In the
Supreme Court of the State of Nevada

NEVADANS FOR REPRODUCTIVE FREEDOM, a political action committee,

Appellant,

vs.

DONNA WASHINGTON, an individual; COALITION FOR PARENTS AND CHILDREN, a political action committee; and FRANCISCO V. AGUILAR, in his official capacity as NEVADA SECRETARY OF STATE,

Respondents.

Case No.: **87681**

First Judicial District Court
Case No.: 23 OC 00115 1B

APPELLANT'S OPENING BRIEF

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N.R.A.P. 26.1 DISCLOSURE

Pursuant to N.R.A.P. 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in N.R.A.P. 26.1(a) that must be disclosed.

The following law firms have appeared and/or are expected to appear in this Court on behalf of Appellant:

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Dated this 8th day of December, 2023.

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INTRODUCTION

For decades, U.S. Supreme Court precedent protected a fundamental federal right to reproductive freedom, conceptualized as a "right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) (emphasis added) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)), *overruled*, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). Initiative Petition C-01-2023 (the "Petition") would allow voters to restore that protection in Nevada by establishing a similar "fundamental [state] right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy." JA 0015.

The district court barred the Petition from being presented to voters based on the inexplicable conclusion that restoring a fundamental right that comprised a single federal-law doctrine for decades necessarily involves more than one subject, along with minor objections to word choices in the Petition's description of effect and an entirely hypothetical

concern that the Petition could cause an expenditure of state funds. Each of those conclusions was error. The Petition concerns a single subject: the restoration of a fundamental right to reproductive freedom. The description of effect concisely and accurately describes the Petition's significance. And the Petition will cause a government expenditure under the district court's theory *only if* a prosecutor chooses to prosecute someone for performing an abortion and chooses to retain an expert to do so—matters which the Petition in no respect requires.

The Court should reverse.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to N.R.A.P. 3A(b)(1) because it is an appeal from a final order resolving all claims presented to the district court, and pursuant to N.R.A.P. 3A(b)(3) because it is an appeal granting an injunction. The final order was entered on November 21, 2023. Notice of entry of the order was filed on November 27, 2023. The notice of appeal was filed on November 27, 2023. This appeal is timely because it was filed within 30 days after the entry of the final judgment as N.R.A.P. 4(a)(1) requires.

ROUTING STATEMENT

This case is presumptively retained by this Court pursuant to N.R.A.P. 17(a)(3) because it is a case involving a ballot or election issue.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court incorrectly concluded that the Petition violates N.R.S. 295.009(1)(a)'s single-subject requirement, where the entire Petition is devoted to creating and defining a single right to reproductive freedom.

2. Whether the district court incorrectly concluded that the Petition's description of effect is misleading in violation of N.R.S. 295.009(1)(b), where the description provides a straightforward, succinct, and nonargumentative summary of the Petition's effects.

3. Whether the district court incorrectly concluded that the Petition contains an unfunded mandate in violation of Article 19, Section 6 of the Nevada Constitution, where the Petition does not require the expenditure of money.

STATEMENT OF THE CASE

Lindsey Harmon filed the Petition on September 14, 2023, on behalf of Appellant Nevadans for Reproductive Freedom. The Petition seeks to add a new section to Article 1 of the Nevada Constitution protecting "a

fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including, without limitation, prenatal care, childbirth, postpartum care, birth control, vasectomy, tubal ligation, abortion, abortion care, management of a miscarriage and infertility care." JA 0015.

On October 5, 2023, Respondents Donna Washington and Coalition for Parents and Children filed a complaint challenging the Petition in the First Judicial District Court, claiming that (1) the Petition violates N.R.S. 295.009(1)(a)'s single-subject requirement, JA 0004–07; (2) the Petition's description of effect is misleading because it omits certain details about the Petition's effects, JA 0007–09; and (3) the Petition contains an unfunded mandate because, among other things, it would make prosecuting reproductive health care providers more expensive, JA 0009–10. The complaint sought declaratory and injunctive relief that would prevent the Petition from being placed on the 2024 general-election ballot. JA 0010.

On November 21, 2023, the district court granted Respondents' challenge. This appeal immediately followed.

STATEMENT OF FACTS

In the wake of last year's *Dobbs* decision, citizens in states across the nation have accepted the U.S. Supreme Court's "return [of] the power to" regulate abortion "to the people and their elected representatives" by enacting constitutional amendments and statutes to safeguard the right to reproductive freedom. The Petition at issue in this appeal seeks to do precisely that: allow Nevada voters to choose for themselves whether or not their state constitution will protect the fundamental right to reproductive freedom, the federal version of which previously protected against "governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Casey*, 505 U.S. at 851 (opinion of O'Connor, Kennedy, and Souter, JJ.) (quoting *Eisenstadt*, 405 U.S. at 453).

To restore that protection, the first subsection of the Petition defines a "fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including, without limitation, prenatal care, childbirth, postpartum care, birth control, vasectomy, tubal ligation, abortion, abortion care, management of a miscarriage and infertility care."

JA 0015. The following subsections further specify the contours of that right by creating an exception for regulation of post-viability abortions and specifying how the fundamental right applies in the context of particular types of state prosecutions. JA 0015–16.

The Petition's description of effect states in its entirety:

> If enacted, this initiative would add a new section to Article I of the Nevada Constitution establishing a fundamental right to reproductive freedom. This initiative enables individuals to make and carry out decisions about matters relating to their pregnancies, including prenatal care, childbirth, postpartum care, birth control, vasectomies and tubal ligations, abortion and abortion care, and care for miscarriages and infertility.
>
> If this measure is enacted, the State still may regulate provision of abortion care after fetal viability, except where medically indicated to protect the life or physical or mental health of the pregnant individual.
>
> Under this measure, the State may not penalize, prosecute, or take adverse action against any individual based on the outcome of a pregnancy of the individual, or against any licensed health care provider who acts consistent with the applicable scope and practice of providing reproductive health care services to an individual who has granted their voluntary consent. Neither may the State penalize, prosecute, or take adverse action against any individual or entity for aiding or assisting another individual in the exercise of the rights established by this initiative.

JA 0017.

On September 28, 2023, the Fiscal Analysis Division of the Legislative Counsel Bureau published a financial impact statement for

the Petition, stating that it "cannot determine whether the provisions of the Initiative . . . would have a financial effect upon the State or local governments with any reasonable degree of certainty." *Financial Impact of the Initiative Petition to Amend the Nevada Constitution—Identifier: C-01-2023*, Legis. Counsel Bureau (Sept. 28, 2023), https://www.nvsos.gov/sos/home/showpublisheddocument/12503/638338310336370000.

SUMMARY OF THE ARGUMENT

The Petition does not violate any of the requirements for Nevada constitutional initiatives, and the district court's conclusions to the contrary were in error.

First, the district court wrongly concluded that the Petition violates the single-subject requirement. The Petition has a single purpose: protecting the right to reproductive freedom, a unified right that was long established under federal constitutional law and that has been repeatedly recognized by other states' electorates, legislatures, and courts. That reproductive freedom covers various activities involving "a person's most basic decisions about family and parenthood," *Casey*, 505 U.S. at 849 (opinion of O'Connor, Kennedy, and Souter, JJ.), does not

change the fact that the Provision seeks to safeguard what has long been recognized as a single fundamental right. Each provision of the Petition is directly related to the protection of that single right, serving to either define the right to reproductive freedom or clarify how the right interacts with other areas of Nevada law. The district court's conclusion that the provisions are unrelated stemmed from both a fundamental misunderstanding of the Petition's single purpose and a misapplication of this Court's single-subject precedent, which confirms that each provision is functionally related to one another because all are germane to the single subject of reproductive freedom.

Second, the district court wrongly concluded that the Petition's description of effect is legally insufficient. The Petition's description achieves precisely what is required under Nevada law: It provides a "straightforward, succinct, and nonargumentative summary of what the initiative is designed to achieve and how it intends to reach those goals." *Helton v. Nev. Voters First PAC*, 138 Nev., Adv. Op. 45, 512 P.3d 309, 316 (2022) (quoting *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 37, 293 P.3d 874, 876 (2013)). In reaching a contrary conclusion, the district court faulted the Petition for omitting details that it actually

contains, inappropriately applied principles of statutory interpretation to its analysis, and improperly adjudicated the substance of the Petition—all of which constitute errors necessitating reversal.

Third, the district court wrongly concluded that the Petition contains an unfunded mandate. The district court's finding that the Petition would require expenditures of state money was premised on pure speculation rather than the Petition's actual provisions, which do not require any prosecution and thus cannot possibly require the expenditure of state funds on expert witnesses—the sole basis for the district court's holding. Absent any evidence that the Petition's enactment would necessitate appropriated funds, and given that both the Petition's financial impact statement and the district court itself acknowledged that any necessary expenditures are mere possibilities, the district court's ruling should be reversed.

STANDARD OF REVIEW

This case turns on the proper interpretation of N.R.S. 295.009; Article 19, Section 6 of the Nevada Constitution; and the Petition. "Questions of law, including questions of constitutional interpretation and statutory construction, are reviewed de novo." *Peck v. Zipf*, 133 Nev.

890, 892, 407 P.3d 775, 778 (2017) (cleaned up); *see also Helton*, 512 P.3d at 313 (applying de novo review to petition challenge). "The party challenging the initiative petition bears the burden of demonstrating the proposed initiative is clearly invalid." *Helton*, 512 P.3d at 313.

ARGUMENT

The Petition satisfies the requirements imposed by N.R.S. 295.009 and the Nevada Constitution: It concerns a single subject, has an appropriate description of effect, and does not mandate the expenditure of any state funds.

I. The district court wrongly concluded that the Petition violates the single-subject requirement.

The Petition addresses a single subject: creating and defining a fundamental right to reproductive freedom. This right was an established feature of federal constitutional law for decades, and it is recognized as a unified right in states across the country. Each of the Petition's provisions furthers the sole objective of restoring a similar right for Nevada's citizens today. The district court reached a contrary conclusion only by insisting without evidentiary or legal basis that what has long been considered a single legal doctrine instead necessarily involves "a multitude of" unrelated subjects. JA 0142. Because the Petition

"embraces but one subject" and each of its provisions is "functionally related and germane to each other," N.R.S. 295.009(2), it satisfies the single-subject requirement.

A. The Petition has a single purpose: safeguarding the right to reproductive freedom.

"In considering single-subject challenges, the court must first determine the initiative's purpose or subject[.]" *Helton*, 512 P.3d at 314. "To determine the initiative's purpose or subject," courts "look[] to its textual language and the proponents' arguments," as well as "whether the description of effect articulates an overarching purpose and explains how provisions relate to a single subject." *Id.* (quoting *Las Vegas Taxpayer Accountability Comm. v. City Council*, 125 Nev. 165, 180, 208 P.3d 429, 439 (2009)).

Here, the Petition's text and description of effect both confirm that the Petition's sole subject is protecting the "fundamental right to reproductive freedom." JA 0015. As the description of effect explains, the Petition "would add a new section to Article 1 of the Nevada Constitution establishing a fundamental right to reproductive freedom," thus allowing "individuals to make and carry out decisions about matters relating to their pregnancies, including prenatal care, childbirth, postpartum care,

birth control, vasectomies and tubal ligations, abortion and abortion care, and care for miscarriages and infertility." JA 0017. Consistent with this description, each of the Petition's provisions either defines the contours of the right to reproductive freedom or clarifies the ability of the State to regulate reproductive freedom. No provision pertains to any other issue. The description of effect therefore "articulates an overarching purpose" that is neither undermined nor contradicted by any of the Petition's provisions. *Helton*, 512 P.3d at 314.

The district court reached a contrary conclusion only by disregarding the fundamental right to reproductive freedom itself and instead focusing exclusively on various specific activities that the right to reproductive freedom protects. JA 0142. The district court objected that the Petition would protect "prenatal care, childbirth, postpartum care, birth control, vasectomy, tubal ligation, abortion, abortion care, management of a miscarriage, and infertility care" and expressed bafflement as to how those matters could possibly relate to one another. JA 0142. But the linkage is both obvious—all of those matters relate to reproduction—and expressly specified in the Petition, which explains that they are encompassed by the fundamental right to reproductive

freedom that the Petition creates. Under the district court's reasoning, a petition to enshrine the "freedom of expression" would equally fail the single-subject rule on the ground that it protects such unrelated matters as books, newspapers, visual arts, music, and theater.

Moreover, the right to reproductive freedom that the Petition would create is an existing legal concept that was long recognized as protecting exactly the sort of activities that the Petition specifies, all of which involve "a person's most basic decisions about family and parenthood," including "the decision whether to bear or beget a child." *Casey*, 505 U.S. at 849, 851 (opinion of O'Connor, Kennedy, and Souter, JJ.) (quoting *Eisenstadt*, 405 U.S. at 453); *see also id.* at 927 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part) (describing constitutional protection for "such intimate family matters as procreation, childrearing, marriage, and contraceptive choice"). Indeed, a right to reproductive freedom comprising such activities has been repeatedly acknowledged by electorates, legislatures, and courts.

Ballot initiatives. The electorates of several states have adopted referenda recognizing a right to reproductive freedom similar to that contained in the Petition.

Last year, for example, Michigan voters approved a constitutional amendment recognizing that "[e]very individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care." Mich. Const. art. I, § 28. This mirrors the contours of the right to reproductive freedom described in the Petition.

Similarly, Ohio voters recently approved an amendment to their state constitution protecting the "right to make and carry out one's own reproductive decisions, including but not limited to decisions on" "contraception," "fertility treatment," "continuing one's own pregnancy," "miscarriage care," and "abortion." Ohio Const. art. I, § 22. They did so after the Ohio Supreme Court rejected a single-subject challenge to the initiative because "each provision relates to the single general purpose of protecting a person's reproductive rights." *State ex rel. DeBlase v. Ohio*

Ballot Bd., No. 2023-0388, 2023 WL 3749300, at *5 (Ohio June 1, 2023) (per curiam).[1]

California voters approved a constitutional amendment last year to protect "an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives." Cal. Const. art. I, § 1.1. Despite fierce legal opposition to reproductive-freedom initiatives across the country, this amendment was never challenged under California's single-subject rule, which is very similar to Nevada's. *Compare Nevadans for Prot. of Prop. Rts., Inc. v. Heller*, 122 Nev. 894, 906–07, 141 P.3d 1235, 1243–44 (2006) (petition provisions "must be 'functionally related' and 'germane' to one another" and to petition's purpose), *with Senate v. Jones*, 21 Cal. 4th 1142, 1157, 988 P.2d 1089, 1098 (1999) ("[A]n initiative measure does not violate the single-subject requirement if, despite its varied collateral effects, all of its parts are reasonably germane to each other, and to the general purpose or object of the initiative." (cleaned up)).

[1] Although the precise contours of other states' single-subject rules might differ from Nevada's, that does not vitiate their persuasive authority. *See Helton*, 512 P.3d at 315 & n.4.

Statutes. Numerous state legislatures have recognized a right to reproductive freedom by statute. Colorado, for example, statutorily safeguards an individual's "fundamental right to make decisions about the individual's reproductive health care." Colo. Rev. Stat. § 25-6-403. Much as in the Petition, this single "fundamental right" covers a broad scope of reproductive activities, with "[r]eproductive health care" defined as "health care and other medical services related to the reproductive processes, functions, and systems at all stages of life," which "includes, but is not limited to, family planning and contraceptive care; abortion care; prenatal, postnatal, and delivery care; fertility care; sterilization services; and treatments for sexually transmitted infections and reproductive cancers." *Id.* § 25-6-402(4); *see also, e.g.*, Minn. Stat. § 145.409 ("Reproductive health care includes, but is not limited to, contraception; sterilization; preconception care; maternity care; abortion care; family planning and fertility services; and counseling regarding reproductive health care."); N.Y. Pub. Health Law § 2599-aa ("comprehensive reproductive health care" includes contraception, sterilization, and abortion).

Other states similarly recognize a single fundamental right to reproductive freedom that, like the Petition, protects a range of reproductive activities. *See, e.g.*, 775 Ill. Comp. Stat. 55/1-15 ("Every individual has a fundamental right to make autonomous decisions about the individual's own reproductive health, including the fundamental right to use or refuse reproductive health care."); Minn. Stat. § 145.409 (same); H.B. 2002, 82nd Leg., Reg. Sess. (Or. 2023) ("Every individual has a fundamental right to make decisions about the individual's reproductive health, including the right to make decisions about the individual's reproductive health care, to use or refuse contraception, to continue the individual's pregnancy and give birth or to terminate the individual's pregnancy.").[2]

Court decisions. Many states' highest courts have also recognized, when interpreting their respective constitutions, a fundamental right to reproductive freedom that protects a set of activities similar to those covered by the Petition. *See, e.g.*, *Hodes & Nauser, MDs,*

[2] Notably, Colorado, Minnesota, Illinois, and Oregon impose single-subject requirements on general legislative enactments. *See* Colo. Const. art. V, § 21; Minn. Const. art. IV, § 17; Ill. Const. art. IV, § 8(d); Or. Const. art. IV, § 20.

P.A. v. Schmidt, 309 Kan. 610, 680, 440 P.3d 461, 502 (2019) (per curiam) ("[T]he Kansas Constitution Bill of Rights protects all Kansans' natural right of personal autonomy, which includes the right to control one's own body, to assert bodily integrity, and to exercise self-determination. This right allows a woman to make her own decisions regarding her body, health, family formation, and family life—decisions that can include whether to continue a pregnancy."); *Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 969 (Alaska 1997) (recognizing that "fundamental reproductive rights *include* the right to an abortion" (emphasis added)); *Right to Choose v. Byrne*, 91 N.J. 287, 306, 450 A.2d 925, 934 (1982) (recognizing "the fundamental right of a woman to control her body and destiny").

Indeed, the Montana Supreme Court's opinion recognizing "that the procreative autonomy component of personal autonomy is protected by Montana's constitutional right of individual privacy" explored why reproductive freedom *cannot* be artificially circumscribed to encompass only a single activity, such as contraception or abortion alone. *Armstrong v. State*, 1999 MT 261, ¶ 48, 296 Mont. 361, 379, 989 P.2d 364, 377.

Quoting legal scholar and philosopher Ronald Dworkin, the Court observed that

> [t]he law's integrity demands that the principles necessary to support an authoritative set of judicial decisions must be accepted in other contexts as well. It might seem an appealing political compromise to apply the principle of procreative autonomy to contraception, which almost no one now thinks states can forbid, but not to abortion, which powerful constituencies violently oppose. But the point of integrity—the point of the law itself—is exactly to rule out political compromises of that kind.

Id. ¶ 47, 296 Mont. at 379, 989 P.2d at 377 (quoting Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* 158 (1994)). In other words, reproductive freedom as a unified concept must necessarily encompass more than the right to an abortion in order to maintain logical—and legal—consistency.

In the face of this established legal pedigree for a single right to reproductive freedom protecting exactly the sort of activities that the Petition addresses, the district court's insistence that the Petition instead covers a multitude of unrelated subjects can be understood only as a rejection *on the merits* of the constitutional right that the Petition would create. The *Dobbs* majority too tried doggedly to reframe the long-recognized federal right to reproductive freedom as a collection of narrow,

unrelated issues, faulting *Casey* for, in the absence of an express federal constitutional protection for reproductive freedom,

> rel[ying] on cases involving the right to marry a person of a different race; the right to marry while in prison; the right to obtain contraceptives; the right to reside with relatives; the right to make decisions about the education of one's children; the right not to be sterilized without consent; and the right in certain circumstances not to undergo involuntary surgery, forced administration of drug, or other substantially similar procedures.

Dobbs, 597 U.S. at 256–57 (citations omitted). The entire purpose of the Petition, however, is to reject this approach under Nevada law and establish instead a clear right that prohibits *all* "unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child," as federal law did for decades. *Casey*, 505 U.S. at 851 (opinion of O'Connor, Kennedy, and Souter, JJ.) (quoting *Eisenstadt*, 405 U.S. at 453). Whether such a right should be established is a question for the voters; it should not be foreclosed at the outset by a district court's apparent hostility to the right the Petition seeks to create.

B. All provisions of the Petition are functionally related to the creation of the fundamental right and to each other.

Once an initiative's single subject has been identified, courts must "then determine if each provision is functionally related and germane to each other and the initiative's purpose or subject." *Helton*, 512 P.3d at 314. Significantly, "even if an initiative petition proposes more than one change to Nevada law, it may still meet the single-subject requirement, provided that the proposed changes are functionally related and germane to each other and a single subject." *Id.* at 312. Here, the Petition makes only a single change—the addition and definition of a fundamental right to reproductive freedom—and each of its provisions is directly related to creating and defining the scope of that fundamental right.

1. A provision-by-provision analysis of the Petition confirms that all parts are functionally related.

A provision-by-provision analysis of section 1 of the Petition confirms that each part is related to the single subject of creating and defining a fundamental right to reproductive freedom and, by extension, to the other parts.

Subsection 1 amends the Nevada Constitution to expressly enshrine the "fundamental right to reproductive freedom," which is

defined to "includ[e], without limitation, prenatal care, childbirth, postpartum care, birth control, vasectomy, tubal ligation, abortion, abortion care, management of a miscarriage and infertility care," and specifies that infringements of that right are subject to strict scrutiny (the right "shall not be denied, burdened or infringed upon unless justified by a compelling State interest that is achieved by the least restrictive means available"). JA 0015. All of that directly involves the Petition's purpose—it defines the new fundamental right that the Petition seeks to protect.

Subsection 2 establishes an exception to the newly created right, providing that one form of protected activity—abortion—may be regulated after fetal viability. JA 0015. It then provides an exception to the exception: An abortion may not be prohibited if, "in the professional judgment of an attending provider of health care," it "is medically indicated to protect the life or physical or mental health of the pregnant individual." JA 0015. This provision too directly involves the Petition's purpose by clearly defining the parameters of the right that the Petition creates.

Subsections 3, 4, and 5 define how the right to reproductive freedom applies in certain prosecutions of pregnant individuals, healthcare providers, and those who help others exercise the new right. In particular, they clarify that the right to reproductive freedom precludes (1) prosecutions of pregnant individuals based on the outcome of their pregnancy, (2) prosecutions of healthcare providers for consensual abortions consistent with the standard of care, and (3) prosecutions of anyone for helping others exercise the right. JA 0015. Each of these three provisions specifies a specific application of the right to reproductive freedom that the Petition creates to a particular form of conduct, and thus serves to further define the scope of the right.

Subsection 6 provides clarification of a different sort, specifying that "[n]othing herein narrows or limits the rights to equality and equal protection." JA 0015. This provision relates to the rest of the Petition by clarifying how it interacts with existing law.

Finally, **subsection 7** serves to define two terms used previously in the Petition: "[c]ompelling state interest" and "[f]etal viability."

JA 0015–16.[3] Therefore, it too serves to further define the right that the Petition creates and that each of the other subsections serves to explain.

In short, subsections 1, 2 and 7 define the right to reproductive freedom, both in terms of what it entails and how the State may regulate it. Subsections 3 through 6, in turn, clarify how that right applies in the context of three categories of criminal prosecutions. All of the proposed changes are thus "interrelated" and "germane to each other and the initiative petition's subject" of defining and protecting the right to reproductive freedom. *Helton*, 512 P.3d at 315.

2. The district court misapplied the single-subject analysis in concluding that the subsections are unrelated.

The district court's analysis of the relationship between the provision's subsections was grounded in the same fundamental error as its insistence that the Petition lacks a core purpose: It turned entirely on the refusal to recognize that creating a fundamental right to reproductive freedom is a single subject even though that right protects more than one activity.

[3] Section 2 of the Petition is a garden-variety severability clause. JA 0016.

The district court concluded, in particular, that subsections 2, 3, 4, and 5 failed the single-subject requirement because they do not "relate[] to postpartum care, birth control tubal ligation, vasectomies, and infertility care," but only to abortions. JA 0142–43. But that conclusion follows only if one wrongly views the Petition as protecting an unrelated grab bag of activities, rather than a single, well-established fundamental right to reproductive freedom. Once the unified nature of the right to reproductive freedom is recognized, the district court's reasoning falls apart—each of those subsections relates directly to the right to reproductive freedom, by regulating and defining an important aspect of that right.

The district court's reasoning also ignored that, because all of the activities enumerated are different types of reproductive care, in some cases there is a *direct* connection between abortion and the Petition's other activities. For example, the medical treatment for miscarriage is often identical to that for abortion, and a patient who has had either a miscarriage *or* abortion often requires postpartum care that, in most respects, is likely to be indistinguishable—no matter the circumstances

that led to the ending of the pregnancy.[4] As another example, as part of their postpartum care, a patient who has to end their pregnancy because "in the professional judgment of an attending provider of health care" it "is medically indicated to protect the life or physical or mental health of the pregnant individual" might then be advised by their medical professional to protect against further pregnancy-related health risks by undergoing tubal ligation or asking their partner to have a vasectomy. Or, a patient who has had to terminate a pregnancy upon learning that their fetus has a genetic condition that is incompatible with life might be advised by their medical professional to seek infertility care to protect against the same genetic condition recurring in future pregnancies, in order to avoid future abortions.

The district court's reasoning was also squarely contrary to this Court's precedent, including its recent decision in *Helton*, which confirms that the district court sliced matters far too thin in demanding that every aspect and subpart of each provision relate directly to every aspect and

[4] *See, e.g.*, Pam Belluck, *They Had Miscarriages, and New Abortion Laws Obstructed Treatment*, N.Y. Times (July 17, 2022), https://www.nytimes.com/2022/07/17/health/abortion-miscarriage-treatment.html.

subpart of all other provisions. In *Helton*, initiative proponents proposed a constitutional amendment that would separately revise the manner in which Nevadans conduct both primary elections (by replacing partisan primaries with open elections) *and* general elections (by instituting a system of ranked-choice voting). 512 P.3d at 312–13. Opponents brought a single-subject challenge, arguing that the two changes were both significant in their own rights and also functionally independent, in that one could achieve open primaries and ranked-choice general elections irrespective of one another. This Court, however, found that "[b]oth changes . . . concern the election process in Nevada and more specifically how candidates for the specifically defined partisan offices are presented to voters and elected." *Id.* at 314–15. Accordingly, the initiative's "single subject" was "the *framework* by which specified officeholders are presented to voters and elected." *Id.* at 314. That the changes were separate (and arguably independent) was not material to a single-subject analysis because the provisions had a functional relationship to one another in achieving the purpose of the initiative generally.

Obviously, in *Helton*, each aspect of the new rules governing primary elections did not relate directly to each aspect of the separate

rules governing general elections; the specific ranked-choice rules that would govern general elections, for example, bore no direct relationship to the rules governing which party name would be listed on a primary ballot next to a given candidate. *See id.* at 313. But that was not at all how the Court approached the single-subject question. The Court instead focused on the overall "policy changes" that the petition would have adopted, not the specific implementation details, and it assessed whether the two policy changes involved unrelated matters or a single framework. *Id.* at 314–15.

Adopting the *Helton* Court's approach, this is a far easier case. Where *Helton* involved two broad policy changes that were "distinct and affect[ed] different aspects of the election process," *id.* at 319 (Cadish, J., dissenting), albeit related to a single framework, the Petition makes just one broad change: It creates and defines a single constitutional right. Each of the Petition's provisions either defines that single right or clarifies the State's authority to regulate it. Aspects of the Petition might be *different—pre*natal care is, of course, different from *post*natal care—but that does not mean they are *distinct* in terms of the unified purpose that links them all together.

The district court's single-minded focus on the differences between provisions—"how a vasectomy relates to infertility care or postpartum care," JA 0142, for example—was misguided and irreconcilable with *Helton*. It is unnecessary for each of the particular implementation details of the Petition to relate directly to one another. Instead, what matters is that they relate to the single subject—the *framework*, as the Court said in *Helton*—of the proposed right to reproductive freedom. From this vantage, it makes no sense to argue that birth control does not relate to tubal ligations, or that prenatal care and management of miscarriages are distinct, since each is a facet of the right to reproductive freedom and, accordingly, relates to the other provisions. (Indeed, as noted above, these different aspects of reproductive care are often part of a single patient's care plan. *See supra* at 25–26.) But even if the Court were to find that they are truly distinct activities, *Helton* still compels reversal. If significant, independent changes to the way Nevada structures primary and general elections can be viably paired in an initiative, then it would require a particularly perverse interpretation to consider a nonexclusive list of "all matters relating to pregnancy" as somehow insufficiently related within a proposed ballot measure

explicitly designed to establish the fundamental right to reproductive freedom—especially given that *nothing* in the Petition strays, even arguably, from this central subject.[5]

In short, all of the Petition's "changes are functionally related and germane to each other in that they work together to" establish a fundamental right to reproductive freedom, "and the effectiveness of one change would be limited without the other." *Helton*, 512 P.3d at 315. Absent the articulation of the right in subsection 1 of the Petition, the remaining subsections that serve to clarify and protect this right from interference "would have little practical effect," since it would simply make no sense to explain and qualify a right that does not otherwise

[5] As evidence that the Petition "does not contain a single subject," the district court noted that the various facets of reproductive freedom are currently addressed in different sections of the Nevada Revised Statutes. JA 0144–45. But this has little relevance given that, for example, primary and general elections are also controlled by different statutory provisions. *Compare, e.g.*, N.R.S. 293.175 (setting date of primary elections), *with* N.R.S. 293.12755 (setting date of general elections). This fact did not change the result in *Helton*, and it should not change the analysis here: What matters is not how different reproductive issues have been previously organized in statutes, but instead whether all of the Petition's changes fall within the single subject of reproductive freedom.

exist. *Id.*[6] "Thus, the changes are necessarily connected and pertaining to each other and to the subject of" reproductive freedom. *Id.* The Petition therefore satisfies the single-subject requirement.[7]

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[6] The *Helton* Court concluded that *even if* a petition's proposed changes "could be brought in separate initiative petitions," it does not violate the single-subject requirement so long as "the changes are functionally related and germane to each other and the petition's subject." 512 P.3d at 314. Here, the case is even stronger: Because the provisions clarifying the right to reproductive freedom would be meaningless if that right were nor first established in subsection 1, the Petition's changes could *not* "be brought in two separate petitions." *Id.* at 320 (Cadish, J., dissenting).

[7] Tellingly, courts have routinely rejected single-subject challenges to initiatives that sought to "preserve human life" by imposing multiple limitations on abortions or addressing both abortions and other issues. *See, e.g.*, *Planned Parenthood of Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 721 (Iowa 2022) (legislation that "couple[d] a mandatory abortion waiting period with a limitation on the removal of life support" did not violate single-subject rule because "both provisions related to state regulation of individual medical decision-making" and "both provisions were designed to preserve human life"); *In re Title, Ballot Title & Submission Clause, & Summary for 1999–2000 No. 200A*, 992 P.2d 27, 28–32 (Colo. 2000) (abortion-related ballot initiative that required informed consent, delivery of prescribed information, and annual reporting by physicians did not violate single-subject rule); *Wyo. Nat'l Abortion Rts. Action League v. Karpan*, 881 P.2d 281, 291 (Wyo. 1994) ("[W]e read the language of the initiative, criminalizing abortion in most instances and withholding state funding for abortions under certain circumstances, to fit within the single-subject rule. Those features are two methods by which the drafters of the initiative intended to achieve their goal of 'protecting human life.'").

C. The policy considerations underlying the single-subject requirement do not support the district court's conclusion.

In applying the single-subject requirement, this Court has identified multiple policy considerations animating the rule. None of those foundational principles supports the district court's ruling here.

First, the Court has noted that "[t]he single-subject requirement 'facilitates the initiative process by preventing petition drafters from circulating confusing petitions that address multiple subjects.'" *Helton*, 512 P.3d at 314 (quoting *Nevadans for Prot. of Prop. Rts.*, 122 Nev. at 902, 141 P.3d at 1240). As discussed above, *see supra* at 10–31, all of the provisions of the Petition fall under the single subject of defining and protecting the fundamental right to reproductive freedom, which the description of effect clearly explains, *see infra* at 35–42. Because there is only one subject present in the Petition, which is not otherwise confusing or misleading, this objective of the single-subject requirement is readily vindicated here.

Second, the single-subject requirement "prevent[s] the enactment of unpopular provisions by attaching them to more attractive proposals or concealing them in lengthy, complex initiatives (*i.e.*, logrolling)."

Helton, 512 P.3d at 314 (quoting *Las Vegas Taxpayer Accountability Comm.*, 125 Nev. at 176–77, 208 P.3d at 436–37). "Logrolling" does not refer merely to the inclusion of multiple provisions in a single petition, as the district court suggested. *See* JA 0142 ("[T]he Petition embraces a multitude of subjects that amount to logrolling."). Instead, it concerns "the inclusion of *two distinct changes* in a single initiative petition," which in turn "forces the electorate to choose between two potentially competing policy goals." *Helton*, 512 P.3d at 320 (Cadish, J., dissenting) (emphasis added); *see also Nevadans for Prot. of Prop. Rts.*, 122 Nev. at 906, 141 P.3d at 1243 (single-subject requirement "prevent[s] proposals that would not otherwise become law from being passed solely because they are attached to more popular measures"); *id.* at 922, 141 P.3d at 1254 (Hardesty, J., concurring in part and dissenting in part) (logrolling "occurs when two or more *completely separate provisions* are combined in a petition, one or both of which would not obtain enough votes to pass without the other" (emphasis added)).

None of these concerns is present here. Far from manifesting competing policy goals, each provision is germane to the subject of protecting a fundamental right to reproductive freedom and serves to

either articulate or clarify that right. Nor, for that matter, does the Petition attempt to surreptitiously enact a controversial proposal by pairing it with more popular measures. *See Nevadans for Prot. of Prop. Rts.*, 122 Nev. at 922, 141 P.3d at 1254 (Hardesty, J., concurring in part and dissenting in part) ("Generally, to 'log-roll' a provision into enactment, the proponent advances a proposition that the proponent expects would pass constitutional muster and be easily enacted by the voters, but then adds to the petition a provision, often 'hidden' deep within, that is less popular."). The Petition does not "try[] to hide an unrelated and unpopular change within the initiative petition with the hope that the electorate decides the more popular change is worth the adoption of the less popular one." *Helton*, 512 P.3d at 315. It cannot be persuasively argued that any of the provisions in the Petition overwhelm and dominate in some manner as to drag hidden, unpopular provisions along with them to the ballot, since each provision functions within the overall framework of the establishment of a single right. Indeed, if any of the activities that the fundamental right to reproductive freedom protects predominates in the Petition's text, it is the one that is likely to

be most controversial: abortion, which is the subject of more of the Petition's subsections than any other activity.

II. The district court wrongly concluded that the Petition's description of effect is legally insufficient.

The district court also erred in rejecting the Petition's description of effect. A description of effect serves a specific and limited purpose: In no more than 200 words, it "facilitates the constitutional right to meaningfully engage in the initiative process by helping to prevent voter confusion and promote informed decisions." *Helton*, 512 P.3d at 316 (quoting *Las Vegas Taxpayer Accountability Comm.*, 125 Nev. at 177, 208 P.3d at 437). The Petition's description does exactly that and therefore satisfies the requirements of N.R.S. 295.009(1)(b).

A description of effect must be "a straightforward, succinct, and nonargumentative summary of what the initiative is designed to achieve and how it intends to reach those goals." *Id.* (quoting *Educ. Initiative PAC*, 129 Nev. at 37, 293 P.3d at 876). But crucially, the description "cannot constitutionally be required to delineate *every* effect that an initiative will have; to conclude otherwise could obstruct, rather than facilitate, the people's right to the initiative process." *Id.* (emphasis added); *see also Nevadans for Prot. of Prop. Rts.*, 122 Nev. at 912, 141

P.3d at 1247 (courts "must make every effort to sustain and preserve the people's constitutional right to amend their constitution through the initiative process," which is "one of the basic powers enumerated in this state's constitution" (quoting *Univ. & Cmty. Coll. Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 734, 100 P.3d 179, 195 (2004) (per curiam))).

Indeed, this Court has extensively analyzed the legislative history and intended limited purpose of the description requirement under N.R.S. 295.009(1)(b) and concluded that an "adequate" description makes a "legitimate effort to summarize what [the proponent] believes to be the Initiative's main components," noting that requiring petitions to describe "every detail or effect that an initiative may have . . . would significantly hinder the people's power to legislate by initiative and effectively bar all but the simplest of ballot measures." *Educ. Initiative PAC*, 129 Nev. at 42–50, 293 P.3d at 879–84; *see also id.* at 43, 293 P.3d at 879 (district court erred when it "mistakenly reviewed the description of effect with an eye on hypothetical effects or consequences . . . without regard for the role that the description of effect serves in the initiative process").

Here, the district court ignored these guidelines and made three legal errors when it concluded that the Petition's description was misleading. *See* JA 0145–47.

First, the district court faulted the Petition's description for failing to mention various details when the description *does*, in fact, mention precisely what the district court found it omitted. For example, the district court found that the Petition "fails to mention that the law will bar the State from prosecuting, fining, or regulating any miscarriage or stillbirth," even while recognizing that the description states that "the State may not penalize, prosecute, or take adverse action against any individual based on the outcome of the pregnancy of the individual." JA 0146. "[A]ny miscarriage or stillbirth" is plainly an "outcome of [] pregnancy," so the description *does* mention that the State is barred from prosecuting any miscarriage or stillbirth.[8] Likewise, the description explains that the State is barred from "fining" any miscarriage or stillbirth by stating that the State "may not penalize . . . or take adverse

[8] The Petition itself also expressly acknowledges that an "outcome of [a] pregnancy" includes, "without limitation, a *miscarriage*, *stillbirth*, or abortion." JA 0015 (emphases added).

action" based on the outcome of a pregnancy, JA 0017; fines plainly constitute "penaliz[ation]."

The district court also claimed that the description fails to mention whether the State can "regulat[e]," "investigat[e]," or "tak[e] any action" against any miscarriage or stillbirth, JA 0146, but the description accurately summarizes precisely these parameters: "[T]he State still may regulate provision of abortion care after fetal viability," except in limited circumstances, and "the State may not . . . take adverse action against any individual," "licensed health care provider who acts consistent with the applicable scope and practice of providing reproductive health care services," or "any individual or entity for aiding and assisting another individual in the exercise of the rights established by this initiative." JA 0017. In short, the details the district court found to be missing from the description are plainly present.

Even if any of these details were actually missing from the description, that alone would not render it misleading. "Most ballot initiatives will have a number of different effects if enacted, many of which are hypothetical in nature," and this Court has "previously rejected the notion that a description of effect must explain 'hypothetical'

effects." *Educ. Initiative PAC*, 129 Nev. at 47, 293 P.3d at 882 (quoting *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 889, 141 P.3d 1224, 1232 (2006) (per curiam)). This is because,

> [w]ith so few words in which to explain the effect of an initiative petition, a challenger will always be able to find some ramification of or provision in an initiative petition that the challenger feels is not adequately addressed in the description of effect. . . . [T]he sufficiency of a description of effect depends not on whether someone else could have written it better but instead on whether, as written, it is "a straightforward, succinct, and nonargumentative summary of what the initiative is designed to achieve and how it intends to reach those goals."

Helton, 512 P.3d at 317–18 (footnote omitted) (quoting *Educ. Initiative PAC*, 129 Nev. at 37, 293 P.3d at 876); *see also Herbst Gaming*, 122 Nev. at 889, 141 P.3d at 1232 ("A ballot measure's summary and title need not be the best possible statement of a proposed measure's intent or address every aspect of a proposal."). Here, the description easily clears this low bar: Its language is straightforward, it is succinct and under 200 words, and there is no basis for a finding of any argumentative language (certainly the district court did not find any such language).

Second, the district court erred in applying principles of statutory construction in analyzing the description. Nevada caselaw is clear: "[I]t is inappropriate to parse the meanings of the words and phrases used in

a description of effect as closely as we would statutory text." *Educ. Initiative PAC*, 129 Nev. at 48, 293 P.3d at 883. Instead, courts "must determine whether the description provides an expansive view of the initiative, rather than undertaking a hyper-technical examination of whether the description covers each and every aspect of the initiative" by examining "the meaning and purpose of each word and phrase contained in the description." *Id.* at 49, 293 P.3d at 884.

This clear guidance notwithstanding, the district court repeatedly undertook a hyper-technical, word-by-word statutory analysis of the description. For example, the district court claimed that the description was misleading because it failed to define a "provider of health care," noting that the term is otherwise "broadly defined under existing Nevada law," and also criticized the description for failing to define "medically indicated." JA 0146. The district court also concluded that the description was misleading because "it is unclear what the term 'equality' means legally." JA 0146. Such a word-by-word analysis of each term in the description is plainly inappropriate and does not demonstrate that the description is legally inadequate.

Third, the district court erred in incorporating substantive legal arguments into its analysis of the description's language. The district court claimed that the description was misleading because it "wholly omits that it will impact the constitutional right of equal protection or a newly identified right to equality" and "would fundamentally alter [] statutes." JA 0146. Such legal arguments "are improperly considered before an initiative becomes law." *Herbst Gaming*, 122 Nev. at 889, 141 P.3d at 1232. Accordingly, the district court's analysis of the validity of the Petition and its legal effects are neither proper at this stage nor relevant to the analysis of the sufficiency of the description. *See Helton*, 512 P.3d at 316 ("[I]n determining whether a ballot initiative proponent has complied with NRS 295.009, it is not the function of this court to judge the wisdom of the proposed initiative." (quoting *Educ. Initiative PAC*, 129 Nev. at 41, 293 P.3d at 878)).

Ultimately, virtually every aspect of the district court's description analysis was flawed. Indeed, its fundamental misunderstanding of N.R.S. 295.009's requirements was revealed by its conclusion that "it is unclear how [Appellant] could describe [the Petition] accurately in 200-

words." JA 0147. This hyper-critical approach is precisely what the Court has cautioned against, since it would allow

> any opponent of a ballot initiative [to] identify some perceived effect of an initiative that is not explained by the description of effect, challenge the initiative in district court, and block the people's right to the initiative process. *Statutes enacted to facilitate the initiative process cannot be interpreted so strictly as to halt the process.*

Educ. Initiative PAC, 129 Nev. at 47, 293 P.3d at 882 (emphasis added). Instead, what Nevada law requires is a description that provides a "straightforward, succinct, and nonargumentative summary of what the initiative is designed to achieve and how it intends to reach those goals." *Helton*, 512 P.3d at 316. Nothing more is required, and the Petition's description of effect readily clears this bar.

III. The district court wrongly concluded that the Petition contains an unfunded mandate.

Under Article 19, Section 6 of the Nevada Constitution, an initiative is prohibited if it "makes an appropriation or otherwise *requires* the expenditure of money" without providing for raising the necessary revenue. (Emphasis added). "Stated differently, an initiative makes an appropriation or expenditure when it *leaves budgeting officials no discretion* in appropriating or expending the money mandated by the

initiative—the budgeting official *must* approve the appropriation or expenditure, regardless of any other financial considerations." *Herbst Gaming*, 122 Nev. at 890, 141 P.3d at 1233 (emphases added).

Here, the district court's conclusion that the Petition contains an unfunded mandate stems solely from subsection 4, which provides that "[t]he State shall not penalize, prosecute, or otherwise take adverse action against a provider of health care . . . for acting consistent with the . . . standard of care for performing an abortion . . . or providing reproductive care services." JA 0015. The court reasoned that this subsection created an unfunded mandate because "[o]nly doctors and other providers of health care would be in a position to testify as to the applicable standard of care" and, "[t]hus, funding would need to be appropriated to create a Panel or Board . . . to evaluate whether a provider of health care performed an abortion within the standard of care," or else "the Petition would be rendered meaningless." JA 0147–48. This conclusion is wholly unsupported by the record.

There is no requirement to appropriate any funding to create a "Panel or Board" because the Petition "leaves the mechanics of its enforcement with government officials." *Herbst Gaming*, 122 Nev. at 891,

141 P.3d at 1233. *Herbst Gaming* is instructive. There, the Court recognized that a petition "merely expands the statutorily delineated areas within which one may be subject to criminal and civil penalties for smoking" and did not contain an unfunded mandate because it did not "compel an increase or reallocation of police officers to enforce its provisions." *Id.*, 141 P.3d at 1233. Such is the case here. Moreover, while *Herbst Gaming* involved a petition that *increased* the scope of potential prosecution (and could conceivably have resulted in increased enforcement), the Petition here *decreases* the scope of potential prosecution. It makes no sense to conclude that hypothetical enforcement and associated expenditures would increase as a result of a petition that seeks to *prevent* prosecutions stemming from reproductive health-related issues.

Even the district court itself appeared to acknowledge this uncertainty at the hearing, noting that the Petition "contains *possibly* an unfunded mandate." JA 0135–36 (emphasis added). And the Petition's financial impact statement states that "[t]he Fiscal Analysis Division cannot determine whether the provisions of the Initiative, if approved by the voters, would have a financial effect upon the State or local

governments with any reasonable degree of certainty." *Financial Impact*, *supra*. Mere "possib[ility]" is not enough: Because the "burden of demonstrating the invalidity of an initiative falls on the challenger," unfunded-mandate claims cannot succeed without actual "evidence regarding the expected costs." *Helton*, 512 P.3d at 318.

Simply put, the Petition can be fully implemented without the need for any appropriated funding—a conclusion amply supported by the record, which contains no evidence to the contrary. The Petition therefore satisfies Article 19, Section 6 of the Nevada Constitution.

CONCLUSION

Based upon the foregoing, Appellant respectfully requests that the Court reverse the decision of the district court.

Dated this 8th day of December, 2023.

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CERTIFICATE OF COMPLIANCE

1. I certify that this Brief complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface, size 14, Century Schoolbook.

2. I further certify that this Brief complies with the type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the Brief exempted by N.R.A.P. 32(a)(7)(C), it contains 8,873 words.

3. Finally, I hereby certify that I have read this Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the Brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

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sanctions in the event that the accompanying Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 8th day of December, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2023, a true and correct copy of **APPELLANT'S OPENING BRIEF** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system:

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