Bureau:

As the Chief General Counsel for the Nevada System of Higher Education (NSHE), I am writing to provide comments on the draft language that will be presented to Nevada voters when they consider amendments proposed to the Nevada Constitution, pursuant to Assembly Joint Resolution No. 5 (AJR 5), which will appear as ballot Question No. 1 during the November 2020 general election.

At the outset, I would like to thank the Legislative Counsel Bureau, Research Division for reaching out and providing the opportunity to submit comments on the draft language. Ensuring that Nevada voters are presented with factually and legally accurate information, even within the context of arguments for or against policy proposals, is paramount to both fair public discourse and the underpinnings of our democracy. This is all-the-more important and necessary when that dialogue involves a ballot measure, such as AJR 5, which seeks to eliminate and replace language that has been a part of the Nevada Constitution since our State was founded in 1864.

As you may be aware, the Nevada Supreme Court has affirmed challenges to explanatory language and arguments in ballot initiatives where statements made were false or misleading. *See, e.g., Nevada Judges Association v. Lau*, 112 Nev. 51, 910 P.2d 898 (1996); *Choose Life Campaign '90' v. Del Papa*, 106 Nev. 802, 801 P.2d 1384 (1990). Setting aside any disagreement with AJR 5 itself, as that is now a matter that will be determined by the collective wisdom of Nevadans in November 2020, a review of the draft language of the “Arguments for Passage” reveals at least five statements that are either factually or legally false by any objective standard, or are misleading and factually unsupported. Each of these statements will be addressed below in the order they are asserted in the draft language. I respectfully request that each of these identified statements either be stricken or corrected and amended before a final version of the ballot materials are published.

First, the “Arguments for Passage” draft language begins with the erroneous assertion that **“Nevada is the only state whose higher education system is governed by an elected board with constitutional status.”** This statement is false and legally incorrect.

Nevada is not the only state whose higher education system is governed by an elected board. Nevada is one of four states whose higher education systems are governed by a board whose elections are guaranteed by their state constitution. The other states are Colorado,<sup>1</sup> Michigan,<sup>2</sup> and Nebraska.<sup>3</sup>

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<sup>1</sup> Article IX, Section 12 of the Colorado Constitution provides:

Regents of University. There shall be nine regents of the university of Colorado who shall be elected in the manner prescribed by law for terms of six years each. Said regents shall constitute a body corporate to be known by the name and style of "The Regents of the University of Colorado". The board of regents shall select from among its members a chairman who shall conduct the meetings of the board and a vice-chairman who shall assume the duties of the chairman in case of his absence.

<sup>2</sup> Article 13, Section 6 of the Michigan Constitution provides:

Regents of university; election. There shall be elected in the year eighteen hundred and sixty-three, at the time of the election of a justice of the supreme court, eight regents of the University, two of whom shall hold their office for two years, two for four years, two for six years, and two for eight years. They shall enter upon the duties of their office on the first of January next succeeding their election. At every regular election of a justice of the supreme court thereafter, there shall be elected two regents whose term of office shall be eight years. When a vacancy shall occur in the office of regent, it shall be filled by appointment of the Governor. The regents thus elected, shall constitute the boards of regents of the University of Michigan.

<sup>3</sup> Article VII, Section 10 of the Nebraska Constitution provides:

This passage is also misleading in that it could cause a reasonable person to incorrectly conclude that Nevada is the “only” state that has a Board of Regents with “constitutional status.” Numerous states throughout the country expressly afford “constitutional status” to the boards that govern or coordinate their higher education and university systems, irrespective of whether those bodies are elected or not.

Some of these states include: Alaska (Alaska Constitution, Article VII, Section 3); Arizona (Arizona Constitution, Article XI, Section 5); California (California Constitution, Article IX, Section 9); Florida (Florida Constitution, Article IX, Section 7); Georgia (Georgia Constitution, Article VIII, Section IV); Hawaii (Hawaii Constitution, Article X, Section 6); Idaho (Idaho Constitution, Article IX, Section 10); Kansas (Kansas Constitution, Article 6, Section 2); Louisiana (Louisiana Constitution, Article VIII, Section 5); Mississippi (Mississippi

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University of Nebraska; government; Board of Regents; election; student membership; terms. The general government of the University of Nebraska shall, under the direction of the Legislature, be vested in a board of not less than six nor more than eight regents to be designated the Board of Regents of the University of Nebraska, who shall be elected from and by districts as herein provided and three students of the University of Nebraska who shall serve as nonvoting members. Such nonvoting student members shall consist of the student body president of the University of Nebraska at Lincoln, the student body president of the University of Nebraska at Omaha, and the student body president of the University of Nebraska Medical Center. The terms of office of elected members shall be for six years each. The terms of office of student members shall be for the period of service as student body president. Their duties and powers shall be prescribed by law; and they shall receive no compensation, but may be reimbursed their actual expenses incurred in the discharge of their duties.

The Legislature shall divide the state, along county lines, into as many compact regent districts, as there are regents provided by the Legislature, of approximately equal population, which shall be numbered consecutively.

The Legislature shall redistrict the state after each federal decennial census. Such districts shall not be changed except upon the concurrence of a majority of the members of the Legislature. In any such redistricting, county lines shall be followed whenever practicable, but other established lines may be followed at the discretion of the Legislature. Whenever the state is so redistricted the members elected prior to the redistricting shall continue in office, and the law providing for such redistricting shall where necessary specify the newly established district which they shall represent for the balance of their term.

Constitution, Article 8, Section 213-A); Missouri (Missouri Constitution, Article IX, Section 9(a)); Montana (Montana Constitution, Article X, Section 9); New Mexico (New Mexico Constitution, Article XII, Section 13); New York (New York Constitution, Article XI, Section 2); North Dakota (North Dakota Constitution, Article VIII, Section 6); Oklahoma (Oklahoma Constitution, Article XIII B, Section 1); South Dakota (South Dakota Constitution, Article XIV, Section 3); and Wyoming (Wyoming Constitution Article 7, Section 17).

Not only do these facts directly belie the assertion made in the draft language, but removing any reference to the Board of Regents or a governing body for higher education in the Nevada Constitution, as AJR 5 now attempts to do, would actually make Nevada both an anomaly and outlier amongst most Western states.

Second, the “Arguments for Passage” draft language next erroneously states that “[t]he **Board of Regents regularly refers to itself as the ‘fourth branch of government,’ relying on its unique constitutional status to claim that it can operate free from legislative control.**” This statement is misleading, untrue, and lacks factual support. Rather, as discussed further below, it is a statement of political ‘spin’ that has been promulgated and repeated by proponents of AJR 5, not the Board of Regents or NSHE.

No known opinion by the Nevada Supreme Court cites to any argument by the Board of Regents that it is the “fourth branch of government.” No testimony before the Nevada Legislature by a Regent, NSHE Chancellor, or member of the Chancellor’s Cabinet has been identified where the Board of Regents has self-described or referred to itself as the “fourth branch of government.”<sup>4</sup> Even a casual Google search fails to reveal an instance where the Board of Regents has referred to itself as the “fourth branch of government.” If any such statements by the Board of Regents exist, they have not been located.

Even if an instance of this statement being used by the Board of Regents or an NSHE employee was ever found, it would be a rare occurrence and certainly not something that is said “regularly,” as this draft language would have Nevada voters incorrectly believe. Rather, references to the Board of Regents as being the “fourth branch of government” is a talking-point that proponents of AJR 5 have repeatedly asserted during numerous hearings before the Nevada Legislature. *See, e.g.*, Minutes of the Senate Committee on Legislative Operations and Elections (March 18, 2019); Minutes of Assembly Committee on Legislative Operations and Elections (February 21, 2019); Minutes of Assembly Committee on Legislative Operations and Elections (March 2, 2017). Because an assertion is made and repeated on the record does not make it any more or less true.

Indeed, being labeled as a “fourth branch of government” appears to be a political strategy and rhetoric that has been employed against numerous government agencies and abstract legal processes or concepts over the past several decades. *See, e.g.*, Minutes of the Senate Committee on Government Affairs (accusing the Nevada Controller of being a fourth branch) (February 3, 1993); Minutes of the Senate Committee on the Judiciary (accusing the Nevada State Bar of being a fourth branch) (May 13, 1999); Journal of Nevada Senate (accusing common interest communities of being a fourth branch) (April 17, 2009); Minutes of the Senate Committee on

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<sup>4</sup> A former regent once responded to assertions made by a proponent of AJR 5 that the Board of Regents considered itself “the fourth branch of government.” But this was simply a response to the erroneous assertion. *See* Minutes of the Assembly Committee on Legislative Operations and Elections (March 2, 2017).



Legislative Operations and Elections (accusing the administrative regulatory process of being a fourth branch) (February 19, 2013); Assembly Committee on Legislative Operations and Elections (accusing the initiative and referendum petition process of being a fourth branch) (February 7, 2017). Political hyperbole such as this should have no place or inference of having a basis in truth or fact when the issue of amending the Nevada Constitution is concerned.

An accurate statement would be that Nevada Supreme Court has recognized that the Board of Regents have limited constitutional sovereignty to manage and control certain aspects of higher education in Nevada, but outside of those limited areas, it is currently subject to considerable oversight by the Nevada Legislature. *See Board of Regents v. Oakley*, 97 Nev. 605, 637 P.3d 1199 (1981) (interpreting *King v. Board of Regents*, 65 Nev. 533, 200 P.2d 221 (1948)).

Over 20 years ago, NSHE expressly rejected the label that it is the “fourth branch of government.” *See* Minutes of Assembly Committee on Constitutional Amendments (where former General Counsel of the University and Community College System of Nevada Tom Ray “stressed the board was not a fourth branch of government but was a constitutional body”) (April 8, 1999). It recently did so again, when it affirmed its respect for the Nevada Legislature and acknowledge its authority over higher education matters. *See* Minutes of the Senate Committee on Legislative Operations and Elections (where former Board of Regents Vice Chairman (and now current Chairman), Jason Geddes stated that he “deeply respect[s] this institution, this body, and the legislative authority. I can tell you . . . we have a slice—a narrow, sovereign piece—of the pie that we think is our authority. The other issues are up to the legislative body to decide. That includes the biennial budget requests that we put together and interim changes given to the Interim Finance Committee on any budget”) (May 17, 2017).

Representing to the voters of Nevada, as the draft language does, that the Board of Regents manage higher education in Nevada independently and free from all legislative oversight and direction is a disservice to the important constitutional issues raised by the AJR 5 ballot measure. Indeed, the Nevada Legislature has enacted approximately 328 separate statutory provisions found in NRS Chapter 396 that govern the affairs of the Board of Regents. Within these provisions, the Nevada Legislature requires the Board of Regents to provide regular reports to it for oversight purposes on a wide variety of matters. *See, e.g.*, NRS 396.340, 396.504, 396.505, 396.507, 396.531, 396.532, 396.542, 396.780, 396.898, 396.960, and 396.9685.

Additionally, the authority and responsibilities of the Board of Regents and/or NSHE are defined and governed by statutes enacted by the Nevada Legislature found in numerous other Chapters. *See, e.g.*, NRS Chapters 43, 223, 232, 239, 241, 278C, 281, 284, 286, 287, 293, 333, 333A, 338, 341, 348, 353, 361, 375A, 385, 387, 388, 391, 391A, 439, 463, 514, 527, 550, 612, 616A, and 701B. Each of these Chapters contain statutes referring in some manner to the Board of Regents and/or NSHE. Given the statutory authority cited above, assertions that the Board of Regents is beyond legislative oversight and control are legally incorrect.

The Board of Regents and NSHE engage with and appear before the Nevada Legislature during regular legislative sessions, routinely communicate with legislators, and remain accountable to and work with legislative bodies during interim periods, such as the Interim Finance Committee and the Legislative Committee on Education. The Board of Regents and NSHE greatly appreciate and respect the role the Nevada Legislature has over higher education in Nevada, and, irrespective of the outcome of the AJR 5 ballot measure, will continue to diligently and responsively work with all legislators to serve Nevada’s higher education students and mission,

and will remain accountable to the oversight of the Nevada Legislature, as it has been for the past 156 years.

Third, the “Arguments for Passage” draft language next erroneously states that the Board of Regents **“controls approximately 15 percent of the State’s budget.”** This statement is highly misleading and, without more context, it is inaccurate. According to research and policy analysis by the non-profit and bi-partisan Guinn Center, NSHE comprised approximately 7.3% of the Governor’s Recommended Budget for the 2019-20 biennium. *See Nevada Budget Overview 2021* at <https://guinncenter.org/photo-essay/nevada-budget-overview-2019-2021/> (as of May 19, 2020). Thus, it is simply incorrect to assert that the Board of Regents controls “15 percent of the State’s budget.” While the Guinn Center also concluded that NSHE received in the Governor’s Recommended Budget approximately 15.8% of General Fund revenue, *see id.*, General Fund revenue and the State’s budget are two different things. Importantly, any funds received by NSHE from State revenue are appropriated to NSHE by the Nevada Legislature.

Fourth, the “Arguments for Passage” draft language next erroneously states that **“NSHE has deliberately provided misleading information in order to receive more funding, according to legislative testimony.”** This statement lacks context or explanation as to how or when NSHE purportedly did this act. NSHE is a government entity established by the Nevada Legislature pursuant to NRS Chapter 396 and collectively refers to a system administration and eight higher institutions that employ over 12,000 academic and administrative faculty. The Board of Regents is comprised of 13 independently elected members. Whether or not it is true an individual ever provided any misleading information to the Nevada Legislature, NSHE and the Board of Regents never did. An act of a single individual or employee cannot be reasonably imputed to an entire government entity and all employees who work within it.

Fifth, the “Arguments for Passage” draft language next erroneously states that **“[r]epresentatives of the business community have also stated that issues with the transfer of student credits within NSHE discourages companies from financially supporting employee participation in continuing education.”** This assertion is broad and fails to identify what sectors within Nevada’s business community have made these statements and how AJR 5 is relevant to addressing these concerns.

As drafted, this statement supports the misleading inference that broad dissatisfaction exists about undefined “issues” in the “business community” with how NSHE treats the transfer of student credits and that students are being harmed. Such an inference is belied by actual data, and an audit performed in 2018 by the Board of Regents’ Academic, Research and Student Affairs Committee. The audit found that “substantial progress” was being made in ensuring a seamless student credit transfer process. Approximately 76% of students receive full credit during transfers and/or lose no more than 3 credits during the credit transfer process. *See 2018 NSHE Transfer & Articulation Audit*, at page 14, [https://nshe.nevada.edu/wp-content/uploads/Academic-Affairs/Transfer-and-Articulation -Audit 2018-FINAL.pdf](https://nshe.nevada.edu/wp-content/uploads/Academic-Affairs/Transfer-and-Articulation-Audit-2018-FINAL.pdf) (as of May 19, 2020). While reasonable minds can debate whether NSHE has more work to do in this area, and proponents of AJR 5 are certainly entitled to their opinion, vague and undefined assertions have no place in the ballot language.

In addition to striking or correcting and amending the five statements in the current draft “Arguments for Passage” section discussed above, nowhere in the “Explanation” or “Digest” sections are Nevada voters provided an explanation as to what is meant by “State University” or what higher education institutions the Board of Regents helps oversee.

Indeed, there is no institution in Nevada specifically named the “State University.” It is relevant that Nevada voters are informed that the Board of Regents oversees a system of eight higher education institutions with campuses located in Carson City, Elko, Ely, Fallon, Fernley, Henderson, Las Vegas, North Las Vegas, Pahrump, Reno, and Winnemucca. These institutions are University of Nevada, Las Vegas; University of Nevada, Reno; College of Southern Nevada, Truckee Meadows Community College; Western Nevada College; Great Basin College; Nevada State College; and Desert Research Institute. *See* NRS 396.020. This information is relevant to inform voters and place the AJR 5 ballot measure into a meaningful context.

Thank you, again, for providing me with the opportunity to submit these comments. Robust debate on public policy matters, and especially ones that involve our State’s founding document, are naturally a part of our democracy. But those debates must be framed by true and accurate statements of fact and law. I appreciate your consideration of these comments. Please contact me at ~~j.reynolds@state.nv.edu or (775) 784-3026~~ if I can be of any assistance.

Sincere regards,



JOE REYNOLDS  
Chief General Counsel  
Nevada System of Higher Education

## **Jim Richardson's comments on AJR 5 draft wording**

### **Opening paragraph**

On #2 in opening paragraph: Why do contractors need academic freedom?

On #3 of opening paragraph: What funds do they mean that need to be redirected? This seems designed to address a problem that is not clear or even nonexistent. It seems an obfuscation.

### **Explanation section**

In first paragraph of explanation: What provisions govern operation of NSHE now? The proposed language implies that such statutory provisions already exist and belies the fact that new provisions would have to be implemented immediately giving the Legislature complete control over every aspect of higher education, subjugating those whose expertise and life's work has been in the management of NSHE institutions. Such legislative control would make for a very unstable environment for higher education and its employees and students, and does not bode well for higher ed in Nevada.

### **Yes vote section**

Paragraph on "Yes vote" misleads and leaves an impression that something is terribly wrong about how federal funds are currently managed. What is the problem being addressed, or is this just a misdirection? NSHE institutions are now subject to intense oversight from the Governor, the Legislature, and federal funding agencies. There have not been major issues raised about such matters by federal agencies, so what is the problem AJR 5 supposedly addresses?

### **No vote section**

Paragraph one "No vote" implies that academic freedom is now endangered and that it can only be protected with legislative action, something that is far from the truth and jeopardizes academic freedom. The language seems based on an assumption that the Legislature is more interested in protecting academic freedom than NSHE's current governance structure. That is a questionable assumption at best.

### **Digest section**

First paragraph of "Digest" implies that the Legislature sets up election of Board of Regents when that is required by the Constitution, with Regents in charge of determining rules and methods of election.

Second paragraph of "Digest" continues this obfuscation and attempts to leave an impression that Legislature already is in charge of higher education. (If so, why is AJR 5 needed?)

Third paragraph of "Digest" attempts to gloss over the clear fact that some legislative leaders do have in mind changing how (and even whether) the Board of Regents is elected. This language seems designed to conceal the legislative interest in changing the method of selection that has been demonstrated in hearings in recent sessions

Fourth paragraph of “Digest” again attempts to leave impression that Legislature governs higher ed in Nevada, when Constitution is clear that responsibility lies with Board of Regents. Seems odd to me. And again, why do contractors need academic freedom?

Last paragraph of “Digest” again offers a straw man of some assumed problem with how federal funds have been handled, and that this can only be remedied if AJR 5 passes. What is the problem supposedly being addressed?

### **Arguments section**

First paragraph of “Arguments” is very misleading and makes claims that are untrue and unjustified. The Constitution is clear that the Board of Regents is in charge of policy in higher ed. It is true that the Legislature must appropriate funds which partially support the System, but the Regents have final authority about how such funds are actually used. The Board has seldom if ever exerted itself as a fourth branch of government in defiance of the Legislative and Executive branches. To do so would be a serious political mistake and those governing and operating the System are fully aware of that fact. Also, the initial claim that NV is unique in how it chooses regents is not accurate, as several states have elected governance boards. . The claims in this opening paragraph seems filled with red herrings meant to distract.

The second paragraph of the “Arguments” is patently false and misleading. NSHE officials have attempted many times to get the Legislative and Executive branches of government to furnish funds to address the pay imbalances that have developed, and this funding has been refused, as recently as the last legislative session. To claim otherwise is to deliberate spread untruths about what has happened concerning faculty salaries. The allegedly “poor hiring decision” of NSHE administrators were simply an effort by NSHE institutions to meet market compensation demands in order to hire excellent faculty. In so doing large discrepancies developed between salaries of new hires and salaries of extant employees. Session after session the Regents and NSHE representatives sought funding to address this problem, but these requests have been denied.

The third paragraph of “Arguments” ignores the great progress that has been made to align educational offering with needs of the State, and it also refuses to accept that under the current NSHE governance structure great strides have been made in working with private businesses to develop educational programs needed by major employers in the state.

The fourth paragraph of “arguments for” is not true. Currently and for many decades the Board of Regents has adhered to national standards of academic freedom and have enshrined those in governing documents for the System. To assert that this is not the case is very misleading, perhaps deliberately so. And it seems very problematic to think that a political body such as the Legislature would offer more protections for academic freedom than currently exist with NSHE.

I take no issue with the arguments against passage, but would have made the language stronger about the obvious effort to politicize higher ed in Nevada. Such politicizing is not in the best interest of Nevada and its citizens.

### **Fiscal note section**

On the “Fiscal Note” portion I would note that the discussion of the salary disparities discussed above, allegedly caused by the mismanagement of the Regents implies that legislative control would rectify such problems. **As noted that would require at least \$90 million dollars at this time. So, passage would carry a major fiscal impact.**

**From:** BallotQuestionFeedbackForm  
**To:** [Guinan, Patrick](#); [Thornton, Diane](#)  
**Subject:** Public Comment for 2020 Ballot Questions  
**Date:** Tuesday, May 19, 2020 3:27:08 PM

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# Email from Melissa Rutter

## AJR 2 Comments

I support this resolution. Any two people that wish to be joined legally should be allowed to do so. This topic seems to assume a sexuality preference, but there are many reasons to join someone and take care of each other. The State should simply recognize two people who wish to join and not be involved with questions of sexuality and the associated moral judgments.

## AJR 5 Comments

I do not support this resolution. The Board of Regents focus on import issues regarding education. Putting these issues into the hands of people that do not specialize in this area could result in poor decisions.

## SJR 1 Comments

I do not support this resolution. If meetings are supposed to be held twice a year and are not then that needs to be addressed outside of a constitutional change.

## SJR 3 Comments

I do not support this resolution. I see no compelling reason to amend the constitution to detail these voting rights.

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## Contact Information

*Address:*  
*City: Reno*  
*State: NV*  
*Zip: 89508*  
*Email:*

From: BallotQuestionFeedbackForm  
To: [Guinan, Patrick](#); [Thornton, Diane](#)  
Subject: Public Comment for 2020 Ballot Questions  
Date: Tuesday, May 19, 2020 4:26:53 PM

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# Email from Devon Snyder

## AJR 2 Comments

I support the passage of this resolution

## AJR 5 Comments

I do not support passage of this resolution.

## SJR 1 Comments

## SJR 3 Comments

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## Contact Information

*Address: City: RENO*

*State: NV*

*Zip: 89503*

*Email:*



From: BallotQuestionFeedbackForm  
To: [Guinan, Patrick](#); [Thornton, Diane](#)  
Subject: Public Comment for 2020 Ballot Questions  
Date: Tuesday, May 19, 2020 6:01:00 PM

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# Email from Pavel Solin

## AJR 2 Comments

## AJR 5 Comments

I am very much in favor of removing NSHE from Nevada Constitution. NSHE behaves like a monopolist company that owns all of higher education in Nevada. This creates an unhealthy environment and has negative impact on a number of issues ranging from academic freedom to business. As a concrete example of the latter, it is virtually impossible for a faculty of an NSHE institution to do business with other Colleges in Nevada. The reason is that all of them are NSHE, and NSHE employees are prohibited from doing business with NSHE. Institutions of Higher Education in Nevada need to become independent. Thank you.

## SJR 1 Comments

## SJR 3 Comments

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## Contact Information

*Address:*  
*City: Reno*  
*State: Nevada*  
*Zip: 89523*  
*Email:*

From: BallotQuestionFeedbackForm  
To: [Guinan, Patrick](#); [Thornton, Diane](#)  
Subject: Public Comment for 2020 Ballot Questions  
Date: Tuesday, May 19, 2020 4:21:53 PM

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# Email from Tamzen Stringham

## AJR 2 Comments

## AJR 5 Comments

Separation of powers is an important part of governance for the people and by the people. Removing the Board of Regents, an elected body, and allowing the State Legislature, who has many chores to accomplish to also determine how NSHE functions is irresponsible. The Board of Regents has a sole purpose of managing the higher education system in Nevada. They are the voice for higher education in our State Government. The legislature does not necessarily have the background nor the expertise to manage higher education. This could end up causing significant disruption to the higher education system in Nevada. I urge you to not move this resolution forward.

## SJR 1 Comments

## SJR 3 Comments

---

## Contact Information

*Address: City: Reno*  
*State:*  
*Zip: 89508*  
*Email:*

From: BallotQuestionFeedbackForm  
To: [Guinan, Patrick](#); [Thornton, Diane](#)  
Subject: Public Comment for 2020 Ballot Questions  
Date: Tuesday, May 19, 2020 3:24:53 PM

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# Email from Mike Teglas

## AJR 2 Comments

## AJR 5 Comments

This resolution is unnecessary and misleading as written. Faculty, students and staff at our state institutions already have their academic freedom. The people of Nevada dont need the legislature to use the NSHE system for their own political benefit. The state legislature needs to do more to fund and protect higher education in this state not diminish it by changing the constitution.

## SJR 1 Comments

## SJR 3 Comments

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## Contact Information

*Address:*  
*City: Reno*  
*State: NV*  
*Zip: 89509*  
*Email:*

**From:** [Wayne Thorley](#)  
**To:** [King, Julianne](#)  
**Cc:** [Guinan, Patrick](#); [Thornton, Diane](#)  
**Subject:** Ballot Questions  
**Date:** Friday, May 8, 2020 10:04:34 PM

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Julianne,

Thanks for giving me an opportunity to review the proposed condensation, explanation, digest, argument for and against, and fiscal note for 2020 ballot questions 1 through 4. After reviewing all the information provided, my only feedback concerns the length of the condensation (ballot question) for Questions 1 and 2. The condensation is the only part that appears on the actual ballot, and whether the person is voting on a machine or on a paper ballot, the condensations gets difficult to read if it is too long. The difficulty is not in the total number of words the voter has to read, but rather the narrow columns on the ballot in which the condensation language is presented to the voter.

We try to keep the condensation under 50 words, but I understand this is not always achievable given the complex nature of certain ballot questions. The condensation for both Question 1 and Question 2 is over 100 words long. If you have not done so already, it would be a good idea to review the condensation language for Questions 1 and 2 to see if there is a way to reduce the number of words used.

Have a good weekend!

*Wayne Thorley*

Deputy Secretary of State for Elections  
Office of Secretary of State Barbara K. Cegavske  
101 North Carson Street, Suite 3  
Carson City, NV 89701

**From:** Douglas Unger

**Sent:** Wednesday, May 20, 2020 8:20 PM

**To:** Thornton, Diane

**Cc:** Guinan, Patrick

**Subject:** Re: UNLV representatives - Question 1 Amendment - Comments, Revision suggestions --

Dear Diane Thornton and Patrick Guinan --

Thank you for your reply. Please note that I made a clerical error for the date on the letter and the notes sent earlier today as comments on Question #1. Could the record reflect that I correctly submitted the letter and comments before the 5 p.m. deadline on May 20, 2020? The letter and notes should also be dated May 20th, and it is entirely my error to have entered the wrong date.

Thank you for making this notation on my submissions, and thank you for your service to our state --

-- Doug Unger

**From:** Douglas Unger

**Sent:** Wednesday, May 20, 2020 11:18 AM

**To:** Guinan, Patrick ; [Thornton, Diane](#)

**Subject:** UNLV representatives - Question 1 Amendment - Comments, Revision suggestions --



May 22, 2020

**FROM:** Douglas Unger, Past-Chair, Council of Faculty Senate Chairs, Nevada System Of Higher Education; Past-Chair, UNLV Faculty Senate; current member UNLV Faculty Senate Executive Committee; President-elect, UNLV chapter Nevada Faculty Alliance (NFA)

**TO:** Legislative Counsel Bureau, c/o Patrick Guinan &/or Diane Thornton

**RE:** Comments, notes and suggestions for revisions of the draft language for Question 1 – Assembly Joint Resolution #5 of the 79<sup>th</sup> session – ballot measure to amend the Nevada Constitution (regarding the role and authority of the Board of Regents)

Dear Legislative Counsel Bureau (c/o Patrick Guinan & Diane Thornton) –

Thank you for reading and strongly considering the attached notes and suggested revisions to the language of the AJR 5 ballot Question #1 for the November election ballot. Please know these notes and suggestions represent the input of faculty members at UNLV, including research faculty in Education Policy, concerned that the ballot question be presented with fair and accurate citations and language. We submit these suggestions and revisions without any bias either for or against, after an objective assessment of the existing draft language. We most strongly insist that the ballot measure to avoid possible court challenge must present both sides of the question accurately, truthfully, and without false language or citations that are prejudicial to either “yes” or “no” on the question. We have done our best to provide the Legislative Counsel Bureau with corrections and information to avoid false representations. We believe our suggestions, if considered and included in the final draft language of the question, will present the fairest and strongest arguments for both sides of the question, and should assist the Legislative Counsel Bureau to avoid embarrassing and possibly disqualifying errors in the question’s presentation. Please know that our motives are to be helpful to the legislative process. We submit them with deep respect for all involved.

Thank you again for your strong consideration of these notes and revisions (attached). Should you require further information or underlying materials for citations or references, please don't hesitate to contact me at the e-mail or phone number listed below.

Sincerely,



Douglas Unger

E-mail:

Ph:

--

Douglas Unger

President-elect, UNLV Chapter  
Nevada Faculty Alliance (NFA)

Director, Creative Writing International Program  
Department of English & Black Mountain Institute  
University of Nevada, Las Vegas 89154-5011

Post-Chair, UNLV Faculty Senate  
University of Nevada, Las Vegas 89154-5014

Post-Chair, Council of Faculty Senate Chairs  
Nevada System of Higher Education  
)

**TO: Legislative Counsel Bureau, c/o Patrick Guinan and Diane Thornton**

**(5-22-2020)**

**RE: Public Comment, notes and suggestions for revised language for the AJR5 ballot amendment Question #1 for the November, 2020 election ballot for the state of Nevada.**

**FROM: Draft notes from Douglas Unger, Past-Chair, Council of Faculty Senate Chairs, Nevada System of Higher Education; Past-Chair, UNLV Faculty Senate; current member, UNLV Faculty Senate Executive Committee; and President-elect, UNLV Chapter of the Nevada Faculty Alliance (NFA). These notes and recommended revisions have been completed in consultation with representative UNLV faculty, including research professionals in Higher Education policy.**

**NOTE: The UNLV faculty expresses no majority or strong position either in favor or not in favor of the passage of the AJR5 ballot question and wishes to maintain a position of neutrality. The following notes and revisions suggested are based on what we believe to be fair, objective appraisals and responses to the proposed draft question language.**

QUESTION NO. 1

Amendment to the Nevada Constitution

Assembly Joint Resolution No. 5 of the 79th Session

CONDENSATION (Ballot Question)

Shall the Nevada Constitution be amended to: (1) remove provisions governing the election and duties of the Board of Regents and its control and management of the affairs and funds of the State University and require the Legislature to provide by law for the governance, control, and management of the State University; (2) require the Legislature to provide by law for the reasonable protection of individual academic freedom for students, employees, and contractors of Nevada's public higher education institutions; and (3) revise provisions governing the administration of certain funding derived under federal law and dedicated for the benefit of certain departments of the State University?

Yes  No

EXPLANATION & DIGEST

EXPLANATION—The Nevada Constitution requires the Legislature to provide for the establishment of a State University that is controlled by an elected Board of Regents whose duties are prescribed by law. Additionally, the Nevada Constitution provides for the Board of Regents to control and manage the affairs and funds of the State University under regulations established by law. This ballot measure, also known as “The Nevada Higher Education Reform, Accountability and Oversight Amendment,” would remove the constitutional provisions governing the election and duties of the Board of Regents and its control and management of the affairs and funds of the State University and would require the Legislature to provide by law for the governance, control, and management of the State University. This ballot measure would not repeal any existing statutory provisions governing the Board of Regents, including those that provide for the election of Board members, but it would make the Board a statutory body whose structure, membership, powers, and duties are governed by those existing statutory provisions, subject to any statutory changes made through the legislative process.



The Nevada Constitution directs the Legislature to encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, ethical, and other educational improvements. This ballot measure would require the Legislature to provide by law for the reasonable protection of individual academic freedom for students, employees, and contractors of Nevada's public higher education institutions in order to facilitate the policies of the Nevada Constitution to encourage the promotion of such educational improvements.

The Nevada Constitution provides that certain funding derived by the State of Nevada under a federal law enacted by Congress in 1862 must be invested in a separate fund and dedicated for the benefit of certain departments of the State University, and that if any amount of the separate fund is lost or misappropriated through neglect or any other reason, the State of Nevada must replace the lost or misappropriated amount so that the principal of the fund remains undiminished. This ballot measure would revise these provisions by: (1) clarifying the legal citations to the federal law, including all amendments by Congress; and (2) specifying that the funding derived under the federal law must be invested by the State of Nevada in the manner required by law.

A "Yes" vote would amend the Nevada Constitution by: (1) removing provisions governing the election and duties of the Board of Regents and its control and management of the affairs and funds of the State University and requiring the Legislature to provide by law for the governance, control, and management of the State University; (2) requiring the Legislature to provide by law for the reasonable protection of individual academic freedom at public institutions of higher education in this State; and (3) revising provisions governing the administration of certain funding derived under federal law and dedicated for the benefit of certain departments of the State University.

A "No" vote would retain existing provisions of the Nevada Constitution governing the election and duties of the Board of Regents and its control and management of the affairs and funds of the State University, would not require the Legislature to provide by law for the reasonable protection of individual academic freedom at public institutions of higher education in this State, and would not revise existing provisions governing the administration of certain funding derived under federal law and dedicated for the benefit of certain departments of the State University.

DIGEST—The Nevada Constitution requires the Legislature to provide for the establishment of a State University that is controlled by a Board of Regents whose duties are prescribed by law. (Nev. Const. Art. 11, § 4) The Nevada Constitution also requires the Legislature to provide for the election of members of the Board and provides for the Board to control and manage the affairs and funds of the State University under regulations established by law. (Nev. Const. Art. 11, §§ 7, 8)

As required by these constitutional provisions, the Legislature has enacted laws to establish the State University and to provide for the election of the members of the Board of Regents. (NRS 396.020, 396.040) In addition, the Legislature has enacted laws to: (1) establish the Nevada System of Higher Education (NSHE), which consists of the State University and certain other educational institutions, programs, and operations; and (2) provide for the Board of Regents to administer NSHE and to prescribe rules for its governance and management. (NRS 396.020, 396.110, 396.230, 396.280, 396.300, 396.420, 396.440, 396.550)

Public Comment explanatory note: the following paragraph of the Digest is misleading in that it does not represent to voters the implications of the amendment passage with regard to the election and composition of the Board of Regents. (Recommended addition provided in blue font).

This ballot measure would remove the constitutional provisions governing the Board of Regents and would require the Legislature to provide by statute for the governance, control, and management of the State University. This ballot measure would not repeal any existing statutory provisions governing the Board of Regents, including those that provide for the election of Board members. Rather, by removing the constitutional provisions governing the Board of Regents, this ballot measure would make the Board a statutory body whose structure, membership, powers, and duties are governed by those existing statutory provisions, subject to any statutory changes made through the legislative process. *If the ballot measure passes, a future legislature and governor could enact laws that would modify the Board of Regents and their election or could replace the Board of Regents with other administrative authority.*

Public Comment explanatory note: the following paragraph of the Digest should cite a more appropriate example in case law to support; the single citation is appropriate, whereas the first is not because it is too specific to an aberrant case of dubious import to the issue of Academic Freedom.

The Nevada Constitution directs the Legislature to encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, ethical, and other educational improvements. (Nev. Const. Art. 11, § 1) As a general principle in public institutions of higher education, rules that provide for the reasonable protection of individual academic freedom are intended to encourage the pursuit of knowledge and the search for academic truth and enlightenment. (~~Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000);~~ (Demers v. Austin, 746 F.3d 402 (9th Cir. 2014)) This ballot measure would require the Legislature to provide by law for the reasonable protection of individual academic freedom for students, employees, and contractors of Nevada's public higher education institutions in order to facilitate the policies of the Nevada Constitution to encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, ethical, and other educational improvements.

Under a federal law enacted by Congress in 1862, each state was provided with certain federal land grants to be sold to support and maintain at least one college in the state that teaches both agriculture and mechanic arts, including military tactics, so long as the state agrees to certain terms and conditions regarding the preservation and use of the proceeds derived from the sale of the federal land grants. (Act of July 2, 1862, ch. 130, §§ 1-8, 12 Stat. 503-05, as amended and codified at 7 U.S.C. §§ 301 et seq.) To secure the benefits offered by the federal law, the Nevada Constitution provides that the funding derived by the State of Nevada under the federal law must be invested in a separate fund and dedicated for the benefit of the appropriate departments of the State University, and that if any amount of the separate fund is lost or misappropriated through neglect or any other reason, the State of Nevada must replace the lost or misappropriated amount so that the principal of the fund remains undiminished. (Nev. Const. Art. 11, § 8) This ballot measure would revise these provisions by: (1) clarifying the legal citations to the federal law, including all amendments by Congress; and (2) specifying that the funding derived under the federal law must be invested by the State of Nevada in the manner required by law.

## ARGUMENTS FOR PASSAGE

Public Comment explanatory note: the following paragraph is inaccurate as to facts. Nevada is NOT the only state whose “higher education system is governed by an elected board with constitutional status.” In point of fact, Nevada’s Board of Regents is only unique in the manner of its election, not its constitutional status. For example: Colorado, Michigan and Nebraska have “governing boards” with constitutional status and who are elected; and at least 21 other states have either governing boards or “coordinating boards” with defined constitutional status. Furthermore, the statement of self-reference to a “fourth estate” by the Board of Regents is not demonstrably true – it cannot be supported in the minutes of Board of Regents meetings nor in any documented comments by individual Regents stretching back at least two decades, so is hearsay at best, which cannot support such a statement in a ballot question, so the “fourth estate” line should be eliminated as unsubstantiated by fact and therefore misleading. The intent of the statement can, however, be retained by a careful rewording, and the slight grammatical misusages may also be corrected (recommended revisions in blue font).

~~Nevada is the only state whose higher education system is governed by an elected board with constitutional status.~~ *Nevada is one of several states whose State University is governed by elected officials or boards but is unique in the manner of election of its Board of Regents and the scope of their authority.* The Board of Regents regularly refers to itself as the “fourth branch of government,” relying *The Board of Regents has in the past relied* on its unique constitutional status to claim that it can operate free from legislative control *save that of the Legislature’s budget authority*. However, the Nevada Constitution specifies only the Legislative, Executive, and Judicial branches of state government . ~~and~~ The framers of the Nevada Constitution made clear their intent for the Legislature *more directly* to oversee the control and management of the State University. Voting in favor of this question will clarify the Legislature’s authority over the Board and result in improved oversight and accountability.

Public Comment explanatory note: The following paragraph is most egregious in its inaccuracies and wrong facts, especially in misrepresenting the AB202 Gallagher Study that served as a basis for the reporting of the issue of salary compression to the Legislature (see AB202 Committee meeting record, May 8, 2018). The Gallagher Study estimated **the amount of the salary compression issue to be \$90 million total and NOT \$90 million per year, which is an outrageous exaggeration misleading to voters.** This paragraph alone has elicited responses from AAUP member faculty suggesting for court action to enjoin this amendment from the ballot if this negligently or deliberately misrepresentative and false language is included.

Also: that the cause would be “poor internal hiring decisions” is also not based anywhere in fact, testimony, argument, or other available documentation for its support and thus also constitutes a deliberately misleading and possibly false statement to voters, as follows: *salary compression* is a phrase used to describe a worker pay syndrome that occurs when newly hired workers and/or employees are paid at higher salaries than employees who were hired years previously, a syndrome that results from salary stagnation or salary freezes for senior ranked employees while marketplace forces keep raising the costs of hiring new employees. This is a condition affecting not only Nevada’s universities, colleges and research institutes but many state agencies as well as many private sector businesses following the Great Recession 2008-09 and several years following. Because the Nevada Legislature did not fund merit raises or any other form of performance raises, and no salary increases other than COLA across the board for state workers, more than once in 12 years, salary compression resulted. This rationale and

explanation of salary compression is clearly delineated in the testimony before the AB 202 Committee to Conduct A Study of The Costs and Affordability of Higher Education (March-June, 2018) and that committee's September, 2018 report. We very strongly suggest deleting the two deliberately misleading sentences from the paragraph. We believe that the argument is a very strong one in support of the amendment without the inclusion of these wrong characterizations and misleading statements.

Further, while the Nevada Constitution requires the Legislature to provide financial support for the operation of the State University, it also directs the Board of Regents to control and manage the funds of the State University. This disconnect between the funding and governance of higher education allows the Board, which controls approximately 15 percent of the State's budget, to avoid the fiscal oversight typically applied to other government agencies. ~~In the past, NSHE has deliberately provided misleading information in order to receive more funding, according to legislative testimony. It has also been shown that years of poor internal hiring decisions caused a faculty pay imbalance, which will cost approximately \$90 million each year to address.~~ **This** lack of oversight coupled with **risks** fiscal irresponsibility **which** ultimately hurts taxpayers as well as students by driving up the cost of higher education.

The disconnect between funding and governance also results in the Board adopting policies and procedures that are not responsive to the higher education needs of the State. Recent legislative testimony indicates the college programs currently offered are not aligned with workforce needs, and some employers are forced to recruit college graduates from outside of the State to fulfill these needs.

Public Comment explanatory note: The half paragraph below is anachronistic – and may originate because it may have been the case during the 2015 and 2017 legislative sessions but is not true currently. NSHE and all state universities and colleges have addressed the issue with: Common Course Numbering throughout the system (implemented); the accords for transfer of credits among institutions (implemented); and the current directive to unify numbers of credits among similar degree programs throughout Nevada universities and colleges to provide for a unified number of credits required for graduation pathways regardless of degree program at any individual university or college (to be implemented by the close of the 2020 academic year commencing in fall 2021). Thus the half paragraph below is misleading because anachronistic. The short first part of the paragraph above makes a stronger, more fact-based argument. Recommended: strike the full text of the anachronistic half paragraph.

~~[ Representatives of the business community have also stated that issues with the transfer of student credits within NSHE discourages companies from financially supporting employee participation in continuing education. Although the Board has claimed for years that it is committed to fixing these issues, the problems remain unsolved. ]~~

It is also important to note that passage of this question will require the Legislature to guarantee by law reasonable protection of academic freedom for students, faculty, and contractors in NSHE.

Guaranteeing such academic freedom warrants inclusion in the Nevada Constitution as opposed to simply being a Board policy that can be changed at any time. Passage of this question will ensure that NSHE continues to foster experimentation, invention, and a robust exchange of ideas.

Improve our higher education system by increasing oversight and accountability and ensuring academic freedom. Vote "yes" on Question 1.

## ARGUMENTS AGAINST PASSAGE

The Nevada Constitution provides the Board of Regents with limited authority over the State University that is independent of the control of the Legislature and Governor. Proponents of this ballot question want voters to believe that removing this limited, independent authority and making the Board of Regents completely subject to the control of the political branches of government will increase the transparency, efficiency, and effectiveness of Nevada's higher education system. Unfortunately, passage of Question 1 does not guarantee any of these promised benefits. Question 1 is nothing but the Legislature trying to gain more power and control, and it would only serve to add political pressures to a governance system that is serving this State well.

Public Comment explanatory note: The paragraph below wrongly cites the R1 Research Highest achievements of the University of Nevada, Reno and University of Nevada, Las Vegas. The statistics cited are also erroneous (perhaps past statistics). Furthermore, the paragraph does not go far enough in laying out the achievements of the leadership of Higher Education in our state compared to the as yet unproven competencies of the Legislature. The paragraph should be corrected and improved for clarity (recommended changes in blue font):

The Board of Regents and ~~NSHE~~ ***Nevada System of Higher Education*** have steadily improved higher education outcomes in Nevada. Recently, both the University of Nevada, Reno and the University of Nevada, Las Vegas were recognized as ~~Tier 1~~ ***Very High Research Activity (R1)*** institutions by the prestigious Carnegie Classification of Institutions of Higher Education. For the last ten years, the number of diplomas and certificates awarded increased by nearly 30 percent, ***over 40% while enrollment has increased 8%. During the same period, state funding in real dollars adjusted for inflation decreased by 16%, thus Nevada universities and colleges under the direction of the Board of Regents have achieved more with less, significantly increasing efficiencies for Nevada taxpayers while adding marketable value for Nevada students. This budget amendment seeks to grant the Legislature and Governor more control over Nevada's universities, colleges and research institutes, without any proven experience in being able to provide Nevada students and citizens with any equivalent efficiencies and value.***

Public Comment explanatory note: The recommended changes below (in blue font) seek to avoid unnecessary abbreviations and acronyms that may be obscure to many voters and to improve the specificity and clarity of the posited arguments. In the second paragraph below, specific reference should be made to the previous history of a partly similar (though vastly more reduced in scope) ballot question rejected by Nevada voters. Other suggested word changes also improve clarity and intent of the arguments (recommended changes in blue font):

The Board has governed our higher education system for over 150 years as the system has grown in size, prestige, and complexity. If this question passes, it is uncertain whether the Legislature will retain or reshape the governance of our higher education system. The sole focus of the Board of Regents is on higher education policy, and it is best equipped to govern ~~NSHE~~ ***and steward the success of Nevada's universities, colleges and research institutes.*** It does not make sense to risk losing the Board's independence, institutional knowledge, and expertise with no assurance of what the Legislature may put in its place.

Maintaining the Board's current status in the Nevada Constitution ensures that the Board remains elected, responsible to the voters, and responsive to constituents. The Nevada Supreme Court has

recognized that the constitutional status of the Board of Regents prevents the Legislature *and Governor* from directly interfering with its essential management and control of the State University, and for good reason. Passage of this ballot question would allow the Legislature to change existing higher education policies and procedures and even allow the Legislature to make members of the Board appointed rather than elected. *In 2006, Nevada voters rejected Question 9, which would have changed the makeup of the Board of Regents to include a majority of appointed members. The current ballot measure is an attempt to effect the same change indirectly, already rejected by Nevada voters in preference for a more responsive, independently elected Board of Regents.* Previous attempts to change higher education governance have failed because Nevadans recognize the importance of keeping the system in the Nevada Constitution as originally ~~drafted~~ *envisioned more than a century and a half ago.*

The Board of Regents has already adopted policies related to academic freedom and responsibility at its institutions. Transferring this duty to the Legislature is not only unnecessary but also takes the definition of academic freedom out of the hands of academic ~~experts~~ *professionals.*

Reject this uncertain and unnecessary change to the constitutional status of the Board of Regents. Vote “no” on Question 1.

#### FISCAL NOTE

##### Financial Impact—Cannot Be Determined

If approved by the voters, Question 1 removes references to an elected Board of Regents from the Nevada Constitution and instead requires the Legislature to provide by law for the governance, control, and management of higher education in this State. This ballot question also requires the Legislature to provide by law for the reasonable protection of individual academic freedom for students, employees, and contractors of Nevada’s public higher education institutions.

Future actions, if any, taken by the Legislature regarding the governance, control, and management of higher education cannot be predicted. Additionally, future actions taken by the Legislature to provide for the reasonable protection of individual academic freedom for students, employees, and contractors of Nevada’s public higher education institutions cannot be predicted. Thus, the resulting financial impact upon state government, if any, cannot be determined with any reasonable degree of certainty.