

## 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.