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7 **IN THE SUPREME COURT OF NEVADA**

8 HOWARD SHAPIRO and JENNA
9 SHAPIRO

10 Appellants/Cross-Respondents

11 v.

12 GLENN WELT, RHODA WELT,
13 LYNN WELT, and MICHELLE
14 WELT,

15 Respondents/Cross-Appellants

Supreme Ct. No. 67363
Dist. Ct. No. A-14-706566-C

**RESPONDENTS’
SUPPLEMENTAL ANSWERING
BRIEF (67363)**

16 HOWARD SHAPIRO and JENNA
17 SHAPIRO

18 Appellants

19 v.

20 GLENN WELT, RHODA WELT,
21 LYNN WELT, and MICHELLE
22 WELT,

23 Respondents

Supreme Ct. No. 67596
Dist. Ct. No. A-14-706566-C

24 **APPEAL**

25 From the Eighth Judicial District Court, Clark County

26 The Honorable Nancy L. Allf, District Judge

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Statutes

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NRS 41.637(4) passim

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1 **Attorney’s Certificate of Compliance**

2 1. I certify that this brief complies with the formatting requirements of
3 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style
4 requirements of NRAP 32(a)(6) because it has been prepared in a proportionally
5 spaced typeface using Microsoft Word 2007 in 14 point Times New Roman.

6 2. I further certify that this brief complies with the page- or type-volume
7 limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by
8 NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or
9 more, and contains 1,244 words.

10 3. Finally, I certify that I have read this petition, and to the best of my
11 knowledge, information, and belief, it is not frivolous or interposed for any
12 improper purpose. I further certify that this petition complies with all applicable
13 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires
14 every assertion in the petition regarding matters in the record to be supported by a
15 reference to the page and volume number, if any, of the transcript or appendix
16 where the matter relied on is to be found. I understand that I may be subject to
17 sanctions in the event that the accompanying petition is not in conformity with the
18 requirements of the Nevada Rules of Appellate Procedure.

19 DATED this 7th day of December, 2015.

20 THORNDAL, ARMSTRONG,
21 DELK, BALKENBUSH & EISINGER

22 */s/ Michael P. Lowry*

23

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1 **Certificate of Service**

2 Pursuant to NRAP 25, on December 7, 2015 **RESPONDENTS'**
3 **SUPPLEMENTAL ANSWERING BRIEF (67363)** was served upon each of the
4 parties to appeal 67363 via electronic service through the Supreme Court of
5 Nevada's electronic filing.

6
7 */s/ Michael P. Lowry*

8

An Employee of Thorndal, Armstrong,
9 Delk, Balkenbush & Eisinger

1 **Summary of the Argument**

2 The Shapiros’ argue for the first time on appeal that NRS 41.637(4) is
3 unconstitutional. However, the Shapiros’ argument is undeveloped, not supported
4 by citation to any legal authority, nor supported by sufficient evidence in the
5 record to enable meaningful appellate review. Even absent these deficiencies,
6 NRS 41.637(4) is constitutionally permissible.

7 **Argument**

8 **A. Standard of Review**

9 “This court reviews constitutional challenges to a statute de novo.”¹
10 “Statutes are presumed to be valid, and the challenger bears the burden of showing
11 that a statute is unconstitutional.”²

12 **B. The Shapiros’ constitutional arguments are not developed or
13 supported by citation to legal authority.**

14 The Shapiros bear the burden of demonstrating NRS 41.637(4) is
15 unconstitutional. They do not meet this burden as their argument is premised upon
16 broad, generalized statements.

17 The constitutional arguments contained in the opening brief do not cite any
18 authority, negating these arguments entirely.³ Unsupported arguments are
19 routinely rejected from consideration. “In this way, Edwards neglected his
20 responsibility to cogently argue, and present relevant authority, in support of his
21 appellate concerns. Thus, we need not consider these claims.”⁴

22 Further, the Shapiros do not address Nevada’s requirements for determining
23 whether a statute is facially invalid for vagueness. “[U]nder a facial challenge to a
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25 ¹ *Deja Vu Showgirls of Las Vegas, LLC v. Nev. Dep’t of Taxation*, 130 Nev. Adv.
Op. 73, 334 P.3d 392, 398 (2014).

26 ² *Busefink v. State*, 128 Nev. Adv. Op. 49, 286 P.3d 599, 602 (2012).

27 ³ *Sengel v. IGT*, 116 Nev. 565, 573, 2 P.3d 258, 263 (2000).

28 ⁴ *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280,
1288 n.38 (2006).

1 civil statute ... the plaintiff must show that the statute is impermissibly vague in all
2 of its applications.”⁵ “In making this showing, a complainant who engages in
3 some conduct that is clearly proscribed cannot complain of the vagueness of the
4 law as applied to the conduct of others.”⁶ A civil statute is unconstitutionally
5 vague when it “(1) fails to provide notice sufficient to enable persons of ordinary
6 intelligence to understand what conduct is prohibited and (2) lacks specific
7 standards, thereby encouraging, authorizing, or even failing to prevent arbitrary
8 and discriminatory enforcement.”⁷ “[W]hen a statute is reviewed under the lower
9 standard of vague in all its applications, if the statute provides sufficient guidance
10 as to at least some conduct that is prohibited and standards for enforcement of that
11 conduct, it will survive a facial challenge because it is not void in all its
12 applications.”⁸ The Shapiros’ opening brief does not address any of this analysis.
13 Nor do the Shapiros address the alternative analysis, “when the statute involves
14 criminal penalties or constitutionally protected rights, the second approach
15 involves a higher standard of whether vagueness permeates the text.”⁹

16 Other than alleging NRS 41.637(4) is unconstitutional, the Shapiros’
17 opening brief provides no analysis, authority, or explanation to support their
18 argument. As the Shapiros’ constitutional argument is undeveloped and deficient,
19 it should not be considered.

20 **C. The Welts expressed protected opinions.**

21 The Shapiros argue NRS 41.637(4) protects only opinion, but that
22 www.howardshapirovictims.com did not contain any opinions.¹⁰ The website
23 contained blended statements of fact and opinion. The Shapiros argue the factual

24 ⁵ *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 512, 217 P.3d 546,
25 553 (2009).

26 ⁶ *Id.* (citations and internal quotations omitted).

27 ⁷ *Id.* at 512-13, 217 P.3d at 553-54.

28 ⁸ *Id.* at 513, 217 P.3d at 554.

⁹ *Id.* at 512, 217 P.3d at 553 (internal quotation omitted).

¹⁰ Brief at 12:6-9.

1 statements were false, but offer no evidence in their appellate record to support this
2 argument. As to opinions, the website attached to the Shapiros' complaint can be
3 fairly read to construe these facts as forming the basis for an opinion that Howard
4 Shapiro was not qualified or suitable to serve as Walter Shapiro's conservator.
5 Even if the Shapiros' construction of NRS 41.637(4)'s definition was accurate, the
6 definition would still protect the Welts' speech.

7 **D. NRS 41.637(4) is consistent with Nevada's constitution.**

8 The Shapiros facial argument as to NRS 41.637(4) is unpersuasive even had
9 it been adequately developed or supported. The statute reads:

10 "Good faith communication in furtherance of the right to petition or
11 the right to free speech in direct connection with an issue of public
concern" means any:

12 4. Communication made in direct connection with an issue of
13 public interest in a place open to the public or in a public
forum,
→ which is truthful or is made without knowledge of its falsehood.

14 The Shapiros argue NRS 41.637(4) "impermissibly protects opinion that is
15 malicious and without truth."¹¹ They state www.howardshapirovictims.com
16 contained no opinions that could be protected.¹² Their argument concludes the
17 statute "is in contravention of ancient common-law claims for defamation and are
18 thus unconstitutionally vague as they create confusion concerning when a
19 defamation case can be made and under what circumstances."¹³

20 Each point is unsupported. First, the text of NRS 41.637(4) at no point
21 distinguishes between facts and opinions. The Shapiros cite no authority
22 supporting their interpretation NRS 41.637(4) as protecting only opinion. This
23 argument must be disregarded.

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¹¹ *Id* at 11:9-10.

27 ¹² *Id* at 12:6-7.

28 ¹³ *Id* at 13:2-6.

1 Second, the Shapiros' argue NRS 41.637(4) conflicts with common law.
2 The Legislature is empowered to enact statutes that abrogate the common law.¹⁴ If
3 NRS 41.637(4) was enacted to modify the scope of common-law defamation
4 claims, the Legislature has the authority to take this action.

5 Finally, NRS 41.637(4) satisfies Nevada's alternative tests to determine
6 whether a statute is facially invalid for vagueness. First, the court must determine
7 what standard of review applies. Generally, "under a facial challenge to a civil
8 statute ... the plaintiff must show that the statute is impermissibly vague in all of
9 its applications."¹⁵ However, "when the statute involves criminal penalties or
10 constitutionally protected rights, the second approach involves a higher standard of
11 whether vagueness permeates the text."¹⁶

12 NRS 41.637(4) concerns speech, a constitutionally protected right, but not in
13 the context the Shapiros apply it. The Welts engaged in speech, the Shapiros then
14 filed suit because of that speech. The Shapiros have not engaged in any speech.
15 NRS 41.637(4) protects the Welts' constitutional right to speak but cannot apply to
16 the Shapiros because they have not spoken. Instead, the Shapiros' argument
17 assumes a constitutional right protecting them from perceived defamation but cites
18 no authority creating or recognizing such a right. Consequently NRS 41.637(4)
19 should be reviewed subject to the lower "impermissibly vague in all of its
20 applications" standard.

21 A civil statute is unconstitutionally vague when it "(1) fails to provide notice
22 sufficient to enable persons of ordinary intelligence to understand what conduct is
23 prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or
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25 ¹⁴ *State v. Palm (In re Estate of Melton)*, 128 Nev. Adv. Rep. 4, 272 P.3d 668, 676
26 (2012) (discussing Legislature's abrogation of common-law disinheritance rules by
adopting NRS 132.370).

27 ¹⁵ *Flamingo Paradise Gaming*, 125 Nev. at 512, 217 P.3d at 553.

28 ¹⁶ *Id.* (internal quotation omitted).

1 even failing to prevent arbitrary and discriminatory enforcement.”¹⁷ “[W]hen a
2 statute is reviewed under the lower standard of vague in all its applications, if the
3 statute provides sufficient guidance as to at least some conduct that is prohibited
4 and standards for enforcement of that conduct, it will survive a facial challenge
5 because it is not void in all its applications.”¹⁸

6 NRS 41.637(4) provides notice sufficient to identify what conduct is
7 prohibited. In evaluating the viability of a potential defamation complaint, the
8 potential plaintiff can read NRS 41.637(4) to determine how the phrase “good faith
9 communication in furtherance of the right to petition or the right to free speech in
10 direct connection with an issue of public concern” is defined in one context. This
11 is necessary because a person who engages in activity that meets this phrase’s
12 definition “is immune from any civil action for claims based upon the
13 communication.”¹⁹ More broadly, NRS 41.637 provides four specific definitions
14 of this phrase for citizens to consider. NRS 41.637(4) provides sufficient guidance
15 as to what conduct is prohibited and the standards to be used in evaluating whether
16 certain conduct falls within its definition for purposes of enforcement. The statute
17 is constitutional.

18 The statute also is constitutional even if the alternative, higher standard is
19 used. Vagueness does not permeate NRS 41.637(4). Its definition is specific as to
20 what conduct is prohibited, providing standards against which a district court may
21 evaluate enforcement.

22 **Conclusion**

23 The Shapiros’ undeveloped constitutional arguments are unsupported by the
24 record or any authority. These arguments should be summarily declined. Even if
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26 ¹⁷ *Id.* at 512-13, 217 P.3d at 553-54.

27 ¹⁸ *Id.* at 513, 217 P.3d at 554.

28 ¹⁹ NRS 41.650.

1 considered on the merits, NRS 41.637(4) satisfies Nevada’s constitutional
2 requirements.

3 DATED this 7th day of December, 2015.

4 THORNDAL, ARMSTRONG,
5 DELK, BALKENBUSH & EISINGER

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