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 Secretary of State of Nevada,

Respondents.

Case No. **87681**

First Judicial District Court
Case No.: 23 OC 0115 1B

BRIEF AMICUS CURIAE OF BALLOT INITIATIVE STRATEGY CENTER FOUNDATION IN SUPPORT OF APPELLANT AND OF REVERSAL

Nathan R. Ring (NSB 12078)
STRANCH, JENNINGS & GARVEY PLLC
3100 W. Charleston Blvd. Suite 208
Las Vegas, NV 89102
Tel: (725) 235-9570
nring@stranchlaw.com

Joseph E. Sandler (Motion to Associate pending)
SANDLER REIFF LAMB ROSENSTEIN & BIRKENSTOCK, P.C.
1090 Vermont Ave. N.W. Suite 750
Washington, D.C. 20005
Tel: (202) 479-1111
sandler@sandlerreiff.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

N.R.A.P. 26.1 DISCLOSURE STATEMENT

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

The following law firms have appeared and/or are expected to appear in this Court on behalf of amicus curiae Ballot Initiative Strategy Center Foundation;

Nathan R. Ring, of Stranch, Jennings & Garvey, PLLC, Las Vegas, Nevada.

Joseph E. Sandler, of Sandler Reiff Lamb Rosenstein & Birkenstock, P.C, Washington, D.C.

Dated this 22nd day of December, 2023.

STRANCH, JENNINGS & GARVEY PLLC

By: */s/ Nathan R. Ring*

Nathan R. Ring (NSB 12078)
Stranch, Jennings & Garvey PLLC
3100 W. Charleston Blvd., Suite 208
Las Vegas, NV 89102
Tel: (725) 235 9750
nring@stranchlaw.com

STATEMENT OF IDENTITY OF AMICUS CURIAE, INTEREST AND AUTHORITY TO FILE

Pursuant to N.R.A.P. 29(d)(3), amicus curiae Ballot Initiative Strategy Center Foundation ("BISC Foundation") states as follows.

Ballot Initiative Strategy Center Foundation ("BISC Foundation") is a District of Columbia nonprofit corporation determined to be exempt from federal taxation under section 501(c)(3) of the Internal Revenue Code of 1986 as amended. BISC Foundation was formed more than 20 years ago to strengthen democracy by improving public understanding of ballot measures' role in civic engagement. The Foundation acts as a clearinghouse for information to understand better public attitudes towards critical issues and the role ballot measures play in our democracy. The organization is a trusted source of ballot measure information, strategic advice, and expertise, and forges critical links to and among the many groups and issue arenas directly affected by ballot measures.

BISC Foundation provides information and analysis to advocacy and civic organizations about the effective utilization of the initiative and referendum process in the States. It also analyzes state laws and rules relating to ballot measures; commissions and publicly disseminates research to help nonprofit organizations and their funders understand the role ballot measures play in civic engagement and how voters understand and approach ballot measures; and helps develop and advocate for

policies that promote fairness, integrity, and transparency in the process of qualifying measures for the ballot and in ballot campaigns.

BISC Foundation's interest in this case derives from its mission of generally promoting policies that support the right to direct democracy, that is, the right to use the initiative and referendum process where authorized by a State's laws, while promoting integrity and preventing voter confusion and fraud. Many states have constitutional or statutory provisions that bar or condition the qualification of ballot initiatives that would require the appropriation of funds. BISC is concerned that the district court's decision in this case, if allowed to stand, would set a precedent for barring ballot measures that do not in fact mandate any appropriation of funds and the fiscal effects of which actually depend on the vagaries of implementation.

BISC Foundation's executive director has authorized the filing of this Brief Amicus Curiae.

SUMMARY OF ARGUMENT

The district court's ruling is fundamentally flawed for one simple reason. The Constitutional Amendment proposed by the Petition does not call for, require, or even suggest the appropriation or expenditure of state funds. So, the limitations in Article 19, Section 6 of the Constitution, which prohibits constitutional amendments that make an appropriation or require the expenditure of money, does not apply. Reaching the opposition conclusion, the district court manufactured a requirement that enforcement of the amendment would require the development of a Panel or Board, given the need for scientific evidence as to the standard of care. But that requirement is unsupported by the plain text of the Amendment, and the concern is equally unfounded. Ordinary rules of evidence apply and assuage that issue. The district court's significant overreach, consequently, tramples on the fundamental right to initiative, enshrined in the Nevada Constitution. A court's ability to imply appropriations would be boundless, reducing that fundamental right to nothing. The district court's ruling, thus, must be reversed.

ARGUMENT

I. The Petition Clearly Does Not Make an Appropriation or Require the Expenditure of Money Within the Meaning of Article 19, Section 6 of the Constitution As Interpreted by This Court

Article 19 of the Nevada Constitution "reserves to the people the power to propose, by initiative petition, statutes and amendments to statutes and the

constitution, and to enact or reject them at the polls." *Garvin v. Ninth Judicial Dist. Court*, 118 Nev. 749, 763, 59 P.3d 1180, 1190 (2002). A limitation on that fundamental right is imposed by section 6 of Article 19, which provides that the Article "does not permit the proposal of any statute or statutory amendment which makes an appropriation or otherwise requires the expenditure of money," unless the ballot measure also "provides for raising the necessary revenue."

The constitutional amendment proposed by the Petition challenged in this case does not, on its face, call for or require any appropriation or expenditure of state funds. Nevertheless, the district court ruled that the amendment would impose an impermissible unfunded mandate under Article 19, section 6, because it would prohibit the state from prosecuting health care providers "for acting within the standard of care for performing and abortion or providing abortion care;" only doctors and other providers could testify as to the applicable standard of care; and so "funding would need to be appropriated to create a Panel or Board—most likely under the supervision of the Nevada Board of Medical Examiners—to evaluate whether a provider of health care performed an abortion within the standard of care." District Court Findings, JA 0162. That reasoning is fundamentally inconsistent with the scope and meaning of Article 19, section 6 as interpreted and applied by this Court.

This Court has made clear that, for purposes of Article 19, section 6, "an appropriation is the setting aside of funds, and an expenditure of money is the payment of funds." *Rogers v. Heller*, 117 Nev. 169, 173, 18 P.3d 1034, 1036 (2001). An "initiative makes an appropriation or expenditure when it leaves budgeting officials no discretion in appropriating or expending the money mandated by the initiative…." *Herbst Gaming, Inc. v. Heller,* 122 Nev. 877, 890, 141 P.3d 1224, 1233 (2006). Under these standards, this Court has disqualified initiatives for containing an unfunded mandate only when the statutory or constitutional amendment in and of itself would necessarily require the appropriation and expenditure of new state funds and could not be implemented at all without such an appropriation. On the other hand, when the need for new funds turns on the way in which the measure enacted by the initiative petition would be implemented, this Court has declined to find the measure barred by Article 19, section 6.

Thus, in *Rogers*, the new statute proposed by the initiative at issue would have outright required the Legislature to appropriate per-pupil "basic support guarantees" for local school districts that would, in the aggregate, be not less than half of the State's total projected revenue for the applicable year. Not surprisingly, the Court found that "the Initiative calls for an appropriation and an expenditure: it requires the Legislature to appropriate and spend a specific amount of money for a specified purpose for all future biennia." *Rogers*, 18 P.3d at 1038. The initiative also proposed

a new tax to help fund the new spending requirement, but the Court found the amount of new revenue insufficient, and therefore ruled that the initiative violated Article 19, section 6.

Similarly, in *Education Freedom PAC v. Reid*, 138 Nev., Adv. Op. 47, 512 P.3d 296 (Nev. 2022), the proposed initiative would have amended the Constitution to require the Legislature to establish "education freedom accounts" to be used by parents to pay for their children's education in private schools. The Initiative provided that the "legislature shall appropriate money to fund each account in an amount comparable to the amount of funding that would otherwise be used. . ." to educate the child in the public schools. Applying the *Rogers* test, this Court found that the initiative violated Article 19, section 6, because it "clearly required an appropriation of funds. . . . The initiative is creating a new requirement for the appropriation of state funding that does not now exist and provides no discretion to the Legislature about whether to appropriate or expend the money. It requires the Legislature to fund the education freedom accounts." *Education Freedom PAC*, 512 P.3d at 303-04.

By contrast, when an initiative proposes a new constitutional provision or law that does not on its face require an appropriation but might require one depending on how the new provision or law is implemented, this Court has found the proscription of Article 19, section 6 to be inapplicable. Thus, in *Herbst Gaming,*

this Court considered an initiative that would enact a new statute restricting or banning smoking in many indoor public areas including bars, taverns, casinos, hotels, and convenience and grocery stores. Initiative opponents contended that the measure would require new funds for its enforcement. This Court disagreed, noting that the new statute "does not make an appropriation or require the expenditure of money. It simply expands the statutory list of public places in which smoking is unlawful." *Herbst Gaming*, 141 P.3d at 1233. The Court explained that the initiative "requires neither the setting aside nor the payment of any funds. . . . It does not, for example, compel an increase or reallocation of police officers to enforce its provisions, …. But rather, leaves the mechanics of its enforcement with government officials." *Id*. The Court found that, for this reason, the initiative was not barred by Article 19, section 6.

Again, in *Helton v. Nev. Voters First PAC*, 138 Nev., Adv. Op. 45, 512 P.3d 309 (2022), the Court considered an initiative amending the Constitution to allow any voter, regardless of party affiliation, to vote in a party's primary and to provide for ranked choice voting in general elections for partisan offices. The initiative opponent contended that these changes would necessarily require new funding to implement, pointing to costs that had been incurred in other jurisdictions to implement similar election law reforms. This Court ruled that the opponent had failed to provide specific evidence "showing that the proposals in the Initiative

require the expenditure of money," and upheld the district court's finding that the "assertion that the . . . Initiative would require an expenditure of money to implement was unsupported speculation." *Helton*, 512 P.3d at 318.

In this case, the constitutional amendment that would be adopted by the Petition says absolutely nothing about mandating any appropriation or requiring any new expenditure of state funds. The sole basis on which the district court held that the Petition would require an appropriation of funds was the district court's belief that a new panel or board would need to be created "to evaluate whether a provider of health care performed an abortion within the standard of care." JA 0162. But nothing in the Petition would require the creation of any such panel or board.

To be sure, as the district court noted, "[o]nly doctors and other providers of health care would be in a position to testify as to the applicable standard of care." *Id*. (citing NRS 41A.071(2) (affidavit of medical expert required in medical malpractice cases). But it does not follow that any new state agency or board would be required. Rather, if a prosecution were brought against a provider for performing an abortion, and the defendant invoked section 4 of the new constitutional provision prohibiting such a prosecution if it was performed "consistent with the applicable scope of practice and standard of care," the defense could simply call their own expert medical witness to testify as to the standard of care.

The Nevada Rules of Evidence allow for testimony by an expert in any situation where "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue…." NRS 50.275. The "district court may generally admit expert testimony on matters outside the average person's common understanding." *Banks v. Sunrise Hospital,* 120 Nev. 822, 833, 102 P.3d 52, 60 (2004). And when that standard is met, expert testimony may be introduced in a criminal case. *E.g, Higgs v. State*, 126 Nev. 1, 13-20, 222 P.3d 648, 656-660 (2010). Indeed, under federal law, "[e]xpert testimony is admissible in criminal cases to establish the 'generally acceptable standards of medical practice for issuing prescriptions,'" among other things. *United States v. Hughes*, 895 F.2d 1135, 1144 (6th Cir. 1990)(quoting *United States v. Kirk*. 584 F.2d 773, 785 (6th Cir. 1978)).

Thus, not only does the constitutional amendment that would be enacted by the Petition not require any appropriation, but there is also no reason to believe that there would *ever* be a need to create any special state panel or board to implement it. Contrary to the district court's assertion, a qualified expert witness could testify as needed in any given case as to whether a healthcare provider's decision met the applicable standard of care. The district court's notion that the new constitutional provision would require a new "legal entity to ascertain whether a provider of healthcare acted within the standard of care," JA 0163, is completely baseless. It is

"unsupported speculation." *Helton,* 512 P.3d at 318. The Petition does not remotely meet the *Herbst Gaming* test: leaving "no discretion" to legislators, in requiring an appropriation. There is no language in the Petition requiring any appropriation or expenditure and no logical basis on which to conclude that any such appropriation or expenditure would ever be required to implement it. For those reasons, the district court clearly erred in finding that the Petition would impose an unfunded mandate.

II. The District Court's Position on the Unfunded Mandate Issue Would Allow Article 19, Section 6 to Be Used Unjustifiably to Infringe the Fundamental Right to Initiative

If the district court's position were adopted by this Court, the fundamental right of the people to use the initiative process would be significantly infringed. Invalidating initiatives in situations where the need for an appropriation is purely speculative would deprive the people of this right in situations in which the purpose of Article 19, section 6 would not be served.

This Court has recognized that the "right to initiate change in this state's laws through ballot proposals is one of the basic powers enumerated in this state's constitution." *Univ. & Community College Sys. of Nev. v. Nevadans for Sound Government*, 120 Nev. 712, 734, 100 P.3d 179, 195 (2004). "This court has consistently held that the initiative powers granted to Nevada's electorate are broad." *We the People Nevada v. Miller*, 124 Nev. 874, 886, 192 P.3d 1166, 1174 (2008). "[T]his court, in interpreting and applying such laws [regulating the initiative

process], must make every effort to sustain and preserve the people's constitutional right to amend their constitution through the initiative process." *Nevadans for the Protection of Property Rights v. Heller*, 122 Nev. 894, 912, 141 P.3d 1235, 1247 (2006).

To be sure, Article 19, section 6, which itself is part of the Constitution and not merely a legislative regulation, serves an important purpose. The "primary purpose behind" this constitutional provision "was to ensure that no initiative petition was presented to the voters that did not contain funding provisions when the initiative would require an appropriation or expenditure." *Educ. Freedom PAC*, 512 P.3d at 302. "The requirement that an initiative involving an appropriation or expenditure include a revenue-generating provision prevents the electorate from creating the deficit that would result if government officials were forced to set aside or pay money without generating the funds to do so." *Herbst Gaming*, 141 P.3d at 1233.

But where any potential requirement for an appropriation is speculative, and may depend on how a constitutional amendment is implemented so that no government official is actually "forced to aside or pay money," applying Article 19, section 6 to invalidate an initiative is unjustified. Such application would deprive the people of their fundamental right to use the initiative without serving the purpose of that constitutional restriction. The reason is that a theory could be concocted for

virtually any initiative under which that initiative could require some new public funding. Any initiative making any new form of conduct unlawful could be said to require funds for increased enforcement even if more tax dollars might be saved because the inhibited conduct lowers other government costs. Conversely, an initiative making formerly prohibited conduct lawful could be said to require new funding for public education, or to educate enforcement officials, even though those costs may be more than offset by lowered enforcement costs.

For this reason, this Court should maintain the framework of *Herbst Gaming*: that Article 19, section 6 applies only in cases in which there is a direct and non-discretionary requirement for an appropriation or expenditure in the initiative itself, and not in cases where the requirement for new spending is speculative or depends on the exercise of discretion by government officials in implementing the initiative. Departing from that framework, as the district court did, is an invitation to deny the right of initiative where no purpose is served by doing so.

That consequence has been recognized by the highest courts of other states with similar constitutional restrictions on use of the initiative process to enact measures that would compel appropriations or expenditures.[1] The Arizona

[1] Fifteen states have constitutional or statutory provisions prohibiting initiatives and/or referenda that compel appropriations or expenditures, or do so without an offsetting revenue source. See National Conference of State Legislatures, Initiative and Referendum Process, https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-processes (last visited Dec. 16, 2023).

Constitution, for example, provides that an "initiative or referendum measure that proposes a mandatory expenditure of state revenues for any purpose, . . . must also provide for an increased source of revenues sufficient to cover" the costs of the measure. Ariz. Const., Article 9, section 23. In *Ariz. Chamber of Commerce & Indus. v. Kiley*, 242 Ariz. 533, 399 P.3d 80 (2017), the Court held that this constitutional provision applies "whenever an initiative or referendum explicitly requires either an expenditure of state revenues or state actions that themselves inherently require expenditure of state revenues. A mandatory expenditure of state revenues does not occur if an initiative or referendum only directly *causes* an expenditure of state revenues." *Ariz. Chamber of Commerce*, 399 P.3d at 84 (emphasis in original). The Court reasoned that interpreting the constitutional provision--

> as applying whenever an initiative or referendum indirectly causes an expenditure of state revenues would severely hamper the initiative process. It is implausible that qualified electors who seek to propose an initiative measure could successfully scour the state's innumerable dealings to anticipate and provide a funding source for any conceivable expenditures of state revenues that a ballot measure might indirectly cause. For example, electors would have to account for the costs to train affected employees, contract for goods and services, or even to publish the new law itself. Our construction of §23(A) avoids this cumbersome consequence and preserve an initiative and referendum practice that has been a tool of direct democracy for more than a century.

Id. at 85. The Court, citing *Herbst Gaming*, noted that its view "aligns with the Nevada Supreme court's interpretation of the [Nevada] corollary to" the Arizona provision. *Id*.

Similarly, the Maryland Constitution provides for the right to petition enacted laws to referendum but provides that "[n]o law making any appropriation for maintaining the State government, . . . shall be subject to" a referendum. Md. Const. Art. XVI, section 2. In *Doe v. Md. State Board of Elections*, 428 Md. 596, 53 A.3d 1111 (2012), the Maryland Supreme Court considered a referendum on a law that would expand the categories of individuals eligible for in-state tuition rates at community colleges and public colleges and universities. A fiscal impact statement concluded that, if the law were implemented, state expenditures would rise and tuition revenues could fall. Nevertheless, the Court held that the law was not one "making any appropriation, because the constitutional bar of referenda on such laws is aimed at laws the primary purpose of which is to appropriate funds. The law at issue, the Court found,

> does not reference appropriations or revenues. Instead, it defines new eligibility requirements for a certain class of students. The impact on future appropriations is several steps removed from the primary purpose of the bill, and these effects are an incidental result of the changed eligibility requirements. Incidental effects are not enough to meet the appropriation exception…To read the appropriation exception a different way would be to expand the exception beyond its intended purpose, effectively depriving voters [of] the right to referendum.

Doe, 53 A.2d at 1120-21.

In *Herbst Gaming*, this Court similarly limited application of the unfunded mandate provision to initiatives that would directly and unconditionally compel an appropriation, regardless of how the measure is implemented, with no discretion left to budget officials. That approach ensures that the purpose of Article 19, section 6 will be served without unduly restricting the right of initiative. The district court's ruling that the Petition in this case imposes an unfunded mandate is entirely at odds with the *Herbst Gaming* framework. It would set a precedent for invalidating many initiatives that simply do not implicate the purpose of Article 19, section 6. The district court's ruling should therefore be reversed.

CONCLUSION

For the reasons set forth above, the district court's holding that the Petition would impose an unfunded mandate, should be reversed.

Dated: December 22, 2023 Respectfully submitted,

STRANCH, JENNINGS & GARVEY PLLC

By: */s/ Nathan R. Ring*
Nathan R. Ring (NSB 12078)
3100 W. Charleston Blvd., Suite 208
Las Vegas, NV 89102
Tel: (725) 235 9750
nring@stranchlaw.com

Joseph E. Sandler (Motion to Associate Pending)
Sandler Reiff Lamb Rosenstein & Birkenstock PC

1090 Vermont Ave., N.W. Suite 750
Washington, D.C. 20005
Tel: (202) 479-1111
sandler@sandlerreiff.com

Attorneys for Amicus Curiae
Ballot Initiative Strategy Foundation

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 type face, size 14, Times New Roman.

2. I further certify that this Brief complies with the type volume limitations of N.R.A.P. 29(e) and N.R.A.P. 32(a)(7) because, excluding the part of the Brief exempted by N.R.A.P. 32(a)(7)(C), it contains 3,132 words.

3. 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 including N.R.A.P. 28(e)(1). I understand that I may be subject to sanctions in the event that the accompanying Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedures.

STRANCH, JENNINGS & GARVEY PLLC

By: */s/ Nathan R. Ring*

Nathan R. Ring (NSB 12078)
3100 W. Charleston Blvd., Suite 208
Las Vegas, NV 89102
Tel: (725) 235 9750
nring@stranchlaw.com

Joseph E. Sandler (Motion to Associate Pending)
Sandler Reiff Lamb Rosenstein & Birkenstock PC

1090 Vermont Ave., N.W. Suite 750
Washington, D.C. 20005
Tel: (202) 479-1111
sandler@sandlerreiff.com

Attorneys for Amicus Curiae
Ballot Initiative Strategy Foundation

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December 2023, a true and correct copy of this Brief Amicus Curiae of Ballot Initiative Strategy Center Foundation was served on all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

By: /s/ *Suzanne Levenson*
an employee of Stranch, Jennings & Garvey