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 REPLY BRIEF

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INTRODUCTION

The Petition embraces a clear, single subject: the creation of an express constitutional right to reproductive freedom, akin to the implied right that was long protected under federal constitutional law before the U.S. Supreme Court's abrupt change of course two years ago. Whether to adopt such a right is a question for the people, not for this Court. *See* Nev. Const. art. 19, § 2. Respondents argue otherwise only by stubbornly ignoring the single new right that the Petition would create and instead focusing exclusively on what they say are disparate applications of that right to particular forms of conduct. But this Court rejected that approach to the single-subject requirement just last year, upholding a petition that proposed to adopt a new framework for elections by making various, separate changes to primary and general elections. *See Helton v. Nev. Voters First PAC*, 138 Nev., Adv. Op. 45, 512 P.3d 309, 312 (2022).

Respondents have no answer to *Helton*, and their theory that the proposed right to reproductive freedom involves no unifying framework at all reflects nothing more than hostility to the proposed right itself. Whatever one's personal view of abortion, the idea that it and the other activities the Petition would protect do not relate to the subject of

reproductive freedom, or that the right to reproductive freedom does not represent a coherent single subject for a petition, is ludicrous. For decades, federal courts recognized a similar right to reproductive freedom under the U.S. Constitution, which protected not just a particular list of practices but a broader "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.) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)), *overruled*, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

The Petition's sole subject is whether to restore a version of that approach in this state. The Court cannot adopt Respondents' and the district court's theory without claiming for itself the authority to enact or reject the proposed amendment—a prerogative the people have reserved for themselves through the constitutional ballot-initiative process. Moreover, the Petition's description of effect properly describes the Petition, including each of the topics that Respondents and the district court say it omits. And the Petition does not require the expenditure of

funds. The Court should therefore reverse and let the people decide whether to adopt the express fundamental right that the Petition proposes.

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 Petition addresses a single subject: reproductive freedom.

The Petition addresses a single subject: creating and defining an express, fundamental right to reproductive freedom. *See* Opening Br. 10–35. Each provision is directly and functionally related to the creation of that single unified right. The Provision thus satisfies the single-subject requirement.

A. *Helton* rejects Respondents' section-by-section approach to the single-subject requirement.

Respondents' single-subject argument is irreconcilable with the Court's decision two years ago in *Helton*. Respondents cherry-pick particular activities protected by the right to reproductive freedom—tubal ligation, vasectomies, and so on—and argue that they are unrelated

to provisions in the Petition that address how that right applies to abortion specifically. *See, e.g.*, Answering Br. 19–22. But the petition in *Helton* complied with the single-subject requirement even though some of its individual provisions, such as the rules on how party affiliation would appear on primary ballots, obviously bore no direct relationship to other individual provisions, like the specific procedures for conducting ranked-choice general elections. *See* 512 P.3d at 313. Given *Helton*'s upholding of a petition comprised of some provisions that affected only primary elections and others that affected only general elections, the mere fact that some of the Petition's individual provisions focus on abortion while others are broader cannot possibly mean that the Petition violates the single-subject requirement.

In fact, this is a much easier case than *Helton*, because where the *Helton* petition made two broad changes—to primary and general elections, each accompanied by detailed provisions—the Petition makes just one: It creates an express fundamental right to reproductive freedom. And just as the *Helton* petition's individual provisions satisfied the single-subject requirement because they "work[ed] together to reform Nevada's election process" by adopting the new proposed framework for

elections, so too the Petition's individual provisions all "work together to" establish and define a new express fundamental right. *Id.* at 314–15.

Respondents argue otherwise by seizing on a single word that appears just once in *Helton*—"mechanics"—and arguing that *Helton* allows petitions that create "frameworks" but not those that address multiple "mechanics." Answering Br. 16–19. But such an interpretation is impossible to square with *Helton*'s result. The petition in *Helton* addressed multiple "mechanics" by which its new framework for elections would be carried out: It defined the particulars of how both primary and general elections would be conducted if the petition were adopted. 512 P.3d at 312–13. Given that context, *Helton*'s distinction between the "*framework* by which specified officeholders are presented to voters and elected" and the "*mechanics* of how voters vote, which would include early voting, absentee ballots, machine voting, and paper ballots, among other things," *id.* at 314, cannot possibly be read as establishing some generally applicable distinction between "frameworks" and "mechanics" (whatever that might mean). Rather, that part of *Helton* is simply an explanation of the scope of that particular petition's single subject. And here, each of

the Petition's provisions relates to the single subject that the Petition addresses.

B. Each provision of the Petition addresses the single subject of creating an express right to reproductive freedom.

The single-subject analysis is therefore straightforward: Do each of the Petition's provisions work together to further the Petition's overall purpose of creating an express constitutional right to reproductive freedom? Appellant's Opening Brief explained in detail how they do, *see* Opening Br. 21–24, and Respondents offer no meaningful answer to that explanation. Nor do Respondents have any answer to Appellant's explanation that many of the particular activities protected by such a right are directly related to each other—even for individual patients—because of the close medical relationships between abortion, miscarriage care, postpartum care, contraception, and fertility treatments. See *id.* at 25–26. Given these medical relationships, "the effectiveness of one change would be limited without the other[s]." *Helton*, 512 P.3d at 315.

Respondents instead argue that creating a right to reproductive freedom is somehow illegitimate (or "disingenuous") as a purpose. Answering Br. 22. But that is a matter for the people to decide. The

Petition's clear single subject is to create an express right to reproductive freedom similar to the one that was long recognized under federal law, covering all "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). Many other states recognize such a right. *See* Opening Br. 13–19. That the Petition's opponents do not believe such a right *should* exist should be no surprise, and their opposition provides no basis for invalidating the Petition, which seeks to establish it.

It makes no difference that Nevada law currently spreads its regulations of reproductive freedom across multiple titles of the Nevada Revised Statutes. *See* Answering Br. 22–23. *Helton* is clear that petitions may "propose[] more than one change" to existing law. 512 P.3d at 314. And that the Legislature has chosen to address, say, postpartum care and birth control in different statutes does not prove that it was *required* to do so. As Appellant pointed out, legislatures in other states—including some limited by analogous single-subject rules—have opted instead to address reproductive freedom as a single issue, just like the Petition. *See* Opening Br. 16–17 & n.2. To make the Legislature's decision to split up

regulations across multiple statutes controlling would improperly empower the Legislature to thwart the people's reserved "constitutional right to amend their constitution through the initiative process," *Nevadans for Prot. of Prop. Rts., Inc. v. Heller*, 122 Nev. 894, 912, 141 P.3d 1235, 1247 (2006), by the simple expedient of dividing the relevant subject matter across multiple statutory titles. Respondents offer no support for enabling such a gambit.

C. Respondents' other single-subject arguments are unpersuasive.

Respondents offer a grab-bag of other single-subject arguments, none persuasive.

First, Respondents object that the Petition "fails to explain how any right—other than abortion—will be implemented." Answering Br. 25. Respondents do not explain what this complaint has to do with the single-subject requirement, and no such connection is apparent. In any event, constitutional protections are often phrased in expansive terms, leaving to courts and lawmakers the particulars of how "to confine, define, implement, [and] effectuate" constitutional rights. *Id.*; *cf. Educ. Freedom PAC v. Reid*, 138 Nev., Adv. Op. 47, 512 P.3d 296, 307 (2022) (Herndon, J., concurring in part and dissenting in part) ("[C]onstitutional provisions

generally provide certain rights or requirements and then rely on the Legislature to adopt laws to facilitate those provisions[.]"). And Nevada law does not contain some "goose-and-gander requirement" such that every provision of an initiative petition must be specified in equal detail. The fact that abortion is granted particular attention in the Petition's text is neither legally significant nor even surprising.

Second, though Respondents claim that "[t]his Petition clearly constitutes logrolling," Answering Br. 23, its treatment of abortion demonstrates why this is decidedly *not* the case. As the Court has explained, logrolling occurs when "proponents [] try[] to hide an unrelated and unpopular change within [an] 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. If anything, the Petition does the opposite. Respondents complain that the Petition is *overly* focused on abortion, with less emphasis on other aspects of reproductive freedom. Answering Br. 19–22. But abortion is, Respondents say, "the most contentious and polarizing issue in our Nation." *Id.* at 1. That the most controversial facet of reproductive freedom is prominently foregrounded in the Petition—as opposed to

being surreptitiously attached to a more palatable, unrelated topic—underscores that concerns about logrolling do not support the district court's ruling in this matter.[1]

Finally, Respondents misapprehend Appellant's use of "foreign authorities." Answering Br. 26. To begin, Respondents' waiver argument is without merit. *See id.* at 26–27. Although "[a] point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal," *Britz v. Consol. Casinos Corp.*, 87 Nev. 441, 447, 488 P.2d 911, 915 (1971), Appellant's reference to other states' laws and caselaw supports a point that was very much urged at the trial court: that the Petition embraces a single, unified subject. *See, e.g.*, JA 0066–70 (addressing this point in Appellant's Opposition to Respondents' Complaint). Respondents cite nothing for the proposition that *legal authorities* cited on appeal—in support of an argument properly

[1] Additionally, "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.'" *Helton*, 512 P.3d at 315 (quoting *Nevadans for Prot. of Prop. Rts.*, 122 Nev. at 922, 141 P.3d at 1253 (Hardesty, J., concurring in part and dissenting in part)). Because the Petition's provisions are germane to each other and related to the single subject of reproductive health, *see supra* at 6–8, logrolling would not be a concern here in any event.

preserved at the district court—are somehow off limits. *Cf. Zonnebloem, LLC v. Blue Bay Holdings, LLC*, 200 Wash. App. 178, 183 n.1, 401 P.3d 468, 471 n.1 (2017) ("[Applicable appellate rule], which bars errors raised for the first time on appeal, does not prohibit parties from citing new authorities on appeal.").[2]

Moreover, although Respondents claim that "it is unclear how these authorities apply directly to the instant analysis," Answering Br. 27, Appellant previously explained their relevance: demonstrating that, contrary to Respondents' and the district court's conclusions, "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," Opening Br. 13. Ballot initiatives, statutes, and court decisions from other states confirm that the "single right to reproductive freedom protect[s] exactly the sort of activities that the Petition addresses." *Id.* at 19. That the enactment processes and single-subject rules from these other states might differ from Nevada's

[2] The only authority Respondents cite for this point, *Old Aztec Mine, Inc. v. Brown*, concerned an appellant's failure to move the trial court to rule on a counterclaim or amend its judgment to that effect, not citation to new legal authorities on appeal. *See* 97 Nev. 49, 52–53, 623 P.2d 981, 983–84 (1981) (per curiam).

does not vitiate their persuasive authority on this point. *See Helton*, 512 P.3d at 315 & n.4 (finding Alaska Supreme Court precedent "persuasive" even though "Alaska's single-subject requirement is slightly different from" Nevada's).[3]

In sum, the Petition complies with the single-subject requirement because it establishes a single fundamental right—the right to reproductive freedom—and each of its provisions is directly related to establishing, defining, and regulating that right.

II. The Petition includes a legally sufficient description of effect.

Respondents also challenge the Petition's description of effect, but that challenge, too, fails. *See* Opening Br. 35–42.

At the outset, Respondents' waiver argument is unavailing. *See* Answering Br. 31–32. Appellant made the same point before the district court as it does now: that the Petition's description of effect is legally sufficient because it provides a "straightforward, succinct, and

[3] Moreover, Appellant's brief *did* include "description[s] of how . . . these laws were enacted, [] meaningful analys[es] of legal challenges to these laws based on the single-subject rule, [and] comparison[s] between the single-subject rule in Nevada and the other jurisdictions." Answering Br. 28; *see also* Opening Br. 13–19 & n.2.

nonargumentative summary of what the initiative is designed to achieve and how it intends to reach those goals." *Helton*, 512 P.3d at 316 (quoting *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 37, 293 P.3d 874, 876 (2013)); *compare* JA 0070–71, 0127–28, *with* Opening Br. 35–36, 42. To support this point, before the district court and now, Appellant argued that courts should not conduct a hyper-technical examination of whether the description covers every possible effect of the initiative, *compare* JA 0070, 0128–30, *with* Opening Br. 40, and that it was inappropriate to require the description to address the initiative's effect on constitutional rights like "equality" and "equal protection," *compare* JA 0071, 0121–22, *with* Opening Br. 41. Indeed, when the district court ruled from the bench at the November 21, 2023, hearing, it expressly addressed the very arguments that Respondents now claim are waived. *See* JA 0135–36, 0138–148.

On the merits, Respondents first argue that the description is misleading because it does not define "provider of health care" and "medically indicated." Answering Br. 32–33. As Appellant explained, this is the exact sort of hyper-technical and hypothetical analysis that is inappropriate when evaluating a description's legal sufficiency. *See*

Opening Br. 38–42; *see also, e.g.*, *Educ. Initiative PAC*, 129 Nev. at 47–48, 293 P.3d at 882–83. Moreover, the Petition *itself* does not define those terms, and the measure's application to a "hypothetical set of facts" may not be assessed at the preelection stage. *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 889, 141 P.3d 1224, 1232 (2006). "If the measure passes, then it may be applied and interpreted according to well settled rules of statutory construction." *Id.* at 889–90, 141 P.3d at 1232.

Respondents next complain about the description's explanation of the Petition's limitations on prosecutions based on pregnancy outcomes. *See* Answering Br. 33–34. But the description lays it out clearly: "[T]he State may not penalize, prosecute, or take adverse action against any individual based on the outcome of the pregnancy of the individual." JA 0146. It also explains the similar protections for healthcare providers and those who help individuals exercise their right to reproductive freedom.. *Id.* These statements are both accurate and complete. Respondents might wish they were framed as an argument against the Petition instead of neutrally, but the law requires a "*nonargumentative* summary." *Helton*, 512 P.3d at 316 (emphasis added).

Indeed, it is Respondents' own argument that is misleading, and severely so. Contrary to Respondents' argument, the Petition would *not* protect a "domestic abuser" who "cause[s] a miscarriage" from prosecution, Answering Br. 34, because such a prosecution would not be based on the "outcome of the pregnancy *of the individual*" being prosecuted, JA 0015 (emphasis added). Thus, the "fact" that Respondents say is omitted—"that the Petition prohibits the State from prosecuting *any* stillbirth or miscarriage," Answering Br. 33 (emphasis added)—is simply false.

Finally, Respondents argue that the description is misleading because it does not describe potential legal effects on constitutional rights like "equality" and "equal protection." *Id.* at 34, 36. But such a description would be at best premature. As the Court has explained, "[i]f the measure passes, then it may be applied and interpreted according to well-settled rules of statutory construction." *Herbst Gaming*, 122 Nev. at 889–90, 141 P.3d at 1232. Until then, legal analysis of the outcome of hypothetical future litigation is neither required nor appropriate in the description. The fact that the district court "made no rulings [] with respect to the legality of the Petition's equality and equal protection clause" is beside

the point. Answering Br. 36. What matters is that the district court erred in faulting the description for not describing the hypothetical interaction between the Petition and other constitutional and statutory provisions, as it might or might not be construed in future litigation.

III. The Petition does not contain an unfunded mandate.

Respondents' argument that the Petition contains an unfunded mandate also fails. *See* Answering Br. 36–40. While a petition that "directs the Legislature" to "fund" an expenditure requires an appropriation, *Educ. Freedom PAC*, 512 P.3d at 303, a petition that instead "leaves budgeting officials' discretion entirely intact" and "leaves the mechanics of its enforcement with government officials" does *not* require an appropriation, *Herbst Gaming*, 122 Nev. at 891, 141 P.3d at 1233.

The Petition does not require the Legislature to fund anything, and it does not require the State to do anything that would require the expenditure of funds. Instead, all the Petition does is establish a "fundamental right to reproductive freedom," explain the parameters of what that right entails, and *prohibit* State action that infringes upon that right. By prohibiting State action, the Petition would if anything decrease

the scope of potential prosecution, and thus prosecutorial expenditures—not increase them as Respondents improbably argue and the district court wrongly concluded. *See* Opening Br. 44.

In the absence of any language directing or requiring the expenditure of funds, or any activities that would demand the expenditure of funds, Respondents have simply made up a funding requirement based on a series of unlikely contingencies. They posit that a government official might eventually decide to commence a prosecution based on an abortion and, in doing so, decide to fund a medical review board to support such a prosecution with physician testimony about the applicable standard of care. *See* Answering Br. 38–39. But the Petition requires none of that: It never mentions a "review board" or otherwise justifies Respondents' hypothetical concerns. *See* JA 0015–17. Rather, the Petition would "leave[] budgeting officials' discretion entirely intact" and "leave[] the mechanics of its enforcement with government officials," and not require an appropriation. *Herbst Gaming*, 122 Nev. at 891, 141 P.3d at 1233.[4]

[4] Respondents also claim that it is "readily foreseeable" that the Petition would "certainly lead to arguments that it creates a funding obligation

IV. The existence of an alternative initiative petition does not change the result here.

Respondents ask the Court to take judicial notice of another petition, Initiative Petition C-05-2023, which proposes to establish a narrower fundamental right to abortion. *See* Answering Br. 40–41. But this alternative petition in no way affects the Court's determination of the legal sufficiency of the Petition at issue here, which seeks to protect a broader fundamental right and complies with the requirements of Nevada law.[5] *Helton* rejected the argument that "if changes in an initiative petition could be brought in two separate petitions, then the single-subject requirement demands that they be so brought." 512 P.3d

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for the State for reproductive services." Answering Br. 39 n.1. But the existence of such an obligation is pure speculation with no basis in the Petition's text. Federal courts recognized a fundamental right to reproductive freedom for decades without ever recognizing a constitutional right to have the government fund abortion care.

[5] Respondents also argue that Initiative Petition C-05-2023 was "redrafted . . . to address a single subject, *i.e.*, abortion," purportedly showing that *this* Petition violates the single-subject requirement. Answering Br. 41. But Respondents have now filed a complaint challenging the *new* petition because, among other claims, it "violates the single-subject rule . . . and therefore is invalid." Complaint for Declaratory and Injunctive Relief at 8, *Washington v. Aguilar*, No. 23 OC 00149 1B (1st Jud. Dist. Ct. Dec. 28, 2023). Respondents' new single-subject claim is no more meritorious than the claim now on appeal, and neither can withstand scrutiny under this Court's precedent.

at 315 n.5 (emphasis omitted). Thus, the existence of a narrower petition does nothing to change the fact that the Petition at issue here satisfies all of Nevada's legal requirements.

CONCLUSION

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

Dated this 8th day of January, 2024.

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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 3,803 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 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 January, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January, 2024, a true and correct copy of **APPELLANT'S REPLY BRIEF** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system:

By: */s/ Dannielle Fresquez*
Dannielle Fresquez, an Employee of
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