BARBARA K. CEGAVSKE, IN HER OFFICIAL CAPACITY AS NEVADA SECRETARY OF STATE, APPELLANT, *v.* ROBERT HOLLOWOOD, AN INDIVIDUAL; KENNETH BELKNAP, AN INDIVIDUAL; NEVADANS FOR FAIR GAMING TAXES PAC, A NEVADA COMMITTEE FOR POLITICAL ACTION; FUND OUR SCHOOLS PAC, A NEVADA COMMITTEE FOR POLITICAL ACTION; NEVADA RESORT ASSOCIATION, A NEVADA NONPROFIT CORPORATION; AND GREATER LAS VEGAS CHAMBER OF COMMERCE, DBA VEGAS CHAMBER, A NEVADA NONPROFIT CORPORATION, RESPONDENTS.

No. 84420

June 28, 2022 512 P.3d 284

Appeal from a district court order granting writs of mandamus and prohibition barring the Secretary of State from placing initiative petition questions on the ballot. First Judicial District Court, Carson City; James E. Wilson, Judge.

Affirmed in part and reversed in part.

HARDESTY, J., with whom SILVER and PICKERING, JJ., agreed, dissented in part.

Great Basin Law and *Wayne O. Klomp*, Reno, for Appellant.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *Bradley S. Schrager, Daniel Bravo*, and *Eric Levinrad*, Las Vegas; *McLetchie Law* and *Margaret A. McLetchie*, Las Vegas, for Respondents Robert Hollowood, Kenneth Belknap, Nevadans for Fair Gaming Taxes PAC, and Fund Our Schools PAC.

Lewis Roca Rothgerber Christie LLP and *Joel D. Henriod, Daniel F. Polsenberg, Abraham G. Smith*, and *Kory J. Koerperich*, Las Vegas, for Respondents Nevada Resort Association and Greater Las Vegas Chamber of Commerce.

Before the Supreme Court, EN BANC.

OPINION

By the Court, STIGLICH, J.:

This appeal involves two verified initiative petitions to place questions on the ballot for the Nevada 2022 general election and the sponsors' withdrawal of the initiative petitions. Although Nevada law provides a procedure to withdraw an initiative petition and directs that "no further action may be taken on [a withdrawn] petition," NRS 295.026(2), Secretary of State Barbara Cegavske

refused to honor the withdrawals of the two petitions at issue here. The sponsors then sought and obtained writs of mandamus and prohibition from the district court to compel her to recognize the withdrawals and thereby prevent the questions from appearing on the 2022 ballot. The Secretary of State appeals, arguing that the statute setting forth the withdrawal procedure, NRS 295.026, is unconstitutional. We conclude that NRS 295.026 is a permissible exercise of the Legislature's power to enact statutes to facilitate the people's initiative power and is thus not unconstitutional. Because the statute compels the Secretary of State not to act on the withdrawn initiative petitions, the district court properly issued a writ of mandamus compelling the Secretary not to act. But because the act of placing matters on a ballot is ministerial, it is not the sort of action that is subject to prohibition, and therefore the district court abused its discretion in issuing a writ of prohibition. We thus affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

Respondents Robert Hollowood, Kenneth Belknap, Nevadans for Fair Gaming Taxes PAC, and Fund Our Schools PAC sponsored two initiative petitions for the purposes of funding education via an increase in Nevada sales tax and a tax on gaming. The initiative petitions listed Hollowood and Belknap as among the three individuals permitted to withdraw or amend each initiative petition. The sponsors obtained the required signatures and submitted them to the Secretary of State, who verified them and submitted the initiative petitions to the Legislature for consideration. The Legislature did not act on the initiative petitions but did reach an agreement to otherwise increase taxes to fund education. Thereafter, Hollowood and Belknap each filed a petition withdrawal form with the Secretary of State's office.

On request from the Governor's office, the Attorney General issued an opinion as to whether the Nevada Constitution prevents initiative petition sponsors from withdrawing a petition. The Attorney General opined that it did not. 2021-04 Op. Att'y Gen. The opinion (1) framed the Secretary of State's role as ministerial, (2) found no constitutional provisions limiting withdrawal of an initiative petition such that there was no direct conflict between the constitution and the statute, (3) interpreted NRS 295.026 as imposing a procedural right permitting sponsors to withdraw a petition, and (4) concluded that the Secretary's duty to place a matter on the ballot was owed to the sponsors and would be waived by the sponsors' withdrawal of the petition. *Id.*

The Secretary disagreed with the Attorney General opinion, concluded that she had a constitutional duty to place verified initiative petitions on the ballot, and thus refused to recognize the sponsors' withdrawal. The sponsors petitioned the district court for

writs of mandamus and prohibition. Respondents Nevada Resort Association and Greater Las Vegas Chamber of Commerce successfully moved to intervene and joined in the petition. The district court concluded that NRS 295.026 permissibly expands initiative sponsors' rights by providing a clear procedure and deadlines to withdraw a petition. The court further held that the Secretary's duty to place a matter on the ballot presupposed a valid petition and that a withdrawal consistent with NRS 295.026 makes the petition void and thus no longer valid, such that there was no further action for the Secretary to take. The district court therefore issued writs of mandamus and prohibition. The Secretary of State appeals.

DISCUSSION

A writ of mandamus may be sought to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 779 (2011). A writ of prohibition may issue if an individual exercising judicial functions or a tribunal acts in excess of its jurisdiction. NRS 34.320; *Goicoechea v. Fourth Judicial Dist. Court*, 96 Nev. 287, 289-90, 607 P.2d 1140, 1141 (1980). While this court reviews a district court decision to grant or deny a writ petition for an abuse of discretion, *DR Partners v. Bd. of Cty. Comm'rs*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000), questions of statutory or constitutional interpretation are reviewed de novo, *Lawrence v. Clark County*, 127 Nev. 390, 393, 254 P.3d 606, 608 (2011).

A writ of prohibition is not appropriate to bar the Secretary of State's ministerial action

We first resolve the Secretary's challenge to the writ of prohibition. The district court issued a writ of prohibition ordering the Secretary not to place the initiative petitions on the general election ballot. The Secretary argues that the order fails to identify any judicial or quasi-judicial functions being carried out and is therefore deficient. We agree and reverse the portion of the order granting a writ of prohibition.

In addition to barring the extrajurisdictional exercise of judicial power, a writ of prohibition may be issued to curtail the inappropriate exercise of quasi-judicial power, *Mineral County v. State, Dep't of Conservation & Nat. Res.*, 117 Nev. 235, 243-44, 20 P.3d 800, 805-06 (2001), but the writ does not serve to curtail the exercise of ministerial power, *Gladys Baker Olsen Family Tr. ex rel. Olsen v. Eighth Judicial Dist. Court*, 110 Nev. 548, 552, 874 P.2d 778, 781 (1994). After a ballot measure is determined to be procedurally sufficient, the Secretary's duty to place it on the ballot is ministerial. *Las Vegas Taxpayer Accountability Comm. v. City Council of Las*

Vegas, 125 Nev. 165, 172-75, 208 P.3d 429, 434-36 (2009) (requiring that a procedurally proper ballot measure be placed on the ballot and rejecting argument that the duty to do so was not ministerial); *see also Caine v. Robbins*, 61 Nev. 416, 423, 131 P.2d 516, 519 (1942) (quoting with approval authority describing the Secretary of State's publishing proposed constitutional amendments as "ministerial, involving the exercise of no discretion").

The district court erred in concluding that the Secretary of State was subject to a writ of prohibition in this context.[1] *See State ex rel. Marshall v. Down*, 58 Nev. 54, 57, 68 P.2d 567, 567 (1937) (concluding that enacting an amendment to a city charter after it had been approved was ministerial and not judicial and thus not subject to prohibition). Accordingly, we reverse the district court order to the extent that it issued a writ of prohibition.

Mandamus relief was warranted to compel the Secretary of State to take no action on the withdrawn initiative petitions

The district court also issued a writ of mandamus that directed the Secretary of State to withdraw the initiative petitions consistent with NRS 295.026 and her duty to take no further action with respect to the withdrawn petitions. The Secretary argues that the Nevada Constitution does not permit withdrawal of an initiative petition after the signatures have been verified and that she was obligated to place the initiative petitions' questions on the ballot after the Legislature did not act on them. We disagree and affirm the portion of the district court order granting a writ of mandamus.

We review a statute's constitutionality de novo. *Nevadans for Nev. v. Beers*, 122 Nev. 930, 939, 142 P.3d 339, 345 (2006). The challenger must overcome the presumption that a statute is constitutional with a clear showing of invalidity. *Id.* If a statute lends itself to both a constitutional and an unconstitutional interpretation, we apply the interpretation that does not violate the constitution. *Sheriff v. Wu*, 101 Nev. 687, 689-90, 708 P.2d 305, 306 (1985). And in inter-

[1]Decisions of other state courts support this conclusion, distinguishing the quasi-judicial act of determining whether a measure or candidate is eligible for placement on the ballot from the ministerial act of placing that entry on the ballot. For instance, the Ohio Supreme Court has recognized that prohibition was appropriate when an elections board exercised a quasi-judicial power in barring a referendum from the ballot after reviewing the measure in a hearing, *State ex rel. McCann v. Delaware Cty. Bd. of Elections*, 118 N.E.3d 224, 228 (Ohio 2018), whereas merely placing a measure already determined to be sufficient on the ballot is ministerial and thus not subject to the writ of prohibition, *State ex rel. Glass v. Brown*, 368 N.E.2d 837, 837-38 (Ohio 1977). The South Dakota Supreme Court concluded that prohibition would be suitable where the Secretary of State had to determine eligibility for office in deciding whether to certify a candidate. *State ex rel. Grigsby v. Ostroot*, 64 N.W.2d 62, 65 (S.D. 1954). The Oklahoma Supreme Court is in accord, distinguishing such a determination from a ministerial act not subject to the writ. *State ex rel. Heartsill v. Cty. Election Bd. of Carter Cty.*, 326 P.2d 782, 786 (Okla. 1958).

preting a constitutional provision, we look to the rules of statutory construction and interpret unambiguous constitutional provisions according to their plain meaning. *We the People Nev. ex rel. Angle v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1170 (2008). Thus, the state constitution is to be read as a whole, and "the interpretation of a statute or constitutional provision will be harmonized with other statutes or provisions to avoid unreasonable or absurd results." *Id.* at 881, 192 P.3d at 1171.

Article 19, Section 2 of the Nevada Constitution sets forth the people's power to propose or amend a statute and to propose a constitutional amendment. In relevant part, it provides that "the people reserve to themselves the power to propose, by initiative petition, statutes and amendments to statutes and amendments to this Constitution, and to enact or reject them at the polls." Nev. Const. art. 19, § 2(1). An initiative petition must be proposed by a qualifying number of registered voters, as verified by the Secretary of State after the petition has been filed with the Secretary. *Id.* art. 19, §§ 2(2), 3. If the initiative petition "proposes a statute or an amendment to a statute," the Secretary must submit the petition to the Legislature for its consideration in the next session, and the Legislature may enact or reject the proposal as posed. *Id.* art. 19, § 2(3). If the Legislature does not timely act on the petition, "the Secretary of State shall submit the question of approval or disapproval of such statute or amendment to a statute to a vote of the voters at the next succeeding general election." *Id.*

The Nevada Constitution authorizes the Legislature to enact statutes to "facilitate the operation" of the people's initiative power. *Id.* art. 19, § 5. As relevant here, the Legislature has adopted a procedure to withdraw an initiative petition. NRS 295.026(1) provides that "[a] petition for initiative or referendum may be withdrawn if a person authorized pursuant to NRS 295.015 to withdraw the petition submits a notice of withdrawal to the Secretary of State on a form prescribed by the Secretary of State."[2] Withdrawal must be timely. *Id.* After a petition is withdrawn, "no further action may be taken on that petition." NRS 295.026(2).

The Secretary of State has not shown that Article 19 creates public rights that are violated by withdrawal of a verified initiative petition

The Secretary of State first argues that the initiative-petition process vests a right held by the individuals who signed the initiative petition or the voting public in general that precludes the withdrawal of a verified petition. We disagree.

[2]NRS 295.015(1)(b)(3) provides that the initial filing of the petition with the Secretary of State—before any signatures may be obtained—must identify no more than three persons authorized to withdraw the petition.

This court will not interfere with the Legislature's broad power to enact statutes absent "a specific constitutional limitation to the contrary." *Nevadans for Nev.*, 122 Nev. at 939, 142 P.3d at 345. The Secretary's argument rests on Article 19, Section 2 of the Nevada Constitution. But Section 2 does not address withdrawal of an initiative petition. And nothing in Section 2 precludes withdrawal. The Secretary has not identified a specific constitutional limitation on the Legislature's power to enact NRS 295.026.

Rather, Article 19, Section 5 of the Nevada Constitution specifically empowers the Legislature to "provide by law for procedures to facilitate the operation" of the people's power to propose statutory and constitutional amendments by initiative petition. Whether and how a petition might be withdrawn is independent of the substantive proposal in the petition; issues regarding withdrawal more reasonably implicate the Legislature's power to enact facilitating procedural laws than the general reservation of the people's power to propose amendments and to enact or reject them at the ballot box. Indeed, this court has upheld other statutory requirements for initiative petitions that might otherwise be considered improper limitations on the "power to propose" and barred initiative petitions that failed to meet those statutory requirements. *See, e.g.*, *Las Vegas Convention & Visitors Auth. v. Miller*, 124 Nev. 669, 700, 191 P.3d 1138, 1158 (2008) (barring initiative from the ballot for failing to comply with the circulator's affidavit requirement set forth in NRS 295.0575); *Nevadans for Nev.*, 122 Nev. at 940, 950, 142 P.3d at 345, 352 (barring initiative petition violating the statutory single-subject rule after concluding that "NRS 295.009's description of effect requirement and NRS 295.061's proviso allowing for a challenge to that description are legitimate procedures"). Accordingly, if a statute is a permissible exercise of the Legislature's Article 19, Section 5 authority (which we address below with respect to NRS 295.026), then it does not violate the reservation of power by the people in Article 19, Section 2.

The authorities the Secretary relies on to argue that NRS 295.026 infringes on public rights are unavailing. She relies primarily on three scarcely cited cases—*Rea v. City of Reno*, 76 Nev. 483, 357 P.2d 585 (1960); *State v. Scott*, 52 Nev. 216, 285 P. 511 (1930); and *Wilson v. Koontz*, 76 Nev. 33, 348 P.2d 231 (1960)—that are distinguishable and do not stand for the broad propositions asserted.

The Secretary cites *Rea* for the proposition that the initiative process consists of the power to propose a law that *must* then proceed to a vote at the polls. This is incorrect. *Rea* held that the initiative power reserved to the municipality's electors was the power to propose laws; such proposed laws would not be enacted through the initiative petition process itself but only after approval by the voters. 76 Nev. at 486, 357 P.2d at 586. The court in *Rea* thus distinguished the initiative process "from a power which would effect a legisla-

tive act without an election." *Id.* The case does not speak to whether initiative sponsors may withdraw a petition or whether an initiative petition's signatories or the public acquire any rights in a petition.

The Secretary cites *Scott* for the proposition that the signatories control their signatures until the petition has been filed and verified, at which point the public becomes interested and control passes to the public from the signatories, who can no longer remove their signatures. This reads too much into *Scott*. There, the court considered signatories' attempts to withdraw their signatures from a recall petition. 52 Nev. at 224, 285 P. at 512. *Scott* thus involved the power to stage a special election to recall public officers, a different constitutional power than that at issue here. *See* Nev. Const. art. 2, § 9 (stating recall power and procedures). Viewing *Scott*'s holding in context counsels against the Secretary's broad reading. Notably, we have never relied on *Scott* to interpret the initiative power under Article 19, Section 2. Even assuming that *Scott* is instructive notwithstanding this distinction, the court held that the signatories there could not withdraw their signatures because no statute or constitutional provision permitted them to do so. 52 Nev. at 229, 285 P. at 514. *Scott* does not suggest that upon filing of the recall petition the public obtains a vested right precluding its withdrawal. Rather, if anything, it suggests that withdrawal is permissible where, as here, a statute provides for it. *See id.* at 230, 285 P. at 515 (quoting *Bordwell v. Dills*, 66 S.W. 646, 647 (Ark. 1902), for the proposition that the public becomes interested and signers may not withdraw their signatures from a recall petition "[i]n the absence of something in the statute permitting it").

The Secretary takes *Wilson* for the proposition that courts may not read extraconstitutional elements into the initiative power and that to do so frustrates the aim of permitting the people to legislate directly through the initiative process. But *Wilson* merely holds that the initiative petition provisions are self-executing, such that statutes are not needed to give them effect. 76 Nev. at 38-39, 348 P.2d at 233-34. *Wilson* thus has nothing to say about any statutes that are enacted to facilitate the initiative power's operation.

Accordingly, the Secretary of State has not shown that NRS 295.026 is unconstitutional on the premise that it violates the constitutional rights of initiative petition signatories or the public.

Withdrawal voids the initiative petitions such that there is no question for the Secretary of State to place on the ballot

The Secretary of State next argues that NRS 295.026 conflicts with the duty that she "shall" place a question on the ballot following the Legislature's inaction on the petition. The Secretary's argument neglects the obligation to harmonize that duty with the Legislature's power to enact statutes facilitating the people's initiative power. And her argument is especially unpersuasive when

considered in light of our precedent establishing that a withdrawn petition is void and the Secretary of State has no duty to act with respect to a void petition.

Rogers v. Heller is instructive. *Rogers* held an initiative void when it failed to comply with the constitutional requirement that a proposal making an appropriation must be offset by a sufficient tax. 117 Nev. 169, 171, 18 P.3d 1034, 1035 (2001) (applying Article 19, Section 6 of the Nevada Constitution). *Rogers* specifically noted that because the initiative petition was "void, the Secretary of State's transmittal of the Initiative to the Legislature was ineffective, and the Legislature is barred from taking further action on it." *Id.* Three points may be taken from this. First, *Rogers* shows that action may not be taken on a void petition and that a void petition terminates the initiative process and any constitutional duties that might otherwise be owed as part of that process. Second, NRS 295.026 was enacted after *Rogers*, and its mandate in subsection 2 that "no further action may be taken on that [withdrawn] petition" closely mirrors the *Rogers* statement barring the Legislature from "taking further action on" a void initiative, *see* 2017 Nev. Stat., ch. 505, § 30, at 3369 (enacting NRS 295.026), suggesting that the language should be read similarly. Third, *Rogers* concerned an initiative petition that the Secretary of State had verified and transmitted to the Legislature, 117 Nev. at 172, 18 P.3d at 1036, and on which the Legislature did not act after the court barred it from doing so. Under the Secretary of State's reasoning here, the Secretary in *Rogers* would have been compelled to place the question on the ballot because of legislative inaction even though the court had determined the initiative petition was void.[3] That outcome would have been both unreasonable and absurd. It would have presented to the voters a ballot question that was facially unconstitutional. *Rogers* instructs that an initiative on which action may not be taken is void and that a void initiative terminates the process set forth in Article 19, Section 2, including any constitutional duties that might otherwise be owed as part of the initiative process.[4]

[3]The 2002 general election ballot did not include the question proposed by the initiative petition invalidated in *Rogers* (the "Nevada Tax Fairness and Quality School Funding Accountability Act"). *See generally Rogers*, 117 Nev. at 172, 18 P.3d at 1035 (describing the proposed statutory amendment); Dean Heller, Sec'y of State, State of Nev. Statewide Ballot Questions 2002, https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2002.pdf (last visited June 10, 2022).

[4]The Secretary of State takes *Rogers* for the proposition that withdrawing a petition is impermissible because *Rogers* barred the Legislature from altering the proposed amendment to cure the constitutional deficiency. This is mistaken in several regards. First, *Rogers* rejected an argument that the unconstitutional provisions could be severed, concluding that severability applied to formally enacted statutes, not proposed amendments. 117 Nev. at 177, 18 P.3d at 1039. *Rogers* thus considered a narrow issue in that regard. Second, *Rogers* observed

The court reached conclusions similar to *Rogers* in *Glover v. Concerned Citizens for Fuji Park & Fairgrounds*. *Glover* held that an initiative petition concerning an administrative act was not within the initiative power's scope, which encompasses only legislative and not administrative action. 118 Nev. 488, 494, 50 P.3d 546, 549 (2002), *overruled in part on other grounds by Garvin v. Ninth Judicial Dist. Court*, 118 Nev. 749, 59 P.3d 1180 (2002). The court observed that "the requirement that an initiative propose only legislation is a threshold requirement" because it goes to the scope of the people's initiative power and, therefore, "an initiative that fails to meet [this] threshold [requirement] is void." *Id.* at 498-99, 50 P.3d at 552. Like the case before us today, *Glover* involved a verified initiative petition that was not acted on by the legislative entity. *Id.* at 490-91, 50 P.3d at 547-48. Based on the court's decision that it was void, the petition was not ultimately placed on the ballot in that form. *See* Carson City Ballot Questions from 1970 thru Present, at 19, https://www.carson.org/home/showpublisheddocument/37739/635984946921000000 (last visited June 10, 2022) (listing different ballot question involving Fuji Park).

Although *Rogers* and *Glover* involved petitions that were void because they did not comply with constitutional requirements, initiative petitions may also be void if they fail to comply with statutory requirements; voidness thus does not turn solely on constitutional compliance. For example, in *Las Vegas Convention & Visitors Authority v. Miller*, we concluded that signatures on an initiative petition were void when they failed to meet statutory requirements. 124 Nev. 669, 673, 191 P.3d 1138, 1141 (2008). As a result, we concluded that the initiative petition question was barred from appearing on the ballot. *Id.* at 700, 191 P.3d at 1158; *see also Lauritzen v. Casady*, 70 Nev. 136, 261 P.2d 145 (1953) (failure of county commission to schedule election within statutory time requirements rendered the election void).

The Secretary of State argues that this court has held that a petition must be placed on the ballot even if it may be unconstitutional and thus futile, citing *Greater Las Vegas Chamber of Commerce v. Del Papa*, 106 Nev. 910, 802 P.2d 1280 (1990). This misunderstands that decision, which held that an initiative question may not be excluded from the ballot based on the possibility that the substantive change it proposes will be found unconstitutional in

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that the constitution expressly prohibited the Legislature from changing the initiative petition's proposal, which it must enact or reject as posed. *Id.* at 178, 18 P.3d at 1040. In contrast, Article 19 does not expressly address withdrawal whatsoever but does authorize the Legislature to enact statutes that facilitate operation of the initiative power. Third, *Rogers* concluded that the initiative petition "should proceed, *if at all*, as originally proposed and signed." *Id.* at 178, 18 P.3d at 1039-40 (emphasis added). Because the emphasized language indicates it is not a given that the initiative petition must proceed, *Rogers* does not support the proposition that withdrawal is constitutionally improper.

the future should it be approved. *Greater Las Vegas Chamber of Commerce*, 106 Nev. at 917, 802 P.2d at 1281. In fact, *Greater Las Vegas Chamber of Commerce* supports barring the initiatives' questions at issue here from the ballot, given that it recognized that "this court has intervened to prevent a ballot question from going to a vote of the people" where a procedural violation was present. 106 Nev. at 916, 802 P.2d at 1281. Where an initiative sponsor has filed a petition withdrawal form with the Secretary of State to render the initiative void, there is a procedural deficiency, not a substantive deficiency with the proposal. *See Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 883, 141 P.3d 1224, 1228 (2006) (explaining the different types of challenges that may be levied against an initiative petition and providing that challenges "based on asserted procedural defects, are virtually always ripe for preelection review, since the question to be resolved is whether a proposal has satisfied all constitutional and statutory requirements for placement on the ballot").

We conclude that NRS 295.026(2)'s directive that "no further action may be taken on [a] petition" after it has been withdrawn renders a withdrawn initiative petition void. Based on our precedent, a void petition is excluded from the initiative process set forth in Article 19. This construes NRS 295.026 in a way that is constitutional and neither absurd nor unreasonable. It further harmonizes the Legislature's power to enact facilitating laws with the Secretary of State's duty to place measures on the ballot.

NRS 295.026 facilitates the provisions in Article 19 guaranteeing the initiative power to the people

Lastly, the Secretary of State argues that NRS 295.026 does not facilitate the provisions of Article 19 but instead infringes on rights reserved to the people. For the reasons discussed above, NRS 295.026 does not infringe on the reservation provision stated in Article 19, Section 2(1). Further, the statute facilitates the operation of Article 19's provisions guaranteeing the people's initiative power.

As noted, Article 19, Section 5 of the Nevada Constitution provides that the Legislature "may provide by law for procedures to facilitate the operation" of the provisions of Article 19. This court has upheld statutes governing the initiative-petition process where those statutes facilitate rather than obstruct the exercise of the initiative power. *See, e.g.*, *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 37, 293 P.3d 874, 876 (2013) (concluding that the statutorily required description of the initiative's effect facilitates rather than obstructs the initiative power so long as the description is straightforward, succinct, and nonargumentative); *Nevadans for Nev. v. Beers*, 122 Nev. 930, 940, 142 P.3d 339, 345 (2006) (holding that statutes requiring a description of the initiative's effect and permitting a challenge to that description facilitate the people's initiative power); *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*,

122 Nev. 894, 902, 141 P.3d 1235, 1240 (2006) (holding that a statute limiting an initiative to a single subject facilitates the right by preventing sponsors from presenting confusing petitions addressing multiple subjects).

The circumstances surrounding the initiative petitions here demonstrate that the statutory withdrawal process facilitates the initiative power. The sponsors circulated initiative petitions that proposed to raise funds for education by increasing sales and gaming taxes. While the Legislature did not act on the petitions after the Secretary of State transmitted them, it did approve a bill to raise mining taxes to fund education. The sponsoring respondents withdrew the petitions after increased education funding was secured through the legislative representatives of the people during the legislative session. The circumstances motivating the initiative petitions had changed, and the sponsors concluded that the statutory amendments proposed by the petitions were no longer warranted. Providing a means for initiative sponsors to respond to changing circumstances or to the realization of undesirable or unintended consequences facilitates the exercise of the initiative power by making the initiative process more flexible. If a situation changes, sponsors may conclude that a proposal is unwise or that an updated version of the proposal is needed, and NRS 295.026 allows them to adjust accordingly.

Further, it is useful to consider the landscape before NRS 295.026 was enacted. The Deputy Secretary of State for elections testified before the Legislature when the statute was proposed. Hearing on A.B. 478 Before the S. Comm. on Legis. Operations & Elections, 79th Leg., at 14 (Nev., May 3, 2017). He explained that the Secretary of State's office processed withdrawal requests in an ad hoc fashion, lacking any formal process constraining or governing the process. *Id.* He requested statutory guidance on the matter. *Id.* NRS 295.026 makes plain to anyone sponsoring or contemplating sponsoring an initiative that he or she has the power to withdraw it and how to do so. In other words, the statute clarifies an issue that previously caused confusion and inconsistencies. Accordingly, we conclude that NRS 295.026 facilitates the operation of Article 19 and thus is a constitutional exercise of the Legislature's Article 19, Section 5 authority.

Mandamus is appropriate

As detailed, NRS 295.026(2) provides that no action may be taken when a petition has been withdrawn pursuant to its terms. The parties do not dispute the sponsors' compliance with NRS 295.026(1) in filing to withdraw the petitions. NRS 295.026(2) thus bars the Secretary of State from acting on the initiative petitions. As the law compels the Secretary not to place the initiatives' questions on the ballot, the district court did not abuse its discretion in issuing a writ

of mandamus. NRS 34.160 (providing that a writ of mandamus may seek to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station); *see DR Partners v. Bd. of Cty. Comm'rs*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) (reviewing district court's decision on a writ petition for an abuse of discretion); *Lundberg v. Koontz*, 82 Nev. 360, 363, 418 P.2d 808, 809 (1966) ("Mandamus is appropriate to prevent improper action by the Secretary of State, as well as to compel him to perform an act which is his duty under the law.").

CONCLUSION

Article 19 of the Nevada Constitution sets out the initiative petition process, does not specifically bar withdrawal of an initiative petition, and permits the Legislature to enact statutes facilitating the initiative-petition process. NRS 295.026 facilitates this process by stating the withdrawal power and imposing deadlines on its exercise. The statute gives petition sponsors the ability to respond to changed circumstances and clarity as to how and when withdrawal is performed. NRS 295.026 is thus facially constitutional. NRS 295.026 provides that no action may be taken on a petition that has been timely withdrawn. Accordingly, a withdrawn petition is void. Because the petitions here are void, the Secretary's duty to place them on the ballot has been nullified, consistent with our precedent barring placement of void initiative petitions on the ballot, regardless of whether they have been verified. Withdrawal of the initiative petitions does not infringe upon any constitutional right or duty. We therefore affirm the district court's grant of mandamus relief. But because the act of placing a matter on the ballot is ministerial, not judicial or quasi-judicial, and thus was not the type of conduct falling within the scope of a writ of prohibition, we reverse the district court order to the extent that it granted a writ of prohibition.

Parraguirre, C.J., and Cadish and Herndon, JJ., concur.

Hardesty, J., with whom Silver and Pickering, JJ., agree, concurring in part and dissenting in part:

When the Legislature has rejected or not timely acted upon a verified initiative petition proposing a statutory amendment or enactment, Article 19, Section 2(3) of the Nevada Constitution provides that the Secretary of State *shall* submit the question proposed for approval by the voters by placing the question on the next general election ballot. NRS 295.026 obstructs the Secretary's duty in this regard by terminating the mandatory constitutional process set forth here, and the court accordingly should have held NRS 295.026 unconstitutional. I disagree with the majority's conclusion to the contrary and respectfully dissent in part.

The plain language of Article 19, Section 2 of the Nevada Constitution provides all the guidance that the court needs to resolve this appeal. This court applies unambiguous constitutional provisions according to their plain language, *Nevadans for Nev. v. Beers*, 122 Nev. 930, 942, 142 P.3d 339, 347 (2006), and I find no ambiguity in the relevant constitutional provisions here. As the majority correctly observes, this section states the people's power to propose a statute, statutory amendment, or constitutional amendment and to decide on that proposal at the polls. Nev. Const. art. 19, § 2(1).

Critically, Article 19 spells out the precise procedure for exercise of the initiative right in detail, and I maintain that this procedure must be adhered to in order to protect and implement the right it establishes. *See We the People Nev. ex rel. Angle v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1170-71 (2008) ("When the Legislature's intent is clear from the plain language, this court will give effect to such intention and construe the statute's language to effectuate rather than nullify its manifest purpose."). Where an initiative petition proposes to enact or amend a statute, Section 2 requires it to be signed by at least 10 percent of the voters who voted in the most recent general election in at least 75 percent of the state's counties, including at least 10 percent of those who voted statewide. Nev. Const. art. 19, § 2(2). Upon filing with the Secretary of State, circulation of the petition ceases, and that office takes up its charge to verify that the signatures affixed to the petition suffice. *Id*. art. 19, §§ 2(3), 3. Once verified, "[t]he Secretary of State *shall* transmit such petition to the Legislature as soon as the Legislature convenes and organizes." *Id*. art. 19, § 2(3) (emphasis added). Now subject to the Legislature's consideration, "[t]he petition *shall* take precedence over all other measures except appropriation bills, and the statute or amendment to a statute proposed thereby *shall* be enacted or rejected by the Legislature without change or amendment within 40 days." *Id.* (emphases added). If the Legislature wants to substitute something else for what the voters have proposed, the constitution prescribes the route it must pursue: "If the Legislature rejects such proposed statute or amendment, the Governor may recommend to the Legislature and the Legislature may propose a different measure on the same subject, in which event, after such different measure has been approved by the Governor, the question of approval or disapproval of each measure shall be submitted by the Secretary of State to a vote of the voters at the next succeeding general election," together with the version proposed by the petition. *Id*. The plain language of Article 19, Section 2 sets forth the initiative power in exacting detail and gives little doubt that each successive step in its procedure is mandatory. *See* NRS 0.025(1)(d) ("'Shall' imposes a duty to act.").

Looking to the initiative petitions before us, the steps detailed above in Article 19, Section 2 were all followed up to the point that

the Secretary of State transmitted the proposals to the Legislature. However, the essence of the dispute here lies in the Legislature's addition of a new option to those given by Article 19, namely, the withdrawal of an initiative petition. The withdrawal clearly contradicts the next step in the procedure, where after transmittal to the Legislature, if that body rejects or does not timely act on the petition, as here, "the Secretary of State *shall* submit the question of approval or disapproval of such statute or amendment to a statute to a vote of the voters at the next succeeding general election." Nev. Const. art. 19, § 2(3) (emphasis added). Post-transmittal withdrawal that prevents the voters from considering the proposal at the next election is not one of the options the constitution provides. I conclude that the plain language of the provision provides the court with clear guidance: the Secretary must place the initiative petitions' questions on the ballot under the circumstances presented. The majority instead treats the Secretary's constitutional duty here as a matter that may be prematurely nullified by the withdrawal power stated in NRS 295.026. I disagree with the majority's decision to interpret NRS 295.026 so as to deviate from and thwart a clear constitutional obligation. *See Strickland v. Waymire*, 126 Nev. 230, 241, 235 P.3d 605, 613 (2010) ("The constitution may not be construed according to a statute enacted pursuant thereto; rather, statutes must be construed consistent with the constitution—and rejected if inconsistent therewith." (internal quotation marks and citation omitted)).

This obstruction shows that the court should have held NRS 295.026 unconstitutional, as applied to allow withdraw after a proposal has qualified for and been transmitted to the Legislature. While statutes may be enacted to facilitate the initiative petition power, Nev. Const. art. 19, § 5, the court must scrutinize any statute purporting to do so to ensure that it in fact facilitates rather than obstructs the exercise of that power, *see Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 37-38, 293 P.3d 874, 876 (2013) (observing the limitation on the Legislature's power to enact statutes concerning the initiative power). Here, too, I differ with the majority. As applied here, NRS 295.026(2) bars action on an initiative petition that has been withdrawn, even after its transmittal to the Legislature, at which point, assuming the Legislature does not enact the proposed statute, the constitution requires the proposal to be placed on the ballot. By inserting an additional step in the constitutionally outlined process that prevents subsequent popular vote on a withdrawn matter, the statute obstructs the constitutional process set forth in Article 19, Section 2 and thus should be held to constitute an unconstitutional exercise of the Article 19, Section 5 authority that empowers the Legislature to enact laws subject to this important constraint. *Cf. Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 122 Nev. 894, 902, 141 P.3d 1235, 1241

(2006) (rejecting a challenge to a statute's constitutionality where the statute properly facilitated the initiative power). The Article 19 initiative power comprises all of its provisions, and each must be given its force as enumerated; this includes the Secretary's duty to place the questions posed by the initiative petitions here on the ballot. *See Nevadans for Nev.*, 122 Nev. at 944, 142 P.3d at 348 ("The Nevada Constitution should be read as a whole, so as to give effect to and harmonize each provision."). In frustrating the fulfillment of this obligation, NRS 295.026 obstructs instead of facilitates the initiative power. *See Rogers v. Heller*, 117 Nev. 169, 177-78, 18 P.3d 1034, 1039 (2001) (quoting with approval a California Court of Appeals decision recognizing that California's initiative power allowed the people to propose and adopt their own laws, so long as "certain legal procedure be followed to properly place said laws before the voters"); *see also We the People*, 124 Nev. at 891-92, 192 P.3d at 1177-78 (invalidating a statute providing for a filing deadline that conflicted with the inflexible deadlines set forth in Article 19). The court should have concluded its analysis there and determined that the district court abused its discretion in granting writ relief that impeded the constitutional process, specifically, the Secretary of State's constitutionally outlined duty to place the initiative petitions' proposals on the general election ballot after the proposals were transmitted to the Legislature and not enacted.

Instead, the majority turns to voidness to create a break interrupting the constitutional process, without any provision in Article 19 permitting the procedure set forth to be terminated by statute. While our decisions have undoubtedly recognized that petitions are void in certain instances for constitutional violations, *see, e.g.*, *Rogers*, 117 Nev. at 171, 18 P.3d at 1035 (holding that a violation of Article 19, Section 6 of the Nevada Constitution rendered the petition void), and that signatures are void where they fail to substantially comply with statutory requirements, *Las Vegas Convention & Visitors Auth. v. Miller*, 124 Nev. 669, 673, 191 P.3d 1138, 1141 (2008), this court has not concluded that a statutory authorization may enable an entity to interfere with the constitutional process set forth in Article 19. The majority overreaches in taking from this line of authorities the conclusion that NRS 295.026 may constitutionally void a verified initiative petition in the circumstances of this case. I disagree that our precedents encompass the majority's construction of voidness in this context.

As a procedural matter, I agree with the majority that the writ of prohibition was not the proper vehicle for the district court to decide this case. While I concur with the majority to that limited extent, because I disagree that the Secretary of State's constitutional obligation could be negated, I respectfully otherwise dissent.

EDUCATION FREEDOM PAC, Appellant, *v.* RORY REID, an Individual; BEVERLY ROGERS, an Individual; and BARBARA K. CEGAVSKE, in Her Official Capacity as NEVADA SECRETARY OF STATE, Respondents.

No. 84736

June 28, 2022 512 P.3d 296

Appeal from a district court order enjoining an initiative petition's circulation and the initiative's placement on the ballot. First Judicial District Court, Carson City; Charles M. McGee, Senior Judge.

Affirmed.

Herndon, J., with whom Pickering, J., agreed, dissented in part.

Hutchison & Steffen, LLC, and *Jason D. Guinasso, Alexander R. Velto*, and *Astrid Alondra Perez*, Reno, for Appellant.

Aaron D. Ford, Attorney General, *Craig A. Newby*, Deputy Solicitor General, and *Laena St-Jules*, Deputy Attorney General, Carson City, for Respondent Secretary of State.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *Bradley S. Schrager, John M. Samberg*, and *Daniel Bravo*, Las Vegas, for Respondents Rory Reid and Beverly Rogers.

Before the Supreme Court, En Banc.

OPINION

By the Court, Hardesty, J.:

The Nevada Constitution gives the people the power to enact laws by initiative petition, subject to the petition meeting constitutional and statutory requirements. First and foremost, under the Nevada Constitution, an initiative petition cannot require appropriations or expenditures without providing funding for those appropriations or expenditures. Reading the relevant state constitutional provisions in harmony, this requirement applies to initiatives proposing constitutional or statutory changes. Additionally, by statute, the description of effect for an initiative petition must adequately inform potential signatories about the petition's goal. Lastly, an initiative petition cannot invade the Legislature's primary role of proposing and enacting laws, a function that inherently includes deliberation and debate during legislative sessions, by directing a future Legislature to enact certain laws. This occurs when an initiative petition omits necessary statutory or constitutional changes and instead proposes

a general idea and then directs the Legislature to enact laws to effectuate that idea at some future date.

The initiative before us in this matter falls short of all three of these requirements. Thus, we conclude the district court properly enjoined the circulation of the initiative petition and enjoined respondent Secretary of State from placing the initiative on the ballot. We also conclude that the statutory requirement to set a hearing on a complaint challenging an initiative within 15 days is directory, not mandatory, and under the circumstances here, the district court properly declined to dismiss the complaint despite not having set the hearing within that time frame.

FACTS AND PROCEDURAL HISTORY

Appellant Education Freedom PAC (EFP) seeks to place an initiative on the ballot that would amend the Nevada Constitution to require the Legislature to establish education freedom accounts for parents to use to pay for their child's education if their child is educated outside of the uniform system of common schools. The initiative seeks to add the following single section to Article 11 of the Nevada Constitution:

> No later than the school year commencing in 2025, and on an ongoing basis thereafter, the Legislature shall provide by law for the establishment of education freedom accounts by parents of children being educated in Nevada. Parents shall be authorized to use the funds in the accounts to pay for the education of their child in full or in part in a school or educational environment that is not a part of the uniform system of common schools established by the Legislature. The Legislature shall appropriate money to fund each account in an amount comparable to the amount of funding that would otherwise be used to support the education of that child in the uniform system of common schools. The Legislature shall provide by law for an eligibility criteria for parents to establish an education freedom account.

The initiative petition included the following description of effect on the signature pages:

> The initiative will provide parents with the ability to use funds appropriated by the Legislature to pay for the education of their child in a school or educational environment that is not a part of the public school system. The initiative requires the Legislature to establish an education freedom account program under which parents may spend money appropriated by the Legislature into those accounts to pay for some or all of their child's education outside the public school system. The Legislature must establish an eligibility criteria for parents to establish an account.

> The initiative will result in the expenditure of state funds to fund the accounts in an amount comparable to the public support that would be used to support the education of the child for whose benefit the account has been established in a public school. For Fiscal Year 2021-2022, the Legislature determined the statewide base per pupil amount to be $6,980 per pupil. For Fiscal Year 2022-2023, that amount is $7,074 per pupil. Generating the revenue to fund the accounts could necessitate a tax increase or a reduction in government services. The Legislature must establish the program by the start of the school year that commences in 2025.

Respondents Rory Reid and Beverly Rogers (collectively referred to as Reid) filed a complaint for declaratory and injunctive relief challenging the initiative in the district court. On the same day Reid filed his complaint, the assigned district court judge recused himself. Nine days later, Senior Judge Charles McGee was assigned to handle the matter, after Reid exercised a peremptory challenge on the remaining district court judge. EFP then intervened in the matter and filed an answer and a brief challenging the district court's authority to hear the matter given that no hearing had been set within 15 days, as is statutorily required.

Thirty days after Reid filed his complaint, the district court set the matter for a hearing. After the hearing, the court entered an order enjoining EFP from circulating the initiative petition for signatures and enjoining respondent Secretary of State from including the initiative on the ballot. First, the district court concluded that while the hearing had not been set within 15 days after the complaint was filed, dismissal was unnecessary because the hearing was expedited to the best of the court's ability. Second, the court concluded the initiative was invalid for three reasons: (1) the initiative is an unfunded mandate, (2) the description of effect is legally misleading and contains a material omission, and (3) the initiative violates the Nevada Legislature's inherent deliberative functions by commanding the Legislature to enact certain laws. EFP now appeals.

DISCUSSION

The district court properly denied EFP's request to dismiss

We first consider whether the district court properly denied EFP's request to dismiss the complaint because the district court had not set the matter for a hearing within 15 days. NRS 295.061(1) requires a party to file a complaint challenging an initiative petition's description of effect no later than 15 days after the petition is filed with the Secretary of State, which Reid did. The statute also states that "[t]he court shall set the matter for hearing not later than 15 days after the complaint is filed." NRS 295.061(1).

"This court has long held that when a statutory time limit is material, it should be construed as mandatory unless the Legislature intended otherwise." *Village League to Save Incline Assets, Inc. v. State, Bd. of Equalization*, 124 Nev. 1079, 1086, 194 P.3d 1254, 1259 (2008). Determining whether a statute's provision is mandatory or directory is a question of statutory interpretation, which we review de novo. *Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 665, 310 P.3d 569, 572 (2013). "As with most issues pertaining to statutory construction, our goal is to determine and implement the Legislature's intent." *Village League*, 124 Nev. at 1087, 194 P.3d at 1260.

In *Village League*, this court considered the policy and equity considerations underlying a statute that required the State Board of Equalization to conclude certain cases by certain dates. *Id.* at 1087-88, 194 P.3d at 1260. We concluded that requiring cases to conclude by those dates would result in some taxpayer appeals being unheard, thus leading to "harsh, unfair or absurd consequences." *Id.* at 1088, 194 P.3d at 1260-61 (internal quotation marks omitted). Therefore, this court concluded that the statute's time requirements were directory, despite the statute's use of the term "shall." *Id.* at 1089, 194 P.3d at 1261.

Here, under NRS 295.061(1), the court had 15 days after Reid filed the February 22 complaint to set a hearing, and the court did not do so. Instead, after the matter was assigned to Senior Judge McGee, he promptly entered an order, 29 days after the complaint was filed, directing the court clerk to set a hearing for the next week. The next day, the matter was set for a hearing on March 29.

Whether the district court was compelled to dismiss the complaint as a result turns on whether the 15-day hearing-setting requirement is mandatory or directory. Although the statute uses the term "shall," which is generally mandatory, *Markowitz*, 129 Nev. at 665, 310 P.3d at 572, we conclude the 15-day requirement in NRS 295.061(1) is directory, given the legislative history as well as policy and equity considerations implicated by challenges to initiative petitions.

First, the statute's legislative history is instructive. In 2007, the Legislature reduced the statutory time frame to set a hearing from 30 days to 15 days. 2007 Nev. Stat., ch. 113, § 3, at 326-27. When legislators expressed concerns that the shortened time would prevent the adjudication of complaints challenging a petition and "remove the opportunity for those complaints to be fully vetted by the courts," Senator Bob Beers, who proposed the amendment, stated that the statute "does not compromise the ability to adjudicate an issue" and instead merely requires the court to prioritize these cases over the rest of its docket. Hearing on S.B. 230 Before the S. Comm. on Legis. Operations and Elections, 74th Leg. (Nev., Mar. 27, 2007).

Further, a representative from the Secretary of State's Office pointed out that the statute would only require the court to *set* the hearing within 15 days, not *hold* the hearing in that short period of time. Hearing on S.B. 230 Before the Assemb. Comm. on Elections, Procedures, Ethics, and Constitutional Amendments, 74th Leg. (Nev., May 1, 2007). This legislative history demonstrates that legislators wanted to ensure that courts still had an adequate opportunity to properly vet challenges to initiatives, just that the courts do so on a priority basis. Nothing in the legislative history indicates that the Legislature intended the 15-day hearing-setting requirement to be mandatory, such that a court's failure to comply with the requirement would require dismissal of the matter.

Second, public policy supports the conclusion that the hearing-setting requirement is directory. It would be harsh and absurd to dismiss a party's challenge to an initiative merely because the district court failed or was not able to set the hearing within 15 days through no fault of the party filing the complaint.

Although we conclude that the hearing-setting requirement in NRS 295.061(1) is not mandatory, we nonetheless emphasize that district courts must make every effort to comply with the expedited statutory time frame for considering initiative challenges. Because "initiative deadlines in general are relatively short, the district court must expedite any challenges to an initiative." *Personhood Nev. v. Bristol*, 126 Nev. 599, 603, 245 P.3d 572, 575 (2010). Otherwise, challenges to initiative petitions could be used as a delay tactic to prevent an initiative from being placed on the ballot. *See Pest Comm. v. Miller*, 626 F.3d 1097, 1109 (9th Cir. 2010) (recognizing "that challenges by opponents have tied initiative petitions up in litigation for extended periods of time or that, in some cases, they have left the proponents without sufficient time to gather signatures"). Here, special circumstances prevented the district court from timely setting the hearing, and the district court set the hearing as quickly as those circumstances permitted and without excessive delay. Accordingly, because the 15-day requirement for setting the hearing is directory, and considering the special circumstances of this case, the district court did not err in denying EFP's request to dismiss the complaint.

The district court properly enjoined the EFP initiative's circulation and placement on the ballot

Next, we consider the district court's decision to enjoin the circulation of the initiative petition for signatures and to enjoin the Secretary of State from placing the initiative on the ballot. This court reviews de novo a district court's order granting injunctive and declaratory relief. *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 41, 293 P.3d 874, 878 (2013).

The initiative fails to comply with constitutional requirements

EFP argues that its initiative did not need to comply with Article 19, Section 6 of the Nevada Constitution regarding unfunded mandates, and regardless, it complied with that section because the initiative does not include any expenditures or appropriations and leaves it to the Legislature to fund the education freedom accounts.

All initiatives must comply with Article 19, Section 6

EFP contends that it did not have to comply with the requirement to include funding provisions because it proposed only a constitutional change. We disagree.

Article 19, Section 2 of the Nevada Constitution provides that "subject to the limitations of Section 6 of this Article, the people reserve to themselves the power to propose, by initiative petition, statutes and amendments to statutes and amendments to this constitution, and to enact or reject them at the polls." Section 6 provides that Article 19 "does not permit the proposal of any statute or statutory amendment which makes an appropriation or otherwise requires the expenditure of money, unless such statute or amendment also imposes a sufficient tax, not prohibited by the Constitution, or otherwise constitutionally provides for raising the necessary revenue." Nev. Const. art. 19, § 6.

"This court reviews questions of constitutional interpretation de novo." *Ramsey v. City of North Las Vegas*, 133 Nev. 96, 98, 392 P.3d 614, 616 (2017). "Constitutional interpretation utilizes the same rules and procedures as statutory interpretation." *Landreth v. Malik*, 127 Nev. 175, 180, 251 P.3d 163, 166 (2011). This court will first look to the plain meaning of the constitutional provision, and only if it is ambiguous will this court "look to the history, public policy, and reason for the provision." *Id.* A constitutional provision is ambiguous if "it is susceptible to two or more reasonable but inconsistent interpretations." *Id.* (internal quotation marks omitted). Additionally, an internal conflict within the constitutional provision's language can render it ambiguous. *Orion Portfolio Servs. 2, LLC v. County of Clark ex rel. Univ. Med. Ctr. of S. Nev.*, 126 Nev. 397, 402, 245 P.3d 527, 531 (2010). Further, much like when the court construes statutes, in construing constitutional provisions, this court must consider the multiple provisions of the constitutional article as a whole. *See, e.g.*, *id.* at 403, 245 P.3d at 531 (providing that when this court engages in statutory interpretation, it must "consider the statute's multiple legislative provisions as a whole" (internal quotation marks omitted)).

We conclude that Article 19, Section 6 is ambiguous because it conflicts internally with Article 19, Section 2. Article 19, Section 2 provides that all initiative petitions, regardless of whether they propose statutory or constitutional changes, are subject to Article 19,

Section 6's requirement to include funding provisions. Yet, Article 19, Section 6's language mentions proposals of statutes or statutory amendments without reference to proposals of constitutional amendments. Thus, the plain language of Article 19, Section 6 conflicts with the plain language of Article 19, Section 2, and we must look to legislative history and public policy to determine the meaning of Section 2 and Section 6.

Both Article 19, Section 6 and the portion of Article 19, Section 2 providing that all initiatives are subject to Section 6 were proposed in 1971 through the same Senate Joint Resolution. The legislative history makes clear that the primary purpose behind the proposed amendment 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. Specifically, the sponsor of the resolution remarked that it would be "destructive for the people to ignore completely the cost of what they are proposing" and that the proposed amendment was meant to "provide a mechanism where they would have to consider [the] budget and therefore [the electorate could] act in a more informed way." Hearing on S.J.R. 1 Before the S. Judiciary Comm., 55th Leg. (Nev., Feb. 18, 1971) (statement of Senator James I. Gibson). Nothing in the legislative history specifically distinguishes between initiative petitions proposing constitutional changes and those proposing statutory changes. The stated purpose thus indicates that Article 19, Section 6 was intended to apply to initiatives proposing statutory changes and those proposing constitutional amendments.

Public policy supports this conclusion as well because there is no benefit to carving out a loophole for initiative petitions proposing constitutional changes.[1] There is no clearer example of this than the initiative at issue here, which proposes a constitutional amendment that will require significant appropriations yet includes no revenue source for those appropriations. The initiative directs the Legislature to pass or amend laws to create a system for education freedom accounts to be used outside the public school system and to fund those accounts. Thus, the petition amounts to a proposal to adopt or amend statutes that require an appropriation without providing a revenue source. This is exactly what Article 19, Section 6 aims to avoid. Initiative proponents cannot be permitted to create a hole in the state's budget merely because they proposed changes via constitutional amendment, rather than statutory amendment.

Additionally, our caselaw supports the conclusion that initiatives proposing constitutional changes must comply with Article 19, Section 6. We have previously stated that "Section 6 applies to *all*

[1]The dissent argues that public policy precludes the inclusion of funding provisions within the constitution. We are not concluding that funding provisions must be included in the constitution, as they could be addressed by statute.

proposed initiatives, without exception, and *does not permit* any initiative that fails to comply with the stated conditions." *Rogers v. Heller*, 117 Nev. 169, 173, 18 P.3d 1034, 1036 (2001) (emphasis in original). And like our conclusion here, *Rogers* recognized that Article 19, Section 2 requires all initiative petitions to comply with Article 19, Section 6. *Id.* We have also recognized that Article 19, Section 6's "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, Inc. v. Heller*, 122 Nev. 877, 890-91, 141 P.3d 1224, 1233 (2006). This purpose is only achieved if Article 19, Section 6 applies to *all* initiative petitions.

Accordingly, we conclude that all initiative petitions must comply with Article 19, Section 6's requirement that initiatives requiring expenditures or appropriations contain a funding provision. This reading harmonizes Section 6 with the rest of Article 19. *See Orion Portfolio Servs.*, 126 Nev. at 402, 245 P.3d at 531 (providing that we must construe multiple statutory provisions as a whole). Thus, regardless of whether the initiative petition is proposing statutory or constitutional changes, if the initiative requires expenditures or appropriations, it must include funding provisions.

EFP's initiative is an unfunded mandate

Because the underlying initiative must comply with Article 19, Section 6, we next turn to EFP's argument that the district court erred by concluding that the initiative requires an appropriation or expenditure. EFP argues that the initiative does not require money to be taken from the treasury and instead only requires the Legislature to make an appropriation after enacting laws to effectuate the education freedom accounts. Because the initiative does not include any explicit expenditure or appropriation, EFP contends it did not need to include a funding provision. EFP asserts that the funding issue is left up to the Legislature.

This court has recognized that an initiative that "makes an appropriation or requires an expenditure of money" is void if it does not also provide for the necessary revenue. *Rogers*, 117 Nev. at 173, 18 P.3d at 1036. "[A]n appropriation is the setting aside of funds, and an expenditure of money is the payment of funds." *Id.* "A necessary appropriation or expenditure in *any* set amount or percentage is a new requirement that otherwise does not exist." *Id.* at 176, 18 P.3d at 1038. "[A]n 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. Because Article 19, Section 6 is "a threshold content restriction," if an initiative does not comply with that section, the initiative is void. *Rogers*, 117 Nev. at 173, 18 P.3d at 1036.

EFP's initiative clearly requires an appropriation of funds. EFP even acknowledges this in its own description of effect, when it states that the changes may necessitate a tax increase or a reduction in government services. The fact that the initiative leaves it up to the Legislature to determine how to fund the proposed change does not exclude the initiative from the funding mandate. 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. Thus, the initiative does not comply with Article 19, Section 6, and the district court properly determined it is void.

The description of effect is misleading

The district court determined that the initiative's failure to comply with Article 19, Section 6 is not the only reason it is void. It concluded that EFP also failed to provide an adequate description of effect for the initiative. We agree with the district court's analysis as to the description of effect.

NRS 295.009(1)(b) requires each initiative to "[s]et forth, in not more than 200 words, a description of the effect of the initiative . . . if the initiative . . . is approved by the voters." 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." *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 37, 293 P.3d 874, 876 (2013). Also, the description of effect must "not be deceptive or misleading." *Id.* at 42, 293 P.3d at 879. The description of effect "facilitates the constitutional right to meaningfully engage in the initiative process by helping to prevent voter confusion and promote informed decisions." *Las Vegas Taxpayer Accountability Comm. v. City Council of Las Vegas*, 125 Nev. 165, 177, 208 P.3d 429, 437 (2009) (internal quotation marks omitted).

The description of effect here provides that "[t]he initiative will result in the expenditure of state funds to fund the accounts in an amount comparable to the public support that would be used to support the education of the child." It then states that the per-pupil expenditure base for fiscal year 2021-2022 was $6,980 and the per-pupil expenditure base for fiscal year 2022-2023 was $7,074. Lastly, it states that "[g]enerating the revenue to fund the accounts *could* necessitate a tax increase or a reduction in government services." (Emphasis added.)

The description of effect omits the need for or nature of the revenue source to fund the proposed education freedom accounts. Because the initiative petition does not include its own funding source, the description of effect is misleading about the impact the proposed change would have on the state's budget. The inevitable ramification of this initiative is either an increase in taxes or a reduction in public school funding or other government services, and the description of effect's failure to address this substantial impact is a material omission. Additionally, because the examples included in the description of effect are lower than the amounts of actual per-pupil funding for the cited fiscal years,[2] the description of effect misleads signatories into thinking that the impact on the state's resources would be less substantial. The description of effect is deceptive and misleading about the substantial fiscal impact the proposed change would have on the state's budget, and the district court properly determined that these deficiencies render the initiative void. *See Las Vegas Taxpayer*, 125 Nev. at 182, 208 P.3d at 440 (explaining that "the description of effect is a statutory requirement for placement on the ballot").

The initiative impedes the Legislature's deliberative function

Lastly, EFP contends that because there are numerous constitutional provisions directing the Legislature to enact laws to effectuate those provisions, an initiative petition proposing a constitutional amendment that directs the Legislature to enact laws is not improper. Thus, EFP argues that the district court erred in concluding that the initiative petition was void because it would impair the Legislature's inherent deliberative function. We disagree.

As an initial matter, we must determine whether Reid's challenge to the initiative in this regard is proper for our consideration preelection. As we explained in *Herbst Gaming*, and as relevant here, there are two types of challenges to an initiative that are appropriate for preelection consideration: (1) those based on an argument that the initiative did not meet the procedural requirements for placing an initiative on the ballot, and (2) those based on a contention that "the subject matter is not appropriate for direct legislation under constitutional or statutory limits on the initiative power." 122 Nev. at 882-83, 141 P.3d at 1228. The legislative power "refers to the broad authority to enact, amend, and repeal laws." *Halverson v. Hardcastle*, 123 Nev. 245, 260, 163 P.3d 428, 439 (2007). Because Reid's challenge is based on the idea that the Legislature itself would not be permitted to enact the change proposed in the initiative, we conclude his challenge falls under the second type of challenge permitted preelection.

[2]Reid asserts that the correct per-pupil expenditure base for fiscal year 2021-2022 is $10,204 and for fiscal year 2022-2023 is $10,290, and EFP does not contest those numbers.

"The people's initiative power is 'coequal, coextensive, and concurrent' with that of the Legislature; thus, the people have power that is legislative in nature." *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 122 Nev. 894, 914, 141 P.3d 1235, 1248 (2006) (quoting *Gallivan v. Walker*, 54 P.3d 1069, 1080 (Utah 2002)). Because the people's initiative power is legislative in nature, that power is subject to the same limitations placed on each Legislature. "Implicit in the plenary power of each legislature is the principle that one legislature cannot enact a statute that prevents a future legislature from exercising its law-making power," and there is "a general rule that one legislature cannot abridge the power of a succeeding legislature." *Wash. State Farm Bureau Fed'n v. Gregoire*, 174 P.3d 1142, 1150 (Wash. 2007); *see also Ex parte Collie*, 240 P.2d 275, 276 (Cal. 1952) ("It is the general rule that one legislative body cannot limit or restrict its own power or that of subsequent Legislatures and that the act of one Legislature does not bind its successors."); *N.D. Legis. Assemb. v. Burgum*, 916 N.W.2d 83, 91 (N.D. 2018). Thus, the people, acting through the initiative power, can no more command the next Legislature to take specific legislative action than a current Legislature can bind a future one.

Accordingly, if an initiative seeks to effectuate a change, its provisions must include the new laws or amendments to current laws that effectuate that change, rather than directing the Legislature to enact laws to accomplish the initiative's proposed change. "If the people have the power to enact a measure by initiative, they should do so directly . . . ." *Am. Fed'n of Lab. v. Eu*, 686 P.2d 609, 627 (Cal. 1984). By directing the Legislature to enact laws in accordance with the change proposed in the initiative petition, the initiative impairs the Legislature's deliberative function. The Legislature no longer has the discretion to determine whether the enactment of laws giving effect to the initiative's proposed change is proper, warranted, or in the best interest of each individual legislator's constituents.

EFP proposes a constitutional amendment that merely directs the Legislature to enact laws creating education freedom accounts with unspecified eligibility criteria and funding sources. Not only does this impede the Legislature's inherent discretion in adopting or amending laws, but it places an unclear change in front of the electorate by not providing *how* the proposed change will be effectuated. Such initiative petitions are not a permissible exercise of the people's initiative power. Accordingly, we conclude the district court properly declared the underlying initiative void as impairing the Legislature's deliberative function.

CONCLUSION

The district court did not err in denying EFP's request to dismiss Reid's challenge to the initiative petition based on the court's noncompliance with NRS 295.061(1)'s 15-day hearing-setting

requirement, as that requirement is directory rather than mandatory. Additionally, the district court did not err in enjoining the circulation of the initiative petition or in enjoining the Secretary of State from placing the initiative on the ballot. All initiative petitions must comply with Article 19, Section 6 of the Nevada Constitution, which demands that any initiative requiring an appropriation or expenditure must also include a funding provision. Because EFP's initiative does not include funding provisions, it is an unfunded mandate and is void. Further, EFP's description of effect rendered the initiative void because it was misleading about the impact the proposed change would have on the state's budget. Lastly, the initiative would impair the Legislature's inherent deliberative function because it directs the Legislature to enact statutes to effect its goal rather than proposing those laws itself. Accordingly, the initiative is void, and we affirm the district court's injunction.

Parraguirre, C.J., and Stiglich, Cadish, and Silver, JJ., concur.

Herndon, J., with whom Pickering, J., agrees, concurring in part and dissenting in part:

While I concur with the majority's conclusion that NRS 295.061(1)'s 15-day requirement to set a hearing on an initiative challenge is directory, and that the district court properly denied the request to dismiss the complaint under these circumstances, I write separately because I would reverse the district court's order on its merits. First, under the plain language of Article 19, Section 6 of the Nevada Constitution, its funding mandate applies only to initiative petitions proposing statutes or statutory amendments, not to initiatives proposing constitutional amendments. Second, the description of effect here was statutorily sufficient in that it explained the initiative's goal within the 200-word limit without being misleading. Third, there is no precedent precluding initiatives from proposing constitutional amendments that direct the Legislature to enact laws, and respondents did not provide persuasive argument to support adopting such a precedent. Thus, I respectfully dissent.

Article 19, Section 6 applies only to initiatives proposing statutory changes

Any evaluation of Article 19, Section 6 must be done by reading it in harmony with Article 19, Section 2(1). Article 19, Section 2(1) provides that "the people reserve to themselves the power to propose, by initiative petition, statutes and amendments to statutes and amendments to this Constitution, and to enact or reject them at the polls." Nev. Const. art. 19, § 2(1). This language establishes the people's right to engage in three distinct, initiative-based actions: (1) to propose statutes, (2) to propose amendments to existing statutes

and (3) to propose amendments to our state constitution. Article 19, Section 6 expresses a restriction on the initiative process. It "does not permit the proposal of *any statute or statutory amendment* which makes an appropriation or otherwise requires the expenditure of money, unless such statute or amendment also imposes a sufficient tax, not prohibited by the Constitution, or otherwise constitutionally provides for raising the necessary revenue." Nev. Const. art. 19, § 6 (emphasis added). This court has very clearly held that when a constitutional provision is unambiguous, the court will apply it according to the plain language of the provision. *Nevadans for Nev. v. Beers*, 122 Nev. 930, 942, 142 P.3d 339, 347 (2006). Here, the plain language of Section 6 is unambiguous and clearly singles out two distinct initiative-based actions available to the people: proposals for new statutes and proposals for amendments to existing statutes; while specifically excluding a third initiative-based action available to the people: proposals to amend the constitution. The majority broadens Section 6's application by fashioning a conflict between Sections 2 and 6 that does not exist. Section 2 outlines the requirements for all initiative petitions. Thus, its application is intentionally broad. Section 6 discusses a limitation for initiative petitions that applies to those proposing statutory changes only. Its application is therefore very specific. As we have repeatedly recognized, when "a general statutory provision and a specific one cover the same subject matter, the specific provision controls." *In re Resort at Summerlin Litig.*, 122 Nev. 177, 185, 127 P.3d 1076, 1081 (2006). The same interpretive rule applies here. *See Landreth v. Malik*, 127 Nev. 175, 180, 251 P.3d 163, 166 (2011) ("Constitutional interpretation utilizes the same rules and procedures as statutory interpretation."). The fact that Section 6 specifically applies only to initiatives proposing statutory changes does not create a conflict with the broader provisions of Section 2.

Furthermore, the majority ignores another long-standing canon of statutory interpretation: "*expressio unius est exclusio alterius*, 'the expression of one thing is the exclusion of another.'" *Poole v. Nev. Auto Dealership Invs., LLC*, 135 Nev. 280, 285, 449 P.3d 479, 483-84 (Ct. App. 2019). By limiting its application to "any statute or statutory amendment," Section 6 excludes initiatives proposing constitutional changes. This reading harmonizes Section 6 with the rest of Article 19, which distinguishes between petitions proposing statutory changes and those proposing constitutional changes. *See, e.g.*, Nev. Const. art. 19, § 2(3) (setting forth the process for an initiative petition that "proposes a statute or an amendment to a statute"); *id.* § 2(4) (setting forth the process for an initiative petition that "proposes an amendment to the Constitution"). Thus, Article 19, Section 6 is unambiguous and can only be interpreted as applying to initiatives proposing statutory changes.

Even assuming Section 6 is ambiguous, its history supports limiting Section 6 to proposals to enact or amend statutes, not proposals to amend the constitution. *See Strickland v. Waymire*, 126 Nev. 230, 234, 235 P.3d 605, 608 (2010) (noting that "[t]he goal of constitutional interpretation is to determine the public understanding of a legal text leading up to and in the period after its enactment or ratification" (internal quotation marks omitted)). Section 6 was added to the Nevada Constitution by popular vote in 1972. The draft amendment originated in the 1969 Nevada Legislature as Senate Joint Resolution 1. The first draft was written broadly to apply to both proposals for constitutional amendments and to proposals to enact or amend statutes. S.J.R. 1, 55th Leg. (Jan. 20, 1969) ("[t]he provisions of this article do not apply to any measure which . . . makes an appropriation or by its operation requires the expenditure of money"). After discussion, the draft language was narrowed to read, "[t]his article does not permit the proposal of any statute or statutory amendment which makes an appropriation or otherwise requires the expenditure of money unless such statute or amendment also imposes a sufficient tax, not prohibited by the Constitution, or otherwise constitutionally provides for raising the necessary revenue." S.J.R. 1, 55th Leg. (Jan. 20, 1969) (First Reprint). It was in this form that what became Section 6 was submitted to and approved by the voters. And the ballot submitting the addition of Section 6 to the constitution made expressly clear that this limitation on the people's reserved initiative rights only applied to initiatives proposing to enact or amend statutes, not proposals to amend the constitution. Secretary of State, *Constitutional Amendments to Be Voted on in the State of Nevada at the General Election, Nov. 7, 1972*, Question No. 5, 21. Thus, the 1972 explanation of Article 19, Section 6 on the ballot stated that the new section would "prohibit an initiative petition *proposing any statute* which makes an appropriation or requires an expenditure of money, unless the same proposal contains a sufficient valid tax to raise the necessary revenue." *Id.* (emphasis added).

Given its text and history, I cannot agree with the majority's conclusion that this court's perception of sound public policy allows us to read Section 6 as applying to all initiatives. Because a state constitution is meant to be a basic set of laws and principles that set out the framework of the state's government, including a funding provision for each specific basic law and principle within that document would be inappropriate. Additionally, constitutional provisions generally provide certain rights or requirements and then rely on the Legislature to adopt laws to facilitate those provisions, which may include measures for funding. Thus, the Legislature's decision to leave initiatives proposing constitutional changes out of Section 6's funding requirement does not present a public policy concern, since funding provisions are a statutory rather than constitutional matter.

And while the majority relies on *Rogers* and *Herbst Gaming* to support its conclusion that Article 19, Section 6 must apply to all initiatives, those cases concerned initiatives that only proposed statutory amendments. Thus, the court was not, in either case, asked to opine on constitutional amendments, and it did not, in either case, address constitutional amendments. As such, *Rogers*' reference to "all" was clearly limited to proposed *statutory* amendments, and the plain language of Section 6 does not support a broader statement. Accordingly, I conclude the district court erred in determining that the initiative is void as an unfunded mandate because Section 6 excludes constitutional amendments from its funding mandate.

The description of effect was statutorily adequate

Next, I disagree with the majority's conclusion that the description of effect was misleading. 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." *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 37, 293 P.3d 874, 876 (2013). Because the description of effect is limited to only 200 words, it "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.* at 38, 293 P.3d at 876.

"In 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." *Id.* at 41, 293 P.3d at 878 (internal quotation marks omitted). By affirming the district court's decision here, the majority does just that. The district court and the majority conclude that the initiative will create a significant impact on the state's budget if adopted. In reaching this conclusion, however, they went beyond reviewing the description of effect to judging the appropriateness of adopting the initiative as proposed based on a perceived ramification on the state's budget. This court has stated that while the description of effect is meant to prevent voter confusion and promote informed decisions, it does not have to address every possible ramification. *See id.* at 37, 293 P.3d at 876.

The description of effect here is legally sufficient. Considering the 200-word limit, it was straightforward, succinct, and nonargumentative and addressed the initiative's goal and how that goal would be achieved. The description does not have a material omission because it acknowledges the possible effect on taxes or government services. NRS 295.009 does not require more. In particular, the description does not have to be perfect or acknowledge every hypothetical effect. *Id.* at 42, 293 P.3d at 879 (providing that "the description of effect does not need to explain 'hypothetical' effects of an initiative"). Additionally, to the extent the district court found that the examples

of per pupil funding were inaccurate, it could have amended the description to reflect the correct figures. NRS 295.061(3).

The description of effect is only intended to assist signatories with deciding whether to sign the initiative petition. *Educ. Initiative PAC*, 129 Nev. at 43, 293 P.3d at 880 ("The utility of the description of effect is confined to the preliminary phase of the initiative process, when the proponent seeks to garner enough initial support so that the initiative will be considered by the Legislature and the voters."). Once the matter is placed on the ballot, it is accompanied by a neutral summary, which has no word limit, drafted by the Secretary of State and arguments for and against voter approval drafted by two separate, independent committees. NRS 293.250; NRS 293.252. The summary and arguments for and against are what educate voters on whether to approve or reject the initiative. Thus, I disagree with the district court's conclusion that the description of effect is so misleading that it renders the initiative void.

An initiative can propose a constitutional amendment that requires the Legislature to adopt laws

Lastly, I disagree with the majority's conclusion that an initiative petition proposing a constitutional amendment exceeds the people's initiative power if it requires the Legislature to adopt laws to effectuate that amendment. There is no Nevada precedent precluding such initiatives. Further, there are numerous examples within our constitution that require the Legislature to act. *See* Nev. Const. art. 4, § 26 (requiring the Legislature to "provide by law, for the election of a Board of County Commissioners"); Nev. Const. art. 9, § 2 (requiring the Legislature to "provide by law for an annual tax"); Nev. Const. art. 11, § 2 (requiring the Legislature to "provide for a uniform system of common schools"); Nev. Const. art. 12, § 1 (requiring the Legislature to "provide by law for organizing and disciplining the Militia of this State"). The preclusion of initiatives that propose similar constitutional amendments that require the Legislature to act only chills the people's initiative power.

The underlying initiative is not one that is directing the Legislature to adopt a resolution, *see Am. Fed. of Labor v. Eu*, 686 P.2d 609, 627 (Cal. 1984), or apply to the U.S. Congress to attempt to change federal constitutional law, *see In re Initiative Petition No. 364*, 930 P.2d 186, 195-96 (Okla. 1996). Those types of initiatives are improper because they are not enacting laws. In contrast, the underlying initiative proposes a state constitutional amendment. Courts should not prevent the electorate from considering such an initiative petition merely because the initiative does not propose specific statutes or statutory amendments. Placing such a requirement on initiatives creates a slippery slope approach of evaluating initiatives preelection because it puts the court in a position of deter-

mining what level of specificity is appropriate for an initiative to make it on the ballot. That is not this court's role, nor should it be.

Accordingly, I would reverse the district court's order enjoining the circulation of the initiative and enjoining the Secretary of State from placing the initiative on the ballot. Because the initiative is proposing a constitutional change, it did not need to comply with Article 19, Section 6 of the Nevada Constitution. Further, the initiative's description of effect was statutorily adequate. Lastly, there is no preclusion on initiatives proposing constitutional amendments that direct the Legislature to enact laws.

AARON LEIGH-PINK; AND TANA EMERSON, APPELLANTS, *v.* RIO PROPERTIES, LLC, RESPONDENT.

No. 82572

June 30, 2022 512 P.3d 322

Certified question under NRAP 5 concerning the scope of damages under common-law fraudulent concealment and statutory consumer fraud claims. United States Court of Appeals for the Ninth Circuit; Ronald M. Gould and Ryan D. Nelson, Circuit Judges, and Brian M. Cogan, District Judge.[1]

Question answered.

Law Office of Robert A. Waller, Jr., and *Robert A. Waller, Jr.*, Cardiff-by-the-Sea, California, for Appellants.

Cozen O'Connor and *Richard Fama*, New York, New York, *F. Brenden Coller*, Philadelphia, Pennsylvania, and *Karl O. Riley*, Las Vegas; *Lemons, Grundy & Eisenberg* and *Robert L. Eisenberg*, Reno, for Respondent.

Gesund & Pailet, LLC, and *Keren E. Gesund*, Las Vegas, for Amici Curiae Public Citizen, National Association of Consumer Advocates, National Consumer Law Center, and Public Justice.

Jones Lovelock and *Stephen A. Davis* and *Marta D. Kurshumova*, Las Vegas, for Amicus Curiae Legal Aid Center of Southern Nevada, Inc.

Before the Supreme Court, EN BANC.

OPINION

By the Court, STIGLICH, J.:

This case comes to us as a certified question under NRAP 5 from the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit asks us to determine whether a plaintiff has suffered damages for purposes of common-law fraudulent concealment and NRS 41.600 consumer fraud claims if the defendant's actions caused the plaintiff to purchase a product or service the plaintiff would otherwise not have purchased, even if that product or service's value was at least equal to what the plaintiff paid.

In this opinion, we conclude that a plaintiff who receives the true value of the goods or services purchased has not suffered damages

[1]The Honorable Brian M. Cogan, United States District Judge for the Eastern District of New York, sitting by designation.

under theories of common-law fraudulent concealment or NRS 41.600.

BACKGROUND

We accept the facts of the underlying case as stated in the certification order. *See In re Fontainebleau Las Vegas Holdings, LLC*, 127 Nev. 941, 956, 267 P.3d 786, 795 (2011). Appellants Aaron Leigh-Pink and Tana Emerson stayed at respondent Rio Properties, LLC's Rio All-Suite Hotel & Casino in 2017. The Rio comped appellants' room costs but charged appellants a daily $34 resort fee to access telephones, computers, and the fitness room.[2] Although the Rio had previously received a letter from the Southern Nevada Health District informing it that two guests had contracted Legionnaires' disease and informed past guests of the contamination, the Rio did not share this information with incoming guests, including appellants.

Asserting that they should have been informed of the potential for exposure, appellants brought a class action lawsuit in Clark County District Court, alleging, as relevant here, fraudulent concealment and consumer fraud claims under NRS 41.600. Appellants did not contract Legionnaires' disease, nor did the *legionella* bacteria impede their access to the phones, computers, or fitness room included in the resort fees; instead, they based their claims on the Rio's failure to disclose the presence of the *legionella* bacteria and sought to recover their resort fees. The matter was removed to federal court. The federal district court dismissed the action, determining that the appellants suffered no damages. It concluded that the resort fees did not amount to damages because appellants received access to the amenities the fees covered and thus had received the "benefit of their bargain." *Ames v. Caesars Entm't Corp.*, No.: 2:17-cv-02910-GMN-VCF, 2019 WL 11794277, at *2 (D. Nev. Nov. 26, 2019) (internal quotation marks omitted).

Appellants thereafter appealed to the Ninth Circuit, contending *inter alia* that they would not have stayed at the Rio—and would not have paid the resort fee—had the Rio disclosed the *legionella* outbreak. The Ninth Circuit reversed in part and affirmed in part the district court's dismissal of claims. *See Leigh-Pink v. Rio Props., LLC*, 849 Fed. App'x 628 (9th Cir. 2021). However, it left one issue unaddressed: whether appellants suffered damages for purposes of their claims for fraudulent concealment and consumer fraud under NRS 41.600. The Ninth Circuit concluded that this court's caselaw was unclear on this issue and certified the question for this court's consideration. The question presented is this:

> For purposes of a fraudulent concealment claim, and for purposes of a consumer fraud claim under NRS 41.600, has a

[2]The precise amount appellants paid per day in resort fees was $34.01.

> plaintiff suffered damages if the defendant's fraudulent actions caused the plaintiff to purchase a product or service that the plaintiff would not otherwise have purchased, even if the product or service was not worth less than what the plaintiff paid?

Leigh-Pink v. Rio Props., LLC, 989 F.3d 735, 738 (9th Cir. 2021).

DISCUSSION

We decline to rephrase the certified question

As a factual matter, the Ninth Circuit determined that appellants received the true value of their resort fees. Appellants challenge this determination, arguing that the certified question should be rephrased to take into account their position that they did not in fact receive the true value of their fees, i.e., that the value of the amenities covered by their daily resort fee *in a hotel containing legionella bacteria* was less than $34. The Rio contends that the scope of the certified question is limited to those scenarios in which the product or service received "was not worth less than what the plaintiff paid."

This court "is limited to answering the questions of law posed" by the certifying court. *Progressive Gulf Ins. Co. v. Faehnrich*, 130 Nev. 167, 170, 327 P.3d 1061, 1063 (2014) (internal quotation marks omitted). A certified question permits this court to answer "questions of law of this state which may be determinative of the cause then pending in the certifying court." NRAP 5(a); *SFR Invs. Pool 1, LLC v. Bank of N.Y. Mellon*, 134 Nev. 483, 489 n.5, 422 P.3d 1248, 1253 n.5 (2018). This court has the discretion to rephrase a certified question. *Echeverria v. State*, 137 Nev. 486, 488-89, 495 P.3d 471, 474 (2021).

In *Echeverria*, the federal district court certified a question to this court to consider whether Nevada had waived its sovereign immunity from damages liability under federal or state law in a minimum wage action by enacting NRS 41.031(1). *Id.* at 488, 495 P.3d at 474. This court elected to rephrase the certified question to remove the consideration of waiver as it related to state law because the plaintiffs' state-law claims had already been dismissed by the certifying court. *Id.* at 490, 495 P.3d at 475. Neglecting to do so, this court concluded, would have violated the prohibition against issuing advisory opinions. *See id.* at 489, 495 P.3d at 475; *see also Capanna v. Orth*, 134 Nev. 888, 897, 432 P.3d 726, 735 (2018) (noting that this court does not have the power to render advisory opinions).

We decline to restate the certified question as appellants request because doing so would improperly go beyond "answering the questions of law posed" by the Ninth Circuit. *See Progressive Gulf*, 130 Nev. at 170, 327 P.3d at 1063.[3] Appellants challenge the Ninth Circuit's factual determination, which we are bound to accept. *See*

[3]Appellants also argue that they should receive relief for unjust enrichment. We do not consider this claim, as it is beyond the scope of the certified question.

In re Fontainebleau, 127 Nev. at 956, 267 P.3d at 795. Furthermore, appellants have not established that our consideration of the certified question as framed by the Ninth Circuit poses any risk of rendering an advisory opinion. *See Echeverria*, 137 Nev. at 489, 495 P.3d at 475. We thus move on to addressing the certified question as posed by the Ninth Circuit.

A plaintiff has not been damaged for purposes of common-law fraudulent concealment or consumer fraud under NRS 41.600 when they received the true value of the goods or services they purchased

Common-law fraudulent concealment

We first consider the common-law portion of the certified question: whether a fraudulent concealment claim can be sustained where a plaintiff has received the true value of the goods or services purchased. Appellants present no argument in support of answering this portion in the affirmative. The Rio maintains that this court should respond in the negative because the act of concealment and a showing of damages are separate elements of a fraudulent concealment claim under the common law. Therefore, the Rio contends that a plaintiff seeking to recover under a theory of common-law fraudulent concealment must show not only that a defendant concealed a material fact but also that this act caused the plaintiff cognizable damages.

A plaintiff must demonstrate five elements to establish a prima facie case of fraudulent concealment under Nevada law:

> (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; that is, the defendant concealed or suppressed the fact for the purpose of inducing the plaintiff to act differently than she would have if she had known the fact; (4) the plaintiff was unaware of the fact and would have acted differently if she had known of the concealed or suppressed fact; (5) and, as a result of the concealment or suppression of the fact, the plaintiff sustained damages.

Dow Chem. Co. v. Mahlum, 114 Nev. 1468, 1485, 970 P.2d 98, 110 (1998), *overruled in part on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 (2001). This court has explained that

> The measure of damages for fraudulent misrepresentation can be determined in one of two ways. The first allows the defrauded party to recover the benefit-of-his-bargain, that is, the value of what he would have if the representations were true, less what he had received. The second allows the defrauded party to recover only what he has lost out-of-pocket,

> that is, the difference between what he gave and what he actually received.

Randono v. Turk, 86 Nev. 123, 130, 466 P.2d 218, 222-23 (1970) (internal quotation marks omitted); *accord Collins v. Burns*, 103 Nev. 394, 398-99, 741 P.2d 819, 822 (1987).[4]

In *Collins*, a family-owned business misrepresented its profitability to prospective purchasers. 103 Nev. at 396-97, 741 P.2d at 820-21. The purchasers, relying on the information provided by the family, bought the business only to find out that the figures they reviewed were grossly inflated. *Id*. at 396, 741 P.2d at 820. The purchasers alleged that the family had fraudulently misrepresented the business's finances. *Id*. This court determined that the purchasers were entitled to damages equaling their out-of-pocket expenses: "the difference between the amount they paid to the respondents and the actual value of the business at the time of the sale." *Id*. at 399, 741 P.2d at 822.

This court also considered a fraudulent concealment claim in *Hanneman v. Downer*, 110 Nev. 167, 871 P.2d 279 (1994). There, the defendant sold her home to the plaintiffs, who later discovered that over four acres of the property belonged to the federal government. *Id*. at 171, 871 P.2d at 281. The plaintiffs sued the defendant for, among other claims, fraudulent misrepresentation. *Id*. at 171, 871 P.2d at 282. This court determined that the plaintiffs were entitled to out-of-pocket damages that reflected the difference in the value of the property that the plaintiffs received (i.e., the relative worth of the portion of the land not owned by the federal government) when subtracted from the value of the property as it was represented to them. *Id*. at 172-73, 871 P.2d at 283.

Other state high courts have held that a plaintiff bringing a fraudulent concealment claim must demonstrate cognizable damages. In *Small v. Lorillard Tobacco Co.*, 720 N.E.2d 892 (N.Y. 1999), New York's highest court held that "an act of deception, entirely independent or separate from any injury, is not sufficient to state a cause of action under a theory of fraudulent concealment."[5] *Id*. at 898. The consumers in *Small* alleged they would not have bought cigarettes had they known that nicotine was highly addictive. *Id*. However, they did not attempt to recover damages for health issues that they may have incurred as a result of their addiction to cigarettes. *Id*. They

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[4]Nevada law treats fraudulent concealment claims similarly to fraudulent misrepresentation claims. *See Poole v. Nev. Auto Dealership Invs., LLC*, 135 Nev. 280, 288 n.3, 449 P.3d 479, 485 n.3 (Ct. App. 2019) (holding "that failure to disclose a fact is equivalent to affirmative representation of that fact's nonexistence").

[5]The *Small* court also rejected the consumers' deceptive trade practice claim under New York's analog to the Nevada Deceptive Trade Practices Act (NDTPA) because they were not able to demonstrate actual or pecuniary harm. *Id*.

only sought to recover the price they paid for the cigarettes, which the court rejected as an unavailing "deception as injury" theory. *Id.*

Brzoska v. Olson stands for a similar proposition as *Small*. *Brzoska* involved dental patients who asserted claims of fraudulent misrepresentation against the estate of their former dentist who concealed his HIV-positive status. 668 A.2d 1355 (Del. 1995). These patients sought damages for, *inter alia*, reimbursement of the fees they paid to the dentist. *Id.* at 1359. None of the patients contracted the HIV virus. *Id*. at 1367. The Delaware Supreme Court noted that recovery for fraudulent misrepresentation is limited to "those damages which are the direct and proximate result of the false representation consisting of the loss of bargain or actual out of pocket losses." *Id*. Since the plaintiffs could not demonstrate they were injured by the dentist's health status and because there was no showing that the dentist performed dental services on the plaintiffs in a deficient manner, the *Brzoska* court determined that the plaintiffs did not suffer any compensable damages. *Id*.

This survey of caselaw is clear: a common-law fraudulent concealment claim requires a plaintiff to demonstrate that they either did not receive the benefit of the bargain or show out-of-pocket losses caused by the defendant's alleged misrepresentation. *See id.*; *Hanneman*, 110 Nev. at 172-73, 871 P.2d at 283; *Collins*, 103 Nev. at 399, 741 P.2d at 822; *Small*, 720 N.E.2d at 898. An act of concealment does not, in and of itself, lead to a cognizable injury under the common law; instead, a corresponding showing that such concealment caused the plaintiff cognizable damages is required. *See Dow Chem.*, 114 Nev. at 1485, 970 P.2d at 110 (establishing that the plaintiff must demonstrate that they sustained damages "*as a result of* the concealment or suppression" (emphasis added)); *see also Small*, 720 N.E.2d at 898 (similar). Where a plaintiff received the value of their purchase, we conclude that they cannot demonstrate that they did not receive the benefit of their bargain or show any out-of-pocket losses, because the value of the goods or services they received is equal to the value that they paid. *See Randono*, 86 Nev. at 130, 466 P.2d at 222-23; *see also Brzoska*, 668 A.2d at 1367 (determining that the plaintiffs' claim failed because they could not demonstrate that the defendant performed deficient services). Here, because appellants received the full value of the amenities covered by their resort fee, they did not suffer any damages. We therefore answer this part of the certified question in the negative.

Consumer fraud under NRS 41.600

Having answered the common-law portion of the certified question, we now consider whether a consumer fraud claim under NRS 41.600 may be sustained where a party has received the true value

of the goods they purchased. We conclude that the party may not, for the reasons that follow.

This court first looks to the plain language of a statute when interpreting a statutory provision. *Clay v. Eighth Judicial Dist. Court*, 129 Nev. 445, 451, 305 P.3d 898, 902 (2013). "When presented with a question of statutory interpretation, the intent of the legislature is the controlling factor . . . ." *Robert E. v. Justice Court*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983). Where a statute is unambiguous, the court does not go beyond its plain language to divine legislative intent. *Id.*

NRS 41.600(1) provides a cause of action to victims of consumer fraud. It defines a deceptive trade practice as outlined in the NDTPA, codified in NRS Chapter 598, as one type of consumer fraud. NRS 41.600(2)(e). A person who knowingly fails to disclose a material fact related to the sale of a good or service has engaged in a deceptive trade practice. NRS 598.0923(1)(b). In a consumer fraud action, "[i]f the claimant is the prevailing party, the court shall award the claimant . . . [a]ny damages that the claimant has sustained." NRS 41.600(3)(a).

The plain language of NRS 41.600(3)(a) counsels this court to conclude that a plaintiff who has suffered no injury has not been damaged under the statute. *Cf. Clay*, 129 Nev. at 451, 305 P.3d at 902. NRS 41.600(3)(a) permits a plaintiff to recover any damages they have "sustained." To "sustain," as in a harm, is "[t]o undergo; suffer." *Sustain*, *Black's Law Dictionary* (11th ed. 2019). The United States Supreme Court has defined damages as "the compensation which the law will award for an injury done." *Scott v. Donald*, 165 U.S. 58, 86 (1897). Combining these definitions, NRS 41.600(3)(a) permits the plaintiff to recover compensation for the injuries they have suffered as a result of the defendant's conduct. Where, as here, the plaintiffs assert only economic injury but have received the true value of their goods or services, we determine that the plaintiffs have not been injured and thus have not "sustained" any damages by the defendant's conduct under NRS 41.600(3)(a).

Our reading of NRS 41.600(3)(a) also has the salutary purpose of coupling the statutory consumer fraud understanding of damages with this court's determination of damages at common law. *See Samantar v. Yousuf*, 560 U.S. 305, 320 (2010) ("The canon of construction that statutes should be interpreted consistently with the common law helps us interpret a statute that clearly covers a field formerly governed by the common law.") To be sure, "[s]tatutory offenses that sound in fraud are separate and distinct from common law fraud." *Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 166, 232 P.3d 433, 436 (2010). And "the NDTPA is a remedial statutory scheme" that should be afforded a liberal construction. *See Poole*, 135 Nev. at 286-87, 449 P.3d at 485; *Welfare Div. of State Dep't of Health, Welfare & Rehab. v. Washoe Cty. Welfare Dep't*, 88 Nev.

635, 637, 503 P.2d 457, 458 (1972). But such a liberal construction must be faithful to the first principles of statutory interpretation. And so where, as here, the plain language of a statutory term is in accord with the term's definition at common law, we elect to interpret them similarly.

The Ninth Circuit draws our attention to the United States District Court for the District of Nevada's decision in *Cruz v. Kate Spade & Co.*, that reached a contrary result. No.: 2:19-cv-00952-APG-BNW, 2020 WL 5848095 (D. Nev. Sept. 30, 2020). While *Cruz* is merely persuasive, rather than binding authority, we take this opportunity to consider it here. *Cf. Lagares v. Camdenton R-III Sch. Dist.*, 68 S.W.3d 518, 528 (Mo. Ct. App. 2001) (determining that federal cases interpreting Missouri law are persuasive); *Stanley v. Reef Sec., Inc.*, 314 S.W.3d 659, 667 n.4 (Tex. App. 2010) (affirming the same proposition under Texas law).

Cruz held that a plaintiff's claim under NRS 41.600 may survive a motion to dismiss even when they received the true value of the goods they purchased. 2020 WL 5848095, at *5. The plaintiff in *Cruz* alleged that Kate Spade listed items on sale, when in actuality the items were never sold for the reference price listed on the clothing tags. *Id*. The plaintiff contended "that she did not get the deal she thought she was getting" and that she would not have purchased the items if she had "known their true market value." *Id.* at *1. However, the plaintiff did not allege that the items she purchased were worth less than what she paid. *Id*. at *5. The district court determined that the plaintiff had sufficiently alleged harm to survive a motion to dismiss because the plaintiff "alleged she would not have purchased the items but for the reference pricing." *Id*. It further noted that a consumer does not have to allege that "her items are worth less than what she paid for them . . . to survive a motion to dismiss." *Id*.

Cruz is not on point. It did not analyze NRS 41.600(3)(a) and merely relied on NRS 41.600(1)'s classification of a "victim" to reach its holding. *See Cruz*, 2020 WL 5848095, at *5. *Cruz* therefore did not consider the meaning of "sustained" and "damages" as used in NRS 41.600(3)(a), and so its applicability in assisting this court to interpret these terms is limited. To the extent *Cruz* would counsel a different result here, we reject it for the reasons stated above. As a result, our analysis is unchanged, and we respond to the certified question's second inquiry in the negative.[6]

[6]Many other jurisdictions have understood their analogs to the NDTPA similarly. *See, e.g.*, *Rule v. Fort Dodge Animal Health, Inc.*, 607 F.3d 250, 253 (1st Cir. 2010) (concluding that a consumer was not damaged under Massachusetts law where she could not demonstrate economic damages); *Mewhinney v. London Wineman, Inc.*, 339 S.W.3d 177, 181 (Tex. App. 2011) (establishing that the appropriate measure of damages under Texas's analog to the NDTPA is "the difference between the amount the company paid and the value it received").

CONCLUSION

We answer this certified question as follows: a plaintiff is not damaged for purposes of a common-law fraudulent concealment claim or an NRS 41.600 consumer fraud claim when they receive the true value of the good or service purchased.

Parraguirre, C.J., and Hardesty, Cadish, Silver, Pickering, and Herndon, JJ., concur.

ROSIE M.; AND HENRY O., APPELLANTS, *v.* IGNACIO A., JR., RESPONDENT.

No. 83023

June 30, 2022 512 P.3d 758

Appeal from a district court order in a paternity and child custody matter. Eighth Judicial District Court, Family Court Division, Clark County; Nadin Cutter, Judge.

Affirmed.

Page Law Firm and *Fred C. Page*, Las Vegas, for Appellants.

McFarling Law Group and *Emily McFarling*, Las Vegas, for Respondent.

Before the Supreme Court, EN BANC.

OPINION

By the Court, STIGLICH, J.:

The Nevada Parentage Act (NPA), contained in NRS Chapter 126, provides the framework by which a person may establish legal parentage of a child. NRS Chapter 125C, in turn, governs child custody and visitation issues, with the best interest of the child guiding the court's decision in such matters. Appellants argue that the district court misinterpreted and misapplied the NPA in concluding that respondent has legal parental rights as to the minor child at issue solely because conclusive DNA test results show that respondent is the child's biological father. Appellants also challenge the district court's resultant child custody decision awarding respondent joint physical custody with the child's mother, arguing that, in addition to being based on an erroneous parentage decision, the court failed to apply the relevant provisions of NRS Chapter 125C and failed to make on-the-record factual findings to support its assessment of the child's best interest in determining physical custody and parenting time.

We affirm. As to the parentage issue, the district court correctly interpreted and applied the NPA in concluding that respondent is conclusively presumed to be the child's legal father based on positive DNA test results and that his status as such gives him rights incident to a parent and child relationship. The district court's finding of paternity authorized it, under NRS 126.161(4), to make an initial determination of custody as between the child's mother and his biological father. The district court's order establishing joint physical custody comported with the record evidence and the preferences stated in NRS Chapter 125C.

FACTS AND PROCEDURAL HISTORY

Appellants Rosie M. and Henry O. were in an off-and-on relationship between 1999 and 2017, residing together part of that time. Rosie was also in an off-and-on relationship with respondent Ignacio A., Jr., between 2008 and approximately 2019. Rosie was never married to either Henry or Ignacio.

In 2011, Rosie became pregnant with A.A., the minor child over whom the parties dispute paternity and custody. When A.A. was born, Rosie and Henry executed a Voluntary Acknowledgment of Paternity (VAP) declaring Henry the only possible father, and Henry was named as the father on A.A.'s birth certificate. Despite a request from Ignacio, Rosie and Henry declined to pursue testing to establish the paternity of A.A.

In 2013, Rosie gave birth to a second child, J.A. Approximately six months after J.A.'s birth, Rosie informed Ignacio that he may be J.A.'s father. Ignacio filed a complaint for custody and was determined to be J.A.'s biological father through paternity testing. A stipulated decree was entered for custody and visitation of J.A.

During his time with J.A., Ignacio had contact with A.A. Ignacio again questioned Rosie about whether he may be A.A.'s father, and Rosie again denied that Ignacio could be A.A.'s father. Henry provided Ignacio with a screenshot of a purported DNA test showing Henry as A.A.'s father. However, Ignacio thought the formatting of the DNA test results looked suspicious. Ignacio completed DNA testing on his own with A.A. and provided the results showing he was A.A.'s biological father to Rosie in early 2017. Rosie did not believe the results, so Ignacio took another test confirming he was A.A.'s father. Despite the results, Rosie continued to deny Ignacio regular visits with A.A.

Ignacio then filed an amended complaint for custody, asserting he was also the father of A.A. Ignacio requested a paternity determination regarding A.A., that A.A.'s name and birth certificate be amended, and that he be awarded joint physical and legal custody of A.A.[1] Ignacio moved to join Henry as a defendant for the limited purpose of determining paternity of A.A. The district court added Henry as a third-party defendant but found "that [Ignacio's] paternity challenge was barred because [A.A.] was over three years old, [Ignacio] failed to demonstrate clear and convincing evidence of fraud, and his claims were barred by claim preclusion."

Ignacio appealed, and we reversed, concluding that the district court improperly denied Ignacio's request for court-ordered paternity testing, and remanded the matter for such testing. *Ignacio A. v. Rosie M.*, No. 77242, 2020 WL 403670 (Nev. Jan. 23, 2020) (Order of Reversal and Remand). We instructed that if Ignacio was found to be

[1]Ignacio also sought to amend the custody decree as to J.A., but custody of J.A. is not at issue in this appeal.

A.A.'s biological father, the district court must determine the issue of paternity based on the procedures set forth in NRS Chapter 126.

On remand, the district court ordered DNA testing regarding A.A., and Ignacio was found to be A.A.'s biological father. At a hearing following the return of the DNA results, the district court set aside its previous order. Following an evidentiary hearing,[2] the district court found that Ignacio is conclusively the biological and legal father of A.A. The court further found that it did not have enough evidence to conclude that Henry presented a fraudulent paternity test to Ignacio but determined that Henry's VAP for A.A. resulted from either a material mistake of fact or fraud. The court determined that the conclusive presumption set forth in NRS 126.051(2) regarding biological testing overcame Henry's VAP and that a paternity dispute such as this one is not time-barred until the child reaches the age of 21. The district court entered a written order concluding "that Ignacio is confirmed as [A.A.]'s father[,]" "that A.A.'s name shall be changed and his birth certificate shall be amended to reflect Ignacio's last name[,]" and "that Ignacio and Rosie shall have joint physical custody of [A.A.], with Ignacio's timeshare to begin immediately." The court further found that this ruling meant "Henry is now considered a third party in this matter" who may, if he so elects, request visitation with A.A. "akin to grandparent visitation." This joint appeal by Rosie and Henry followed.

DISCUSSION

The district court correctly interpreted and applied the NPA in determining that Ignacio is A.A.'s legal father

Rosie and Henry contend the district court improperly found Ignacio to be A.A.'s legal father, asserting the court failed to distinguish between biological and legal paternity. They argue that the district court erred by incorrectly giving greater weight to biology to determine Ignacio is A.A.'s legal father. Relying largely on California caselaw and *Love v. Love*, 114 Nev. 572, 959 P.2d 523 (1998), Rosie and Henry claim that once a child reaches the age of three years, absent clear and convincing evidence of fraud, biology ceases to be the predominant consideration for determining paternity. Furthermore, they maintain that pursuant to NRS 440.610, a person listed as the father on the birth certificate is presumed to be the father of the child if paternity becomes disputed.

We give deference to a district court's factual findings and will not set aside those findings unless they are clearly erroneous or not supported by substantial evidence; however, questions of law are subject to our plenary review. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 672, 221 P.3d 699, 704, 707 (2009); *see also Waldman v. Maini*, 124

[2]Before this hearing, the matter was reassigned from Judge Gerald W. Hardcastle to Judge Nadin Cutter.

Nev. 1121, 1136, 195 P.3d 850, 860 (2008) (providing that issues of statutory interpretation are legal questions reviewed de novo).

To determine parentage, courts look to the NPA, codified at NRS 126.011-.900. *St. Mary v. Damon*, 129 Nev. 647, 652, 309 P.3d 1027, 1031 (2013). Under NRS 126.021(3), a "'[p]arent and child relationship' means the legal relationship existing between a child and his or her natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations. It includes the mother and child relationship and the father and child relationship."[3] A man can establish this "parent and child relationship" by meeting the conditions for a presumption of paternity. *See* NRS 126.041(2)(a) ("The parent and child relationship between a child and . . . man may be established . . . [u]nder this chapter . . . .").

In a paternity dispute, NRS 126.051 controls. *Russo v. Gardner*, 114 Nev. 283, 289, 956 P.2d 98, 102 (1998). Paternity is presumed either rebuttably or conclusively when a man meets certain conditions under NRS 126.051. First, under subsection 1, "[a] man is [rebuttably] presumed to be the natural father of a child if" he and the child's natural mother were married or attempted to get married; "[h]e and the child's natural mother were cohabiting for at least 6 months before the period of conception and continued to cohabit through the period of conception"; or "[w]hile the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child." NRS 126.051(1). These presumptions may be rebutted by clear and convincing evidence in a proceeding challenging paternity and are "rebutted by a court decree establishing paternity of the child by another man." NRS 126.051(3). Second, under subsection 2, "[a] conclusive presumption that a man is the natural father of a child is established if tests for the typing of blood or tests for genetic identification . . . show a probability of 99 percent or more that he is the father . . . ." NRS 126.051(2).[4]

We conclude that the district court properly applied NRS 126.051(2) in determining that the court-ordered DNA test conclusively established Ignacio as A.A.'s natural father. We further conclude that the court properly interpreted the NPA in determining that Ignacio's status as the child's natural father proved a legal parent and child relationship, entitling Ignacio to parental rights with A.A.

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[3]As of June 2021, Nevada law recognizes that a child may have a legal "parent and child relationship" with more than two persons. *See* 2021 Nev. Stat., ch. 512, § 3, at 3404 (amending NRS 126.021(3) to include the following language: "This subsection does not preclude a determination by a court that a child has such a legal relationship with more than two persons."). The district court rendered its decision before this statute's effective date, and the parties do not address it on appeal.

[4]The presumption under subsection 2 may be rebutted only if the man has an identical sibling who may be the father, which is not a factor in this case.

Rosie and Henry fail to establish a legal or factual basis to disturb the district court's parentage determination. First, they do not dispute that the genetic test results establish that Ignacio is the child's natural father. Instead, Rosie and Henry rely on California statutes and caselaw in arguing that once a child reaches the age of three years, DNA testing no longer provides a presumption of paternity. But those authorities are inapposite, as the NPA directly addresses the circumstances here and permits Ignacio to rely on the conclusive genetic test results to establish a father and child relationship with A.A. Specifically, NRS 126.071(1) allows an alleged father, such as Ignacio, to bring an action under the NPA to declare the existence of the father and child relationship, and under NRS 126.081(1), such an action "is not barred until 3 years after the child reaches the age of majority." Ignacio filed his complaint well before that deadline. As to the parentage determination, NRS 126.051(2) provides a conclusive presumption of paternity based on positive genetic test results, and paternity gives rise to a parent and child relationship with corresponding rights under NRS 126.021(3).

Second, Rosie and Henry cite *Love* for the proposition that DNA testing confirming a man as a child's natural father is only *a factor* in determining parentage and argue that the district court gave too much weight to that factor here. When we decided *Love*, however, positive genetic test results provided only a rebuttable presumption of paternity. *See* NRS 126.051 (1995). Citing the then-effective version of the statute, we explained that "[n]owhere in our statutory scheme does the legislature state that the results of a DNA test compel a district court to determine, as a matter of law, that a man is or is not a child's father." *Love*, 114 Nev. at 578, 959 P.2d at 527. However, in 2007, the Nevada Legislature amended NRS 126.051 to provide that positive genetic test results are conclusive on the paternity issue. *See* 2007 Nev. Stat., ch. 337, § 1, at 1524. Consequently, a positive DNA test result is no longer simply *a factor* for the district court to weigh in determining paternity, and *Love* no longer controls to the extent that it conflicts with NRS 126.051(2)'s conclusive presumption of paternity based on such results.

Finally, Rosie and Henry misconstrue NRS 440.610 in arguing that A.A.'s birth certificate is dispositive evidence of Henry's paternity. While Rosie and Henry correctly point out that NRS 440.610 provides that a birth certificate "shall be prima facie evidence of the facts therein stated," they fail to address the remainder of the statute, which provides that if an alleged father was not the spouse of the person who gave birth, "the data pertaining to the parent who did not give birth to a child is not such evidence in any civil or criminal proceeding adverse to the interests of the alleged father . . . if the paternity is controverted." Henry and Rosie were never married to each other, and Ignacio petitioned the court for a determination

of paternity, controverting Henry's paternity of A.A. Thus, Henry's name on A.A.'s birth certificate is not dispositive on the issue of paternity.

Based upon the foregoing, the district court properly determined that under NRS 126.051(2), the conclusive presumption of Ignacio's paternity cannot be rebutted. *See also Presumption*, *Black's Law Dictionary* (11th ed. 2019) (defining a conclusive presumption as "[a] presumption that cannot be overcome by any additional evidence or argument because it is accepted as irrefutable proof that establishes a fact beyond dispute"). And under Nevada's statutory scheme, because Ignacio is the natural father of A.A. and has not had his rights restricted or terminated, he has a "parent and child relationship," "incident to which the law confers or imposes rights, privileges, duties and obligations." NRS 126.021(3). Therefore, we conclude that the district court properly interpreted and applied the NPA in determining that Ignacio is A.A.'s natural father with legal rights attendant to a parent and child relationship.[5]

The district court was not required to engage in an Ellis v. Carucci *analysis and appropriately awarded joint physical custody to Ignacio and Rosie*

Rosie and Henry contend the district court erred by failing to make a custody modification determination under *Ellis v. Carucci*, 123 Nev. 145, 161 P.3d 239 (2007), and by not thoroughly analyzing A.A.'s best interest under NRS 125C.0035(4) to determine the custody arrangement.

We review a child custody determination for an abuse of discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). Under NRS 126.161(4)(a), an order in an action to determine paternity may "[c]ontain any other provision directed against the appropriate party to the proceeding, concerning . . . the custody and guardianship of the child, visitation with the child, . . . or any other matter in the best interest of the child." The Legislature has declared that it is the policy of this state "[t]o ensure that minor children have frequent associations and a continuing relationship with both parents after the parents have ended their relationship" and "[t]o encourage such parents to share the rights and responsibilities of child rearing." NRS 125C.001(1)-(2). Consequently, in an action to determine physical custody, a court should award parents joint

[5]Rosie and Henry additionally argue that the district court exceeded the scope of remand by considering the issue of fraud. We disagree. The district court merely followed the procedures set forth in NRS Chapter 126, as we instructed, to determine paternity and considered Ignacio's challenge to the VAP in doing so. This was appropriate. *See* NRS 126.053(3) (providing that a signed VAP may be challenged "upon the grounds of fraud, duress, or material mistake of fact"); NRS 126.051(2) (providing a conclusive presumption of paternity based on DNA testing).

physical custody unless the best interest of the child requires otherwise. *See* NRS 125C.0035(3)(a) (providing that an award of physical custody to both parents is preferred); *see also* NRS 125C.0035(1) ("In any action for determining physical custody of a minor child, the sole consideration of the court is the best interest of the child.").

In this matter, the district court ordered that Ignacio and Rosie shall have joint physical custody of A.A. and put in place a parenting schedule for roughly equal time, effective immediately after the hearing. The court did not engage in a child custody modification analysis, but it was not required to do so because Ignacio did not seek to modify an existing custody order, as no such order had been entered regarding A.A., and he instead sought an initial custody determination following a decision on paternity. *See* NRS 125C.0015(2) ("If a court has not made a determination regarding the custody of a child, each parent has joint legal custody and joint physical custody of the child until otherwise ordered by a court of competent jurisdiction."); NRS 125C.0045(1) (providing that the district court may "[a]t any time modify or vacate [a custody order]"); *see also Ellis*, 123 Nev. at 150, 161 P.3d at 242 (setting forth a test that applies in evaluating custody *modification* requests). Thus, contrary to Rosie's and Henry's argument, the court properly declined to engage in an *Ellis* analysis.

The district court's custody determination comports with the record facts presented and the preferences that NRS 125C.0025 and NRS 125C.0035(3)(a) establish that joint physical custody ordinarily is in the best interest of the child. Once the district court determined that Ignacio was A.A.'s biological father and that Rosie and Ignacio had no custody order in place as to A.A., NRS 125C.0015(2) gave Ignacio and Rosie joint custody "until otherwise ordered by a court of competent jurisdiction." With that as its starting point, the district court proceeded to determine whether to order something besides joint physical custody based on the evidence and law presented.

Rosie appeared pro se in district court, while Henry and Ignacio each had separate counsel. Before entering its custody order, the district court questioned Rosie about A.A. and his relationship with her, Henry, and Ignacio. In awarding joint physical custody to Ignacio and Rosie, the district court found that "Henry and Rosie intentionally deprived Ignacio of time with [A.A.]" and that, as a result, Ignacio has "missed [A.A.]'s infancy, toddlerhood, and young childhood." This triggered the joint custody preference stated in NRS 125C.0025, which provides that "[w]hen a court is making a determination regarding the physical custody of a child, there is a preference that joint physical custody would be in the best interest of a minor child if . . . [a] parent has demonstrated, or has attempted to demonstrate but has had his or her efforts frustrated by the other parent, an intent to establish a meaningful relationship

with the minor child." The district court also found that "[t]he best interest factor under NRS 125C.0035 which considers 'which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent' incredibly favors Ignacio." In light of the limited record presented, the district court did not abuse its discretion in awarding joint physical custody of A.A. to Rosie and Ignacio, consistent with the parental statutes and preferences stated in NRS 125C.0015, NRS 125C.0025, and NRS 125C.0035(3)(a).[6]

CONCLUSION

We conclude the district court properly applied the NPA in finding that Ignacio is A.A.'s legal father with corresponding parental rights. We further conclude the district court properly determined that Ignacio's status as natural father entitled him to custody rights, and that it did not abuse its discretion in ordering joint physical custody. We therefore affirm the district court's order.

Parraguirre, C.J., and Hardesty, Cadish, Silver, Pickering, and Herndon, JJ., concur.

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[6]We are not persuaded by Rosie's and Henry's argument that Ignacio's failure to obtain a guardian ad litem for A.A. provides an additional basis for reversal and remand. Although the judge who presided over an initial hearing ordered that contact be made with the Children's Attorney Project and that Ignacio must pay guardian ad litem fees, it is the role of the court, not a party, to appoint a guardian ad litem. Moreover, the decision to make the child a party or to appoint a guardian ad litem is committed to the discretion of the district court. *See* NRS 126.101(1) (providing that in a paternity action, the court *may* make the child a party to the action and appoint a guardian ad litem for the child if it determines that doing so is necessary). Here, the court considered Rosie's and Henry's guardian ad litem concerns and decided not to appoint one or to make A.A. a party to the action. We perceive no abuse of discretion in that decision.

YA-LING HUNG AND WEI-HSIANG HUNG, EACH INDIVIDUALLY, AS SURVIVING HEIRS, AND AS CO-ADMINISTRATORS OF THE ESTATE OF TUNG-TSUNG HUNG AND PI-LING LEE HUNG, APPELLANTS, *v.* GENTING BERHAD; GENTING U.S. INTERACTIVE GAMING, INC.; GENTING NEVADA INTERACTIVE GAMING, LLC; AND RESORTS WORLD LAS VEGAS LLC, RESPONDENTS.

No. 83197-COA

June 30, 2022 513 P.3d 1285

Appeal from a district court order dismissing an amended complaint and denying a motion to amend in a tort action. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

Affirmed.

Law Offices of Kevin R. Hansen and *Kevin R. Hansen* and *Amanda A. Harmon*, Las Vegas, for Appellants.

Greenberg Traurig, LLP, and *Mark E. Ferrario, Christopher R. Miltenberger*, and *Elliot T. Anderson*, Las Vegas, for Respondents.

Before the Court of Appeals, GIBBONS, C.J., TAO and BULLA, JJ.

OPINION

By the Court, TAO, J.:

The purpose of an appeal is to remedy an error, whether procedural or substantive, made during the proceedings in the district court. And appellate procedure is clear on the proper way to raise and brief those errors to the reviewing court. Somewhat less clear, however, is how this court will treat an appeal when the appellant only properly challenges a district court's order on a singular issue, even though the outcome of that order rests on multiple alternative grounds. For that narrow reason alone, we take this opportunity to clarify that when a district court provides alternative bases to support its ultimate ruling, and an appellant fails to challenge the validity of each alternative basis on appeal, this court will generally deem that failure a waiver of each such challenge and thus affirm the district court's judgment.

The district court dismissed the operative complaint in the proceedings below on several alternative grounds and denied the appellants' motion to amend. But in their opening brief on appeal, the appellants failed to challenge each of the alternative grounds for dismissal, instead attempting to raise such arguments for the first time in their reply brief. Consequently, we conclude that the appel-

lants waived each such challenge, thereby foreclosing their appeal as it concerns the district court's dismissal ruling. We further conclude that the district court did not abuse its discretion in denying the motion to amend. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

In 2017, an armed assailant walked into Resorts World Manila and set fire to furniture in the casino. Patrons of the hotel and casino ran for safety. Two of those patrons, Tung-Tsung Hung and Pi-Ling Lee Hung, sought refuge in their hotel room closet. While hiding in the closet, Tung-Tsung Hung and Pi-Ling Lee Hung became trapped and died due to smoke inhalation.

Almost two years later, acting individually and in their capacity as co-administrators of their parents' estate, Ya-Ling Hung and Wei Hsiang Hung filed a two-count complaint in Clark County, Nevada, alleging wrongful death and negligence, against Genting Berhad; Genting U.S. Interactive Gaming, Inc.; Genting Nevada Interactive Gaming, LLC; Genting Intellectual Property Pte. Ltd.; Resorts World Inc. Pte. Ltd.; Resorts World Las Vegas LLC; Resorts World Manila; and Kok Thay Lim. Shortly thereafter, the Hungs filed an amended complaint, which ultimately did not change the identity of the named defendants.

Within a month of filing the amended complaint, the Hungs successfully served three of the defendants: Genting Nevada, Genting U.S., and Resorts World Las Vegas. The district court then approved two requests to extend the time to serve the remaining defendants: Genting Berhad, Genting Intellectual Property, Resorts World Inc., Resorts World Manila, and Kok Thay Lim. These defendants, however, were never served.

Together, Genting Nevada, Genting U.S., and Resorts World Las Vegas, along with Genting Berhad, moved to dismiss the amended complaint, arguing that (1) under NRCP 12(b)(2), the district court could not exercise general or specific personal jurisdiction over the Genting defendants; (2) under NRCP 12(b)(5), the amended complaint did not state a claim upon which relief could be granted against Resorts World Las Vegas; (3) under NRCP 12(b)(6), because of the Hungs' failure to serve Resorts World Manila and others, the amended complaint failed to join necessary and indispensable parties; and (4) the complaint should be dismissed under the doctrine of *forum non conveniens*.

In opposing the motion to dismiss, the Hungs' only substantive argument was that the district court could exercise general personal jurisdiction over all the defendants listed in the amended complaint, whether served or unserved, because "Resorts World Las Vegas and Resorts World Manila are [ ] for all intents and purposes, one and the same, owned by the Genting entities." To remedy any other

deficiency in the amended complaint, the Hungs moved to amend and submitted a proposed second amended complaint, which they stated would "narrow[ ] down the proposed parties and dismiss[ ] certain parties who . . . are not known to be directly involved." After holding a hearing on the motions, the district court dismissed the amended complaint under NRCP 12(b)(2), 12(b)(5), 12(b)(6), and the doctrine of *forum non conveniens* and denied the Hungs' motion to amend.

The Hungs now appeal, arguing that reversal is warranted because the district court erred in determining that it could not exercise personal jurisdiction and abused its discretion in denying their motion to amend. But because the Hungs' appeal of the dismissal of the amended complaint suffers from a fatal procedural flaw, and because the district court was within its discretion in denying the motion to amend, we disagree. Therefore, we affirm the district court.

ANALYSIS

An appellant must challenge each of the alternative grounds supporting the district court's ultimate ruling in his or her opening brief

It is well established in Nevada that "[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). It is equally well established that an appellant's failure to timely raise an issue in its briefing on appeal, even if it raised the issue before the district court, generally results in a waiver of that issue. *See Kahn v. Morse & Mowbray*, 121 Nev. 464, 480 n.24, 117 P.3d 227, 238 n.24 (2005) (explaining that issues that are not properly raised on appeal may be deemed waived); *see also* NRAP 28(a) (setting forth the required contents of an appellant's opening brief); NRAP 28(c) (setting forth the required contents of an appellant's reply brief).

A natural result of these fundamental waiver principles is that, when a district court provides independent alternative grounds in support of a decision later challenged on appeal, the appellant generally must successfully challenge all of those grounds in its appellate briefing to obtain a reversal.[1] *See State v. Willis*, 358 P.3d 107, 121 (Kan. Ct. App. 2015) ("When a district court provides alternative bases to support its ultimate ruling on an issue and an appellant

[1]Many other appellate courts have reached the same conclusion. *See, e.g.*, *Hillis v. Heineman*, 626 F.3d 1014, 1019 n.1 (9th Cir. 2010); *Utah ex rel. Div. of Forestry, Fire & State Lands v. United States*, 528 F.3d 712, 724 (10th Cir. 2008); *Kellis v. Estate of Schnatz*, 983 So. 2d 408, 413 (Ala. Civ. App. 2007); *Navajo Nation v. MacDonald*, 885 P.2d 1104, 1112-13 (Ariz. Ct. App. 1994); *Foxley v. Foxley*, 939 P.2d 455, 459 (Colo. App. 1996); *AED, Inc. v. KDC Invs., LLC*, 307 P.3d 176, 181 (Idaho 2013); *Salt Lake County v. Butler, Crockett & Walsh Dev. Corp.*, 297 P.3d 38, 44 (Utah Ct. App. 2013).

fails to challenge the validity of each alternative basis on appeal, an appellate court may decline to address the appellant's challenge to the district court's ultimate ruling."); 5 Am. Jur. 2d *Appellate Review* § 718 (2022 update) ("[W]here a separate and independent ground from the one appealed supports the judgment made below, and is not challenged on appeal, the appellate court must affirm."). And when appellants fail to challenge the alternative grounds in their opening brief, even if they later do so in the reply brief, the failure to raise those issues in the opening brief results in waiver.[2] *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 682-83 (11th Cir. 2014) (concluding the appellants had waived any challenge to the district court's alternative rulings, even though they presented arguments concerning those rulings in their reply brief, because "[t]hose arguments c[a]me too late").

In this case, the district court's order of dismissal rested on four independent alternative grounds: NRCP 12(b)(2), NRCP 12(b)(5), NRCP 12(b)(6), and the doctrine of *forum non conveniens*. But the Hungs' opening brief challenged only the district court's determination regarding personal jurisdiction. Under these circumstances, the failure to properly challenge each of the district court's independent alternative grounds leaves them unchallenged and therefore intact, which results in a waiver of any assignment of error as to any of the independent alternative grounds.[3] And the Hungs have not

[2]This is also in harmony with the general rule that arguments raised for the first time in an appellant's reply brief are deemed waived. *See, e.g.*, NRAP 28(c); *Khoury v. Seastrand*, 132 Nev. 520, 530 n.2, 377 P.3d 81, 88 n.2 (2016) (citing NRAP 28(c) and concluding that an issue raised for the first time in an appellant's reply brief was waived); *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011) (declining to consider an argument that the appellant "raised . . . for the first time in his reply brief, thereby depriving [the respondent] of a fair opportunity to respond"); *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived."); *Bongiovi v. Sullivan*, 122 Nev. 556, 570 n.5, 138 P.3d 433, 444 n.5 (2006) (declining to consider an argument that the appellant first raised in his reply brief, explaining that "reply briefs are limited to answering any matter set forth in the opposing brief").

[3]For example, the district court's application of the doctrine of *forum non conveniens*—which appellants did not properly challenge and which we therefore assume to be correct—is legally sufficient to sustain the dismissal as to all defendants. *See Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 131 Nev. 296, 303, 350 P.3d 392, 397 (2015) (providing that a court may properly dismiss an action for *forum non conveniens* without deciding the issue of personal jurisdiction). We further point out that dismissal is proper under NRCP 12(b)(5) and NRCP 12(b)(6), assuming, as we must in the absence of a proper challenge by appellants, that the district court correctly applied those rules. *See, e.g.*, *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009) (stating the standard for dismissal under NRCP 12(b)(5)); *Olsen Family Tr. v. Eighth Judicial Dist. Court*, 110 Nev. 548, 553-54, 874 P.2d 778, 781-82 (1994) (explaining that failure to join a necessary and indispensable party to a case is fatal to the district court's ability to enter a judgment).

demonstrated otherwise.[4] This logically forecloses their appeal as it concerns the district court's dismissal of the amended complaint.

Indeed, from a practical point of view, for us to reverse the district court's dismissal ruling, we would have to, first, raise challenges on the Hungs' behalf regarding NRCP 12(b)(5), NRCP 12(b)(6), and *forum non conveniens*; second, conceive of reasons to find fault with the district court's resolution of those issues; and then, third, use those reasons to reverse the district court's order. As another court persuasively reasoned in an analogous situation, "[s]uffice it to say, such an exercise of *sua sponte* judicial power would impermissibly place us in the role of advocate—far outside the boundaries of our traditional adjudicative duties." *Johnson v. Commonwealth*, 609 S.E.2d 58, 59-60 (Va. Ct. App. 2005); *see Senjab v. Alhulaibi*, 137 Nev. 632, 633-34, 497 P.3d 618, 619 (2021) ("We will not supply an argument on a party's behalf but review only the issues the parties present."); *see also Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."). So applying this principle, because the Hungs did not challenge each and every one of the district court's independent alternative grounds for dismissal of the complaint, we summarily affirm based on the unchallenged grounds.

The district court did not abuse its discretion in denying the motion to amend

NRCP 15(a)(2) states that after a party has amended its pleading once as a matter of course, "[the] party may amend its pleading only with the opposing party's written consent or the court's leave." Although "[t]he court should freely give leave when justice so requires," *id*., it need not do so if the amendment would be futile. *See Allum v. Valley Bank of Nev.*, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993). On appeal, this court reviews the denial of leave to amend a pleading for an abuse of discretion. *Connell v. Carl's Air Conditioning*, 97 Nev. 436, 439, 634 P.2d 673, 675 (1981).

The Hungs' proposed second amended complaint contains no new factual allegations that remedy the deficiencies the district court found in the first amended complaint. Mainly, they did not plead the necessary elements of an alter-ego theory to impute Resorts World Manila's alleged wrongdoing onto Resorts World Las Vegas or any of the Genting defendants. *See Lorenz v. Beltio, Ltd*., 114 Nev. 795, 807, 963 P.2d 488, 496 (1998) (explaining that to state a claim for alter-ego liability in Nevada, a plaintiff must allege that: "(1) [t]he

[4]In fact, in their reply, the Hungs did not even attempt to dispute the extensive arguments made in the answering brief regarding waiver.

corporation [is] influenced and governed by the person asserted to be its alter ego[;] (2) [t]here [is] such unity of interest and ownership that one is inseparable from the other; and (3) [t]he facts [are] such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice" (third alteration in original) (quoting *Ecklund v. Nev. Wholesale Lumber Co.*, 93 Nev. 196, 197, 562 P.2d 479-80 (1997))). Thus, because the Hungs' proposed amendment would have been futile, the district court did not abuse its discretion in denying their motion for leave to amend.

CONCLUSION

We clarify the basic appellate principle that when a district court provides independent alternative grounds to support its ultimate ruling on an issue, an appellant must properly challenge all those independent alternative grounds. Otherwise, affirmance is warranted on the unchallenged grounds. Accordingly, we affirm the district court's order dismissing the amended complaint and denying the motion to amend.

Gibbons, C.J., and Bulla, J., concur.