SONJIA MACK, Appellant, *v.* BRIAN WILLIAMS; JAMES DZURENDA; ARTHUR EMLING, JR.; and MYRA LAURIAN, Respondents.

No. 81513

December 29, 2022 522 P.3d 434

Certified questions under NRAP 5 concerning a private citizen's enforcement, through a claim for damages, of due-process and search-and-seizure rights guaranteed under the Nevada Constitution and the defense of such actions. United States District Court for the District of Nevada; Andrew P. Gordon, District Judge.

Questions answered in part.

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McLetchie Law and *Margaret A. McLetchie*, Las Vegas; *Roderick & Solange MacArthur Justice Center* and *Megha Ram*, Washington, D.C., and *Rosalind Dillon* and *Daniel Greenfield*, Chicago, Illinois, for Amicus Curiae Roderick & Solange MacArthur Justice Center.

Before the Supreme Court, En Banc.

OPINION

By the Court, Cadish, J.:

The United States District Court for the District of Nevada certified four questions under NRAP 5 concerning a private plaintiff's ability to enforce by private right of action due-process and search-and-seizure rights guaranteed under the Nevada Constitution and a defendant's accompanying ability to defend such actions. While we decline to answer the certified question related to due-process rights, we elect to reframe the remaining certified questions to answer only the determinative issues in this case and, to that end, conclude that a private right of action for money damages exists to vindicate violations of search-and-seizure rights under the Nevada Constitution, but a qualified-immunity defense does not apply to such an action.

FACTS AND PROCEDURAL HISTORY

Appellant Sonjia Mack went to High Desert State Prison (HDSP) to visit an inmate. According to Mack, respondents Arthur Emling and Myra Laurian, officers at HDSP, escorted her to an administrative building, where "Laurian conducted a strip search of Mack" that did not turn up any contraband. Still, after the strip search, Emling interrogated Mack regarding her alleged possession of contraband and knowledge of "ongoing crimes." Following the strip search and interrogation, the HDSP employees refused to allow Mack visitation. Shortly thereafter, Mack received a letter from HDSP indefinitely suspending her visiting privileges and requiring her to obtain written permission from respondents Brian Williams, the Warden of HDSP, or James Dzurenda, the then-Director of the Nevada Department of Corrections (NDOC), to return to HDSP.

As a result of this incident, Mack filed a civil-rights action against respondents (collectively, NDOC parties) in federal district court, asserting violations of her federal and state constitutional rights. As relevant to the certified questions, Mack asserted that Emling and Laurian's allegedly unlawful strip search of her violated her right to procedural due process under Nevada Constitution, Article 1, Section 8 and her right against unreasonable searches and seizures under Article 1, Section 18.[1] The NDOC parties moved for summary judgment on all state and federal claims; however, their motion focused exclusively on the federal claims and offered no arguments specific to the state-law claims. The U.S. District Court denied summary judgment on the state-law claim under Article 1, Section 8 against Emling and Laurian based on its conclusion that qualified immunity does not apply to claims based on state law. The court also denied summary judgment on the state-law claim under Article 1, Section 18 against Emling and Laurian based on its conclusion that genuine disputes of material fact existed as to "whether Mack was seized," "Mack consented to the strip search," and "Emling and Laurian had reasonable suspicion to strip search Mack."

Moving for reconsideration, the NDOC parties argued, for the first time, that there was "no private right of action under the Nevada Constitution." Additionally, they argued that "if such a right exists, Nevada courts would apply the doctrine of qualified immunity." Based on these arguments, the U.S. District Court reconsidered its order to the extent it had allowed the state-law claims to proceed and certified four questions of law to this court:

1. Is there a private right of action under the Nevada Constitution, Article 1, Section 8?

[1]Mack also asserted state constitutional claims against Williams and Dzurenda, but the district court entered summary judgment against her on those claims, and they are not at issue in this matter.

2. Is there a private right of action under the Nevada Constitution, Article 1, Section 18?
3. If there is a private right of action, what immunities, if any, can a state-actor defendant raise as a defense?
4. If there is a private right of action, what remedies are available to a plaintiff for these claims?

We accepted the certified questions and ordered briefing.

DISCUSSION

We elect to reframe and answer some of the certified questions

We have discretion under NRAP 5 to answer questions of Nevada law certified to us by federal courts when no controlling authority exists on those questions of law and they involve "determinative" matters of the case before the certifying court. NRAP 5(a); *see also Progressive Gulf Ins. Co. v. Faehnrich*, 130 Nev. 167, 170, 327 P.3d 1061, 1063 (2014). "A certified question under NRAP 5 presents a pure question of law, which this court answers de novo." *Echeverria v. State*, 137 Nev. 486, 488, 495 P.3d 471, 474 (2021). Accepting "the facts as stated in the certification order and its attachment[s]," if any, we limit our role "to answering the questions of law posed." *In re Fontainebleau Las Vegas Holdings*, 127 Nev. 941, 955-56, 267 P.3d 786, 794-95 (2011) (permitting parties to supply an appendix to give "a greater understanding of the pending action" but disallowing use of the appendix "to contradict the certification order"). We nevertheless maintain "discretion to rephrase the certified questions as . . . necessary" to conform to our long-standing prohibition against advisory opinions. *Echeverria*, 137 Nev. at 488-90, 495 P.3d at 474-75 ("[M]ere considerations of efficiency cannot overcome the firm jurisdictional bar on advisory opinions."). While "further factual and legal development . . . does not make our answers to . . . certified questions impermissibly advisory," we decline to answer certified questions where our answers are "[in]sufficiently outcome-determinative to satisfy NRAP 5," such as where "Nevada law may [not] resolve the case . . . without need of further proceedings." *Parsons v. Colts Mfg. Co.*, 137 Nev. 698, 703, 499 P.3d 602, 606 (2021).

Applying these principles here, we find no controlling authority on a private plaintiff's ability to enforce the at-issue provisions of the Nevada Constitution. Nevertheless, as to the determinative nature of the questions, the U.S. District Court asks us to resolve the availability of a private right of action for violations of procedural due-process and search-and-seizure rights, yet, unlike the search-and-seizure claim, the certification order yields little information about the nature of the procedural due-process claim. While the order mentions that Mack asserts a protected liberty interest

derived from prison regulations related to strip searches, it does not identify that claimed interest. Similarly, the certification order does not specify those regulations and does not describe any process, let alone a deficient one, adopted by state actors that allegedly denied Mack due process. *Cf. Eggleston v. Stuart*, 137 Nev. 506, 511, 495 P.3d 482, 489 (2021) (discussing comparable federal procedural due-process rights and observing that "[p]rocedural due process claims arise where the State interferes with a liberty or property interest and the State's procedure was constitutionally insufficient"). Nor does the certifying court ask us to assume, without independently deciding, any legal principles related to the claim. *See Parsons*, 137 Nev. at 702, 499 P.3d at 606 (recognizing that we "accept the certifying court's determinations [of] . . . its own substantive and procedural law"). The insufficient facts, law, or context in the certification order regarding the nature of the procedural due-process claim would require us, in answering the question posed and in conflict with our caselaw, to conceive of the claim in the abstract and to apply a framework to factual and legal uncertainty. *See, e.g.*, *Applebaum v. Applebaum*, 97 Nev. 11, 12, 621 P.2d 1110, 1110 (1981) ("This court will not render advisory opinions on . . . abstract questions.").

Even putting those concerns aside, our answer on the procedural due-process claim would "have, at best, a speculative impact in determining the underlying case," as the viability of the claim necessarily entails further proceedings before this court regarding whether a cognizable liberty interest exists, and assuming the prison regulations provide a "process," whether the process satisfies our due-process jurisprudence. *See Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 751, 137 P.3d 1161, 1164 (2006). Our answer, then, on that claim may not resolve the matter pending before the certifying court and instead may amount to an advisory opinion. By contrast, the certification order develops the factual and legal nature of the search-and-seizure claim, and our answer, if affirmative, leaves only factual determinations regarding well-settled principles on seizure, reasonable suspicion, and consent. Accordingly, while we decline to answer the first question, we determine it proper to answer the second question.

Moreover, the U.S. District Court calls on us to determine what remedies, if any, are available to private plaintiffs and what immunities, if any, are available to state actors if we conclude a private right of action under the Nevada Constitution exists. But Mack's remaining state-law claims under the Nevada Constitution seek only retrospective monetary relief for the allegedly unlawful strip search. Additionally, the NDOC parties raised only the defense of qualified immunity in their pleadings before the U.S. District Court. We would thus exceed our jurisdictional authority if we addressed

the availability of any and all remedies and defenses to such claims, where only monetary relief and qualified immunity remain determinative of the cause before the district court. *See Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) ("This court's duty is not to render advisory opinions . . . ."); *see also Echeverria*, 137 Nev. at 489, 495 P.3d at 475 (declining to answer a certified question on the State's immunity from liability based on the argument that appellants would assert certain claims later in the case).

Accordingly, we elect to rephrase and address the remaining certified questions to the extent necessary to avoid impermissible responses. Taking our analyses together, we consider the U.S. District Court's certified questions as follows:

1. Is there a private right of action for retrospective monetary relief under the Nevada Constitution, Article 1, Section 18?
2. If there is a private right of action, can a state-actor defendant raise qualified immunity as a defense?

Certified Question 1: The Nevada Constitution Article 1, Section 18 contains an implied private right of action for retrospective monetary relief

Mack contends that the mere articulation of a right in the Nevada Constitution establishes an implied private cause of action for violations of that right. She urges this court to rely on its inherent power and to analogize to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing a federal right of action for damages for violations of the Fourth Amendment), in recognizing a private right of action under the Nevada Constitution. By contrast, the NDOC parties argue that neither the Nevada Constitution nor the Nevada Legislature has authorized monetary relief by private right of action. They contend that the lack of a legislative private right of action for monetary relief in this context forecloses an implied private right of action under the Nevada Constitution. As we discuss in more detail below, we do not find either position, by itself, wholly satisfactory to resolve the first certified question as rephrased.

The Nevada Constitution represents "the direct, positive, and *limiting* voice of the people." *Wren v. Dixon*, 40 Nev. 170, 187, 161 P. 722, 726 (1916) (emphasis added). In discussing our constitution, we have characterized its "prohibitory provisions" as "self-executing," thus "need[ing] no further legislation to put [them] in force." *See id.* at 194, 196, 161 P. at 729, 729 (quoting, in part, *Davis v. Burke*, 179 U.S. 399, 403 (1900)); *Wilson v. Koontz*, 76 Nev. 33, 36-37, 38-39, 348 P.2d 231, 232, 233-34 (1960) (construing as "self-executing" a provision of the Nevada Constitution that "empower[s]" the people to propose and adopt amendments by voter referendum, based in part on express designation in the language of the amendment

and in part on the nature of the amendment). We reaffirmed this principle in *Alper v. Clark County*, emphasizing that constitutional provisions, "as prohibitions on the state and federal government, are self-executing." 93 Nev. 569, 572, 571 P.2d 810, 811 (1977) (discussing, specifically, the Takings Clause under the Nevada Constitution). As one of our sister courts explained, a "self-executing" provision "prohibit[s] certain conduct" by the government, as opposed to "indicat[ing] a general principle or line of policy," such that it does not depend on or require legislation for the people to enjoy or enforce the rights therein. *Jensen v. Cunningham*, 250 P.3d 465, 481-82 (Utah 2011) (quoting, in the second clause, *Spackman v. Bd. of Educ. of Box Elder Cty. Sch. Dist.*, 16 P.3d 533, 535 (Utah 2000)) (concluding that a provision under the Utah Constitution guaranteeing search-and-seizure protections was "self-executing"); *see also Gray v. Va. Sec'y of Transp.*, 662 S.E.2d 66, 71 (Va. 2008) (providing that "constitutional provisions in bills of rights . . . are usually considered self-executing," as they "specifically prohibit particular conduct" by the government (quoting *Robb v. Shockoe Slip Found.*, 324 S.E.2d 674, 681 (Va. 1985))). Drawing on this understanding of self-executing constitutional provisions, we held in *Alper* that the "effect" of the self-executing nature of the provisions "is that they give rise to a cause of action regardless of whether the Legislature has provided any statutory procedure authorizing one. As a corollary, such rights cannot be abridged or impaired by statute." *Alper*, 93 Nev. at 572, 571 P.2d at 812.

Article 1, Section 18 of the Nevada Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches." Nev. Const. art. 1, § 18. Considering the same language in the federal constitution, we have described search-and-seizure rights as "protect[ion] against 'unreasonable' invasions of privacy . . . by the government." *Hiibel v. Sixth Judicial Dist. Court*, 118 Nev. 868, 872, 59 P.3d 1201, 1204 (2002) (discussing the Fourth Amendment to the U.S. Constitution, which is substantively identical to Article 1, Section 18 of the Nevada Constitution). That is, the language of Section 18 imposes "a limitation," as opposed to "an affirmative obligation," on a state actor's "power to act," rendering this provision prohibitory. *See DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989); *cf. Daniel v. Cook County*, 833 F.3d 728, 733 (7th Cir. 2016) (describing the "individual rights" in the analogous U.S. Constitution's Bill of Rights as "negative rights, meaning that [the Bill of Rights] protects individuals from some forms of government intrusions upon their liberty, without imposing affirmative duties on governments to care for their citizens"); *Alper*, 93 Nev. at 572, 571 P.2d at 811 (describing "[t]he right to just compensation for private property taken for the public use" as "prohibitions on the [S]tate"). As our caselaw suggests, the provision,

because of its prohibitory nature, is self-executing and thus is not dependent on "subsequent legislation to carry it into effect." *Wilson*, 76 Nev. at 39, 348 P.2d at 234 (quoting *Willis v. St. Paul Sanitation Co.*, 50 N.W. 1110, 1111 (Minn. 1892)). It thus follows from our decisions in *Alper* and *Wilson* that the self-executing search-and-seizure provision of the Nevada Constitution contains a private cause of action to enforce its proscription, regardless of any affirmative legislative authorization. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

True, a damages remedy does not automatically follow from the conclusion that a private right of action exists. *See Brown v. State*, 674 N.E.2d 1129, 1138 (N.Y. 1996). While we held in *Alper* that a private right of action for money damages exists under the Takings Clause of the Nevada Constitution, that clause specifically contemplates "compensation," so we did not need to deeply analyze the propriety of a damages remedy there. *See Alper*, 93 Nev. at 572, 571 P.2d at 811; *see also* Nev. Const. art. 1, § 8, cl. 3. Helpfully, several other courts have considered the question we confront today regarding the availability of money damages for violations of self-executing provisions of their respective state constitutions. *See, e.g.*, *Katzberg v. Regents of Univ. of Cal.*, 58 P.3d 339, 342-43 (Cal. 2002) (addressing whether the California Constitution's self-executing provision on procedural due process supports an action for money damages); *Godfrey v. Iowa*, 898 N.W.2d 844, 871 (Iowa 2017) ("The Iowa constitutional provision regarding due process of law . . . has traditionally been self-executing without remedial legislation for equitable purposes, and there is no reason to think it is not self-executing for the purposes of damages at law."); *Dorwart v. Caraway*, 58 P.3d 128, 136 (Mont. 2002) ("We conclude that the *Bivens* line of authority buttressed by § 874A of the Restatement (Second) of Torts are sound reasons for applying a cause of action for money damages for violations of those self-executing provisions of the Montana Constitution."); *Brown*, 674 N.E.2d at 1139 (recognizing the New York Constitution's equal-protection and search-and-seizure provisions as "self-executing" and considering the availability of money damages for violations thereof); *Spackman*, 16 P.3d at 538 ("[A] Utah court's ability to award damages for violation of a self-executing constitutional provision rests on the common law. The Restatement (Second) of Torts supports this view.").

Most famously, the U.S. Supreme Court in *Bivens* recognized that, "in the absence of affirmative action by Congress," a private damages action exists for injuries that result from violations of the Fourth Amendment of the U.S. Constitution by federal actors, despite that the amendment "does not in so many words provide"

for such enforcement.[2] *Bivens*, 403 U.S. at 396-97. There, the appellant brought a damages action against federal narcotic agents after they entered his home, "manacled [him] in front of his wife and children," and conducted a warrantless and suspicionless search of his home. *Id.* at 389. In so recognizing a private damages action, the Court observed that its holding "should hardly seem a surprising proposition," given that, "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id.* at 395. In the Court's view, provision of a damages remedy simply accorded with the common practice of courts to "adjust their remedies" as the circumstances demanded "so as to grant the necessary relief." *Id.* at 392 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). Moreover, the Court identified "no special factors counseling hesitation in the absence of affirmative [legislative] action," such as "federal fiscal policy," "equally effective" alternative remedies, or explicit legislative prohibition of such claims. *See id.* at 396-97 (internal quotation marks omitted).

While the *Bivens* decision is persuasive, it is nevertheless incomplete in our view to resolve the first rephrased certified question. As the California Supreme Court observed, the *Bivens* decision asked whether "a court *should create* or *recognize* a tort action premised upon violation of a constitutional provision" absent affirmative legislative action, without addressing whether the at-issue constitutional provision *evidenced an intent* to provide or withhold such an action. *Katzberg*, 58 P.3d at 347-48. Moreover, in subsequent decisions, the U.S. Supreme Court has critiqued the normative approach of the *Bivens* decision based on its view that judicial provision of a remedy for a constitutional violation often encroaches on a legislative task. *See, e.g.*, *Ziglar v. Abbasi*, 582 U.S. 120, 131-37 (2017). That is, the Court's subsequent *Bivens* jurisprudence has treated Congress as "better equipped to create a damages remedy," lest the Court "arrogate legislative power." *Egbert v. Boule*, 596 U.S. 482, 492 (2022) (internal alterations omitted) (quoting, in the second clause, *Hernández v. Mesa*, 589 U.S. 93, 100 (2020)). In so doing, it has narrowed the appropriate circumstances in which a damages remedy exists and has effectively accomplished the result that only Congress may confer a damages remedy on private plaintiffs. *See id.* at 491 (observing that "Congress is 'far more competent than the Judiciary' to weigh such policy considerations. And the Judiciary's authority to do so at all is, at best, uncertain" (internal citations omitted) (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988))).

[2]However, the U.S. Supreme Court did not explicitly premise its decision on the principle of self-executing rights. *See Bivens*, 403 U.S. at 396 (reasoning that while the text of the Fourth Amendment does not explicitly provide an enforcement mechanism for violations therein, settled legal principles nevertheless permit federal courts to provide an available remedy for the invasion of legal rights guaranteed therein).

However, we remain "free to interpret [our] own constitutional provisions" as we see fit, regardless of any similarities between our state and federal constitutions. *See State v. Bayard*, 119 Nev. 241, 246, 71 P.3d 498, 502 (2003) (quoting *Osburn v. State*, 118 Nev. 323, 326, 44 P.3d 523, 525 (2002)) (referencing the search-and-seizure clauses of the U.S. Constitution and the Nevada Constitution); *see also California v. Greenwood*, 486 U.S. 35, 43 (1988). The Nevada Constitution places limitations on legislative action, while it leaves interpretation and enforcement of the Nevada Constitution to the judiciary. *See Wren*, 40 Nev. at 187, 161 P. at 726; *cf. Clean Water Coal. v. M Resort*, 127 Nev. 301, 309, 255 P.3d 247, 253 (2011) (recognizing, in the context of legislative action, the judiciary's obligation "[u]nder constitutional checks and balances principles" to enforce constitutional restrictions on such "law-making authority"). Our caselaw makes clear that when it comes to the self-executing rights contained within our Constitution's provisions, the Legislature lacks the authority to pass legislation that abridges or impairs those rights; likewise, the availability of remedies that follow from violations of those rights does not depend on the Legislature's benevolence or foresight. *Alper*, 93 Nev. at 572, 571 P.2d at 811-12. Thus, we do not view the question before us as simply a battle between judicial and legislative competence. Accordingly, the *Bivens* decision and its progeny do not by themselves resolve whether Mack may enforce her search-and-seizure rights under our Constitution by a private action for money damages.

By contrast, the California Supreme Court has recognized its state constitution similarly embodies the self-executing principle and has developed a framework to approach, on a case-by-case basis, whether to recognize a damages action for violations of an at-issue self-executing constitutional provision. *See Katzberg*, 58 P.3d at 342-43, 350. Its approach—unlike the U.S. Supreme Court's—focuses first on "the language and history of the constitutional provision" at issue to ascertain whether "an affirmative intent either to authorize or to withhold a damages action to remedy a violation" exists. *Id.* at 350. It then enforces any affirmative intent either way. *Id.* We believe this first step reflects our general approach to constitutional interpretation in other contexts, as it treats the plain language of the Constitution as controlling to the extent the language therein expresses an intention to grant or to withhold a private right of action. *See Schwartz v. Lopez*, 132 Nev. 732, 745, 382 P.3d 886, 895 (2016). Moreover, the framework's recognition that the mere absence of any indicative language within a provision does not foreclose a private damages action comports with our recognition that self-executing rights require no specific language or procedure for their private enforcement. *See Alper*, 93 Nev. at 572, 571 P.2d at 812.

But absent such affirmative indication of intent, the California Supreme Court undertakes second a "'constitutional tort' analysis." *See Katzberg*, 58 P.3d at 350. While a "constitutional tort" generally refers to a damages action "for violation of a constitutional right against a government or individual defendants," *Brown*, 674 N.E.2d at 1132, a constitutional-tort analysis denotes a methodology that answers on a case-by-case basis the central question of whether to recognize a private damages action under a state constitution,[3] *see Katzberg*, 58 P.3d at 355. To that end, the California Supreme Court relies on § 874A of the Restatement (Second) of Torts, which several authorities have also described as reflected or illustrated in the *Bivens* decision, although that decision makes no explicit reference to the Restatement approach. *See id.* at 355-57; *see also Brown*, 674 N.E.2d at 1138. Section 874A of the Restatement provides that if

> a provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may provide such remedy if (1) it is in furtherance of the purpose of the [provision] and (2) is needed to assure the effectiveness of the provision.

Restatement (Second) of Torts § 874A (Am. Law Inst. 1979); *see also id.* § 874A cmt. a. As we discuss in more detail below, the Restatement uses a factor-based approach that incorporates flexibility, while encouraging judiciousness in determining whether an at-issue self-executing provision is enforceable by the requested remedy in the absence of affirmative language to the contrary. It also incorporates a degree of deference to legislative determinations insofar as it directs courts to consider the existence of alternative legislatively enacted remedies. Nevertheless, it does not treat legislative action as dispositive, which aligns with our acknowledgment in *Alper* that the Legislature lacks authority to curtail or weaken self-executing rights. *See Alper*, 93 Nev. at 572, 571 P.2d at 812.

Even if the constitutional-tort analysis favors a damages action, the California Supreme Court determines third whether "any special factors counsel[ ] hesitation in recognizing a damages action." *Katzberg*, 58 P.3d at 350. This third step invokes *Bivens* and its progeny, as the U.S. Supreme Court's *Bivens* jurisprudence has consistently relied on the absence or existence of special factors in ultimately recognizing or declining to recognize damages as an available remedy under the U.S. Constitution for private actors. *See id.* at 358; *see also Bivens*, 403 U.S. at 396; *Ziglar*, 582 U.S. at 140-41. While we do not adopt the U.S. Supreme Court's current test for the so-called "*Bivens* action," we hold that consideration of these "special factors" further encourages cautious and prudent judicial

[3]As damages remain the only remedy at issue in this matter, we express no view on the applicability of this framework to other forms of relief.

decision-making, while maintaining fidelity to our separation-of-powers structure of governance. *See Ziglar*, 582 U.S. at 135-36 (explaining that "separation-of-powers principles are . . . central to the analysis" of whether a factor is "special" in that it "cause[s] a court to hesitate"); *cf. Comm'n on Ethics v. Hardy*, 125 Nev. 285, 291-92, 212 P.3d 1098, 1103 (2009) (explaining that the Nevada Constitution has "embraced" the separation-of-powers doctrine "to prevent one branch of government from encroaching on the powers of another branch").

Based on the above discussion, we believe that the *Katzberg* framework is persuasive and compatible with our caselaw on self-executing provisions. Accordingly, we formally adopt the *Katzberg* framework to resolve questions of whether a damages action exists to enforce self-executing provisions of the Nevada Constitution. We now turn to applying this framework.

Article 1, Section 18 of the Nevada Constitution neither establishes nor precludes a private right of action for monetary relief for violations of its guarantees

As noted above, the Nevada Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches." Nev. Const. art. 1, § 18. The provision unambiguously does not explicitly authorize a right of action for money damages; however, it unambiguously does not explicitly preclude a right of action for money damages, either. Further, Article 1 of the Nevada Constitution does not otherwise contain a provision that expressly provides or forecloses a right of action for money damages to enforce individual rights therein.[4]

Moreover, nothing in the language of the Nevada Constitution as a whole requires the Legislature to authorize suits against state actors for violations of the protections therein. *See Alper*, 93 Nev. at 572, 571 P.2d at 812. We cannot assume, as the NDOC parties suggest, that the absence of language providing a right of action for monetary relief establishes the converse, that none exists. Unlike the statutory-rights context, where we treat "legislative intent" as the "determinative factor" in considering whether the judiciary may

[4]The two provisions of the Nevada Constitution that provide express rights of action were not ratified by the voters until 2006 and 2018, respectively. *See* Nev. Const. art. 15, § 16, cl. B (providing a right of "action against" an employer who violates minimum-wage requirements of the section); Nev. Const. art. 1, § 8A, cl. 4 (providing a right of "action to compel a public officer or employee to carry out any duty" of the section related to the "rights" of a "victim of a crime"). Thus, those provisions do not support the claim that Article 1, as originally ratified in 1864, provides no right of action absent express language or legislative authorization. *Cf. Ramsey v. City of North Las Vegas*, 133 Nev. 96, 98, 392 P.3d 614, 617 (2017) (explaining that "contemporaneous" interpretation "of a constitutional provision is a safe guide to its proper interpretation" (quoting *Halverson v. Miller*, 124 Nev. 484, 488-89, 186 P.3d 893, 897 (2008))).

imply a right of action to enforce statutory rights, *see Baldonado v. Wynn Las Vegas*, 124 Nev. 951, 958-59, 194 P.3d 96, 100-01 (2008), in the constitutional-rights context, we "retain[ ] the authority—indeed the duty—to vindicate the rights guaranteed by our Constitution," *Bauserman v. Unemp't Ins. Agency*, 983 N.W.2d 855, 862 (Mich. 2022); *see also* Nev. Const. art. 6, § 1 (vesting judicial power of the state in our courts). As the Michigan Supreme Court said of its own state's constitution, the Legislature's ability to create statutory rights "has no bearing on whether the Legislature has the authority to restrict rights codified in the Constitution, let alone whether those rights remain fallow without legislative enactment." *Bauserman*, 983 N.W.2d at 870. Constitutional rights must remain enforceable in the absence of some action by the Legislature, or risk that constitutional rights become all but "mere hopes." *Id.* at 869-70, 872. Therefore, we reject the NDOC parties' invitation to apply a *Baldonado*-type analysis to the certified question.

Nor can we assume one step further that *only* the Legislature possesses the authority to create a private damages action. Article 4 of the Nevada Constitution, which creates our state's legislative branch, does not commit to the Nevada Legislature the sole authority to recognize causes of action to enforce individual rights. *Cf. id.* at 870-71 (discussing that a separation-of-powers form of governance establishes each branch's "authority within its purview" but does not "explore the boundaries of that purview" (emphasis omitted)). Article 4 states only that "[p]rovision may be made by general law for bringing suit against the State as to all liabilities originating after the adoption of this Constitution." Nev. Const. art. 4, § 22. We have previously described this language as "vest[ing] in the Legislature" the authority "to waive sovereign immunity." *See Echeverria*, 137 Nev. at 490, 495 P.3d at 475 ("In Nevada, the power to waive sovereign immunity is vested in the Legislature." (citing Nev. Const. art. 4, § 22)). But we do not read the authority to waive the State's sovereign immunity or the authority to establish the State's liabilities to unequivocally vest the Legislature with the *exclusive* power to recognize judicial mechanisms to enforce rights guaranteed by the Nevada Constitution.[5] *See generally* Antonin

[5]The waiver statute provides that "[t]he State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations, except as otherwise provided" in the statutory scheme. NRS 41.031(1). State actors are also subject to liability based on the waiver. *Cf.* NRS 41.0349 (indemnifying state actors who have "a judgment . . . entered against" them "based on any act or omission relating to [their] public duty or employment," except in limited, enumerated situations). The statutory scheme even appears to assume that a right of action under the Nevada Constitution already exists. *See, e.g.*, NRS 41.0334(1), (2)(b) (providing immunity for situations that fall within the subsection but restoring the waiver for "any action for injury, wrongful death or other damage" that

Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012) ("Nothing is to be added to what the text states or reasonably implies . . . . That is, a matter not covered is to be treated as not covered.").

As the NDOC parties point out, we have previously acknowledged the availability of certain forms of relief for constitutional violations that had at the time of our decisions already been legislatively authorized. *See, e.g.*, *City of Sparks v. Sparks Mun. Court*, 129 Nev. 348, 357, 302 P.3d 1118, 1124 (2013) (discussing availability of preliminary injunctive relief in a constitutional challenge); *Tam v. Colton*, 94 Nev. 452, 455-56, 581 P.2d 447, 449-50 (1978) (concluding that appellant "ha[d] the requisite standing to challenge" the constitutionality of NRS 396.040 and obtain declaratory relief). However, the legislatively authorized relief in both the declaratory-relief statute, NRS 30.040, and the injunctive-relief statute, NRS 33.010, does not apply solely to, or even expressly mention, constitutional challenges. Importantly, we have never suggested that the availability of the relief necessarily depended on the legislative authorization, as such a suggestion conflicts with our understanding of self-executing provisions described above. *See Godfrey v. State*, 898 N.W.2d 844, 865 (Iowa 2017) ("It would be ironic indeed if the enforcement of individual rights and liberties in the Iowa Constitution, designed to ensure that basic rights and liberties were immune from majoritarian impulses, were dependent on legislative action for enforcement. It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens.").

And our decisions have, in other contexts, recognized a cause of action under the Nevada Constitution, *see, e.g.*, *Fritz v. Washoe County*, 132 Nev. 580, 583-84, 376 P.3d 794, 796 (2016) (permitting an aggrieved party to file a claim for inverse condemnation against state actors to recover "just compensation" after "a governmental entity takes property without [such] compensation, or [without] initiating an eminent domain action"), despite that it does not expressly provide one, *see* Nev. Const. art. 1, § 8, cl. 3 (guaranteeing "just compensation" for "[p]rivate property . . . taken for public use"). Accordingly, we do not interpret the absence of language in the Nevada Constitution regarding a private damages action to enforce Article 1, Section 18 as a limitation on the judiciary's inherent powers to recognize such an action. *See* Nev. Const. art. 6, § 1 (vesting the "[j]udicial power of this State . . . in a court system, comprising a Supreme Court, a court of appeals, district courts and justices of the peace"); *see also Marbury*, 5 U.S. (1 Cranch) at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."). Ultimately, then, although

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results "from the deprivation of any rights, privileges or immunities secured by the United States Constitution or the Constitution of the State of Nevada").

the Nevada Constitution does not address enforcement of individual rights, it also does not foreclose an implied right of action for money damages based on violations of those rights. Confronted with no affirmative indication of intent, we accordingly move to step two of our newly adopted framework.

Applying the constitutional-tort analysis embodied in the Restatement favors monetary relief as an available remedy to vindicate rights guaranteed by the Nevada Constitution Article 1, Section 18

As noted above, the Restatement indicates that a remedy should exist for violations of a prohibitory constitutional provision if such a remedy (1) is "in furtherance of the purpose of the" provision and (2) is "needed to assure the effectiveness of the provision."[6] Restatement (Second) of Torts § 874A (Am. Law Inst. 1979); *see also id.* § 874A cmt. a (applying the Restatement approach to constitutional provisions). The Restatement also lists several factors to consider in applying that analysis: (1) "[t]he nature of the legislative provision," (2) "[t]he adequacy of existing remedies," (3) the extent to which a tort action "supplement[s] or interfere[s] with" existing remedies and enforcement, (4) "[t]he significance of the purpose" of the provision, (5) "[t]he extent of the change in tort law," and (6) "[t]he burden" on the judiciary. *See id.* § 874A cmt. h. However, ultimately, the Restatement recognizes judicial "discretion" and directs courts to use such discretion "cautiously and soundly." *Id.* § 874A cmt. d.

As the Restatement's primary test considers whether the proposed remedy is consistent with the purpose of and necessary to enforce the provision, the analysis necessarily depends on existing alternative remedies. *See id.* § 874A cmt. h(2). While the existence of alternative remedies represents only one of many factors, it may, depending on the circumstances, carry more weight than some of the other factors set forth in the Restatement. *See, e.g.*, *Katzberg*, 58 P.3d at 357 (applying several factors but ultimately concluding that "the availability of meaningful alternative remedies leads [the court] to decline to recognize" a damages action there); *Bivens*, 403 U.S. at 397 (discussing that no "equally effective" remedy was available for appellant). But, here, the Legislature has not "crafted a meaningful alternative remedy for the constitutional violation[s]." *See Binette v. Sabo*, 710 A.2d 688, 697-98 (Conn. 1998). And even if the Legislature has authorized injunctive and declaratory relief for such claims (an argument we questioned above), equitable relief rarely,

[6]By its terms, the Restatement analysis applies both to legislative and constitutional provisions. Restatement (Second) of Torts § 874A cmt. a (Am. Law Inst. 1979). By adopting the Restatement in the constitutional context, we do not abrogate our caselaw on implied statutory rights of action. *See Baldonado*, 124 Nev. at 958-59, 194 P.3d at 101 (setting forth three factors for determining whether to "create a private judicial remedy").

if ever, suffices to remedy a past wrong, as Mack has assertedly suffered here. *See Bivens*, 403 U.S. at 409-10 (Harlan, J., concurring) ("For people in [appellant's] shoes, it is damages or nothing."); *see also Brown*, 674 N.E.2d at 1141 (reasoning that injunctive and declaratory relief "fall short" of deterring "invasion[s] of personal interests in liberty").

Similarly, we reject the NDOC parties' assertion that state tort law provides meaningful redress for invasions of the constitutional right at issue here. Although other courts have determined tort remedies suffice to compensate for personal invasions of certain constitutional rights, *see, e.g.*, *Katzberg*, 58 P.3d at 340, 356 (deeming defamation tort remedies sufficient to compensate for harm based on a violation of appellant's due-process liberty interest over the failure of university regents to provide him with a timely "name-clearing" hearing after his removal as department chair at a university medical center), we disagree that any commonalities between state tort-law claims and constitutional protections, *see Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 370-71, 212 P.3d 1068, 1082-83 (2009) (precluding certain common-law tort claims under "the general rule against double satisfaction" where those claims were premised on violations of appellant's Fourth Amendment rights for which he had brought a cognizable § 1983 claim), provide meaningful recourse for violations of the constitutional right against unreasonable searches and seizures by government agents, as state tort law ultimately protects and serves different interests than such constitutional guarantees, *see Bivens*, 403 U.S. at 394-95. A state actor's legal obligation under a state constitution "extends far beyond that of his or her fellow citizens" under tort law; accordingly, a state actor is "not only . . . required to respect the rights of other citizens" but also "sworn to *protect and defend* those rights." *Binette*, 710 A.2d at 698. Absent a damages remedy here, no mechanism exists to deter or prevent violations of important individual rights in situations like that allegedly experienced by Mack.[7] Thus, a damages remedy is warranted under this factor of the Restatement test, as monetary relief remains necessary to enforce the provision for individuals in Mack's shoes, and a damages remedy furthers the purpose of the search-and-seizure provision to the extent it acts as a deterrent to government illegality.

Nor do any of the other factors identified in the Restatement disfavor a damages remedy here. The nature of the constitutional provision, *see* Restatement (Second) of Torts § 874A cmt. h(1), h(4) (Am. Law Inst. 1979), demands that this court exercise

[7]Because we find no meaningful remedy already exists, we do not need to reach the issue of what alternative or superseding remedies satisfy our newly adopted framework or our caselaw on self-executing provisions. *See Alper*, 93 Nev. at 572, 571 P.2d at 812 (explaining that self-executing provisions "cannot be abridged or impaired by statute").

its authority and responsibility to enforce the limitations that the Nevada Constitution imposes on the State and its actors for such fundamental rights, *see Bauserman*, 983 N.W.2d at 862-63, 865-66. Further, conduct proscribed and regulated by the search-and-seizure provision has been well developed and mostly well settled by this court, such that a damages action will not create a new burden on state actors or interfere with existing principles related to search-and-seizure jurisprudence. *See* Restatement (Second) of Torts § 874A cmt. h(3), h(5) (Am. Law Inst. 1979). And, finally, we do not believe that any additional burden on the judiciary as a result of recognizing a damages action for violations of Article 1, Section 18 of the Nevada Constitution outweighs the need to recognize one where, as here, a fundamental right is implicated but no civil remedy is otherwise available. *See id.* § 874A cmt. h(6). Because the Restatement's constitutional-tort analysis favors a damages action to vindicate search-and-seizure rights under the Nevada Constitution, we accordingly move to the third and final step of our newly adopted framework.

No special factors lead us to hesitate in recognizing a damages action to enforce Article 1, Section 18 of the Nevada Constitution

As mentioned above, the nonexhaustive "special factors" considered in the third step of the constitutional-tort framework we adopt today derive in part from *Bivens*, among other cases, and include "deference to legislative judgment, avoidance of adverse policy consequences, considerations of government fiscal policy, practical issues of proof, and the competence of courts to assess particular types of damages." *See Katzberg*, 58 P.3d at 350. Applying these factors, we conclude that none disfavor a damages action here.

First, no legislative judgments regarding a damages action for constitutional violations exist to which to accord deference. *Cf. Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction." (quoting *United States v. Wise*, 370 U.S. 405, 411 (1962))). Second, as to policy consequences, a private right of action for money damages here would not impose new limitations on government conduct, given the already developed status of search-and-seizure jurisprudence. *Cf. State v. Bayard*, 119 Nev. 241, 247, 71 P.3d 498, 502 (2003) (recognizing that an arrest in violation of NRS 484.795 violates the Nevada Constitution's search-and-seizure guarantees, even though it "does not offend the Fourth Amendment"). The lack of a damages remedy itself produces adverse policy consequences insofar as it renders illusory the guarantees of the Nevada Constitution in situations like the present.

Third, a private right of action for money damages does implicate legislative fiscal policy because, as the court has recognized, the Legislature has already decided to presumptively waive the State's sovereign immunity. *See Echeverria*, 137 Nev. at 491, 495 P.3d at 476. In so doing, the Legislature has consented to damages liability, except as specifically enumerated in the statutory-waiver scheme. *Id.* In *Echeverria*, this court recognized as much when it held that NRS 41.031's waiver subjected the State to damages liability under the Fair Labor Standards Act (FLSA), even though the waiver does not mention the State's liability under federal law.[8] *See id.* at 491-93, 495 P.3d at 476-77. And the Legislature has already chosen to indemnify its employees for certain judgments. *See* NRS 41.0349 (setting forth parameters for indemnification).

Fourth and fifth, a damages action for retrospective harm presents no practical issues of proof beyond what the judiciary handles every day. Nevada courts routinely and competently assess personal-injury type damages, including inherently subjective damages. *See, e.g.*, *Guar. Nat'l Ins. Co. v. Potter*, 112 Nev. 199, 206-07, 912 P.2d 267, 272 (1996) (affirming an award of compensatory damages unless the award is "so excessive" as to shock the conscience). Damages simply do not represent a "revolutionary" or remarkable remedy. *See, e.g.*, *Bauserman*, 983 N.W.2d at 866-68 ("We share this view and make the unremarkable observation that damages are an available remedy for the state's constitutional violations."). Damages remain a traditional—and indeed, a preferred—remedy for legally recognized wrongs. *Cf. Korte Constr. Co. v. State ex rel. Regents of Nev. Sys. of Higher Educ.*, 137 Nev. 378, 378, 492 P.3d 540, 541 (2021) ("Nevada recognizes that equitable remedies are generally not available where the plaintiff has a full and adequate remedy at law."). And we have observed, seemingly without controversy, the availability of equitable remedies to redress constitutional violations, despite that none of the at-issue constitutional provisions expressly provide for such remedies. *E.g.*, *City of Sparks v. Sparks Mun. Court*, 129 Nev. 348, 357, 302 P.3d 1118, 1124 (2013) (discussing availability of preliminary injunctive relief in a constitutional challenge). None of the parties have offered any sound basis to treat equitable remedies differently from legal remedies for purposes of recognizing a private right of action here. *See Bauserman*, 983 N.W.2d at 869 (discussing that there is no "specific reason" to treat enforcement of constitutional rights through monetary relief any differently from cases permitting injunctive relief, despite an

[8]We also note that the Legislature has capped damages for claims "sounding in tort." *See* NRS 41.035(1). While this matter does not present the need to reach whether the damages action we recognize today falls within the statutory cap's ambit, we observe that the issue of whether such an action "sound[s] in tort has the potential to affect the extent of the State's [damages] liability." *See Echeverria*, 137 Nev. at 491 n.6, 495 P.3d at 476 n.6 (emphasis omitted).

absence of explicit legislative authorization). Thus, the "special factors" identified in the framework we have adopted today support that Mack may bring a private right of action for money damages to enforce her search-and-seizure rights under Nevada law. Accordingly, we answer the first rephrased certified question in the affirmative: a private right of action under Article 1, Section 18 for retrospective monetary relief exists.

Certified Question 2: Qualified immunity is not a defense to an implied private right of action for retrospective monetary relief under the Nevada Constitution Article 1, Section 18

Mack argues that qualified immunity is not available because it is a federal doctrine that deals only with clearly established federal law. By contrast, the NDOC parties contend that we must adopt qualified immunity as a defense to mitigate the substantial costs to ensue if we also extend a *Bivens* rationale to the Nevada Constitution.

Qualified immunity is a federal, judicially created doctrine that immunizes state, local, and federal officials from liability for discretionary functions unless (1) the official violated a federal constitutional right, and (2) the right was clearly established at the time the challenged conduct occurred. *Lane v. Franks*, 573 U.S. 228, 243 (2014); *see also Pagán v. Calderón*, 448 F.3d 16, 31 (1st Cir. 2006) ("Qualified immunity is a judge-made doctrine . . . ."). Other courts agree that qualified immunity, as a federal doctrine, does not protect government officials from liability under state law. *E.g.*, *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1171 (9th Cir. 2013); *Jenkins v. City of New York*, 478 F.3d 76, 86 (2d Cir. 2007); *Samuel v. Holmes*, 138 F.3d 173, 179 (5th Cir. 1998); *Andreu v. Sapp*, 919 F.2d 637, 640 (11th Cir. 1990). Accordingly, we have applied qualified immunity only in the context of federal-law claims. *See, e.g.*, *Grosjean*, 125 Nev. at 359-61, 212 P.3d at 1076-77 (addressing whether private actors could claim qualified immunity from appellant's 42 U.S.C. § 1983 claim). Instead, the availability of qualified immunity for state-law claims depends on whether state law authorizes such an immunity. *E.g.*, *Jenkins*, 478 F.3d at 86 (applying a doctrine "under New York" law that is "similar" to qualified immunity under federal law).

In contrast to our authority to determine that Article 1, Section 18 is enforceable by a damages action, only the Legislature retains "the power to waive sovereign immunity." *Echeverria*, 137 Nev. at 490, 495 P.3d at 475. As stated above, the Legislature has exercised that power in NRS 41.031(1). *Id.* "The plain language of NRS 41.031(1) waives the State's [and a state actor's] immunity from liability unless an express exception to the waiver applies" to restore that immunity. *Id.* at 491, 495 P.3d at 476. We have emphasized that

"Nevada's qualified waiver of sovereign immunity is to be broadly construed." *Id.* (quoting *Martinez v. Maruszczak*, 123 Nev. 433, 441, 168 P.3d 720, 725 (2007)). Accordingly, we have "repeatedly refused to imply provisions not expressly included in the legislative scheme" regarding Nevada's immunity waiver. *Id.* (quoting *Zenor v. State, Dep't of Transp.*, 134 Nev. 109, 110, 412 P.3d 28, 30 (2018)). While several "exceptions to, and limitations on, the waiver" exist, *id.* at 490, 495 P.3d 476, the Legislature has not provided for a state-law equivalent of qualified immunity in the manner it exists under federal law, *see* NRS 41.032-.0337 (providing circumstances under which sovereign immunity has been restored). Absent such "express exception to the waiver" of immunity, we cannot supply the defense of qualified immunity to claims under the Nevada Constitution. *Echeverria*, 137 Nev. at 491, 495 P.3d at 476 ("If the Legislature meant to pass a law that waived immunity from one category of liabilities only, it could easily have done so expressly."). Otherwise, we threaten to "undermine this [S]tate's public policy, reflected in NRS 41.031, that [state actors] should generally take responsibility when [they] commit[ ] wrongs." *Id.* at 491-92, 495 P.3d at 476. Accordingly, qualified immunity, as that doctrine is understood under federal law, is not a defense available to state actors sued for violations of the individual rights enumerated in Nevada's Constitution. Thus, we answer the second rephrased certified question in the negative: qualified immunity is not a defense to a private damages action under Article 1, Section 18.

CONCLUSION

Today, we consider four questions certified to us by the U.S. District Court for the District of Nevada regarding the remedies and defenses available for private plaintiffs to enforce due-process and search-and-seizure rights under our Nevada Constitution. However, NRAP 5 calls on us to exercise our discretion to answer only determinative and concrete certified questions. With those rules in mind, we decline to answer the first certified question and elect to rephrase the remaining three certified questions.

In answering the certified questions as rephrased, we conclude first that, yes, a private right of action against state actors for retrospective monetary relief exists to enforce search-and-seizure rights under Article 1, Section 18 of the Nevada Constitution. In reaching this conclusion, we recognize that it is not necessary for the Nevada Constitution to expressly confer such a remedy, nor for the Nevada Legislature to expressly authorize one, because the search-and-seizure rights are self-executing limitations on, and thus inherently enforceable against, arbitrary abuse of government power. And while we acknowledge our authority and obligation to enforce the Nevada Constitution, we adopt today a framework for answering

whether a self-executing provision of the Nevada Constitution is enforceable through a damages remedy that we believe harmonizes our understanding of self-executing provisions with our desire to defer to legislative judgments, protect fundamental rights, and exercise caution in judicial decision-making.

Applying this framework, we ask whether the language and history of the at-issue constitutional provision establishes an affirmative indication of intent to provide or withhold the requested remedy, and if so, enforce that apparent intent. However, because the Nevada Constitution specifies no such intent for search-and-seizure rights, we consider whether the several factors set forth in § 874A of the Restatement (Second) of Torts favor the requested remedy. Applying this constitutional-tort analysis, the lack of any remedy for individuals in Mack's shoes to enforce fundamental rights against unreasonable searches and seizures leads us to conclude that a damages remedy remains essential to effectuate and advance the goals of Article 1, Section 18. Because we conclude that consideration of that and other factors favors a damages action, we turn to the final step and determine whether any special factors counsel hesitation against recognition. Concluding, however, that a damages action here does not implicate any of the identified special factors, we hold that Mack's claim for money damages under Article 1, Section 18 of the Nevada Constitution is cognizable.

Having answered the first rephrased certified question in the affirmative, we respond to the second rephrased certified question and conclude that, no, qualified immunity, a federally created doctrine, is not a defense to claims under Article 1, Section 18 of the Nevada Constitution in the absence of legislative authorization. As only the Legislature may waive sovereign immunity of state actors, so too only the Legislature may restore sovereign immunity to state actors. It is not within our inherent judicial power to create exceptions to sovereign immunity or to the waiver of sovereign immunity.

Appellant Sonjia Mack visited HDSP, where, allegedly without consent or suspicion, she was subjected to a strip search by NDOC employees. In holding that she may seek money damages for harm suffered from violations of her search-and-seizure rights under the Nevada Constitution, Article 1, Section 18, we do not create a new cause of action. We simply recognize the long-standing legal principle that a right does not, as a practical matter, exist without any remedy for its enforcement.

Hardesty, C.J., and Parraguirre, Stiglich, Pickering, and Herndon, JJ., concur.

WASHOE COUNTY HUMAN SERVICES AGENCY, Petitioner, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF WASHOE; and THE HONORABLE PAIGE DOLLINGER, District Judge, Respondents, and ROLANDO C.-S.; PORSHA C.-S.; and L.S.C., a Minor Child, Real Parties in Interest.

No. 83422

December 29, 2022 521 P.3d 1199

Original petition for a writ of mandamus in a juvenile dependency matter challenging a district court order declaring NRS 432B.393(3)(c) unconstitutional.

Petition denied.

Christopher J. Hicks, District Attorney, and *Erin L. Morgan* and *Jeffrey S. Martin*, Deputy District Attorneys, Washoe County, for Petitioner.

Washoe Legal Services and *Jennifer Jeans*, Reno, for Real Party in Interest L.S.C.

John L. Arrascada, Public Defender, and *Jennifer Rains* and *John Reese Petty*, Chief Deputy Public Defenders, Washoe County, for Real Party in Interest Porsha C.-S.

Marc Picker, Alternate Public Defender, and *Amy Crowe*, Deputy Alternate Public Defender, Washoe County, for Real Party in Interest Rolando C.-S.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Hardesty, C.J.:

We elect to consider the merits of this petition under the capable-of-repetition-yet-evading-review exception to the mootness doctrine to clarify a substantial issue of public policy and precedential value: whether NRS 432B.393(3)(c) violates due process.

NRS 432B.393(3)(c) relieves a child welfare services agency from its duty to provide reasonable efforts to reunify a child with his or her parent if a court finds that the parental rights of that parent were involuntarily terminated with respect to a sibling of the child. The

[1]The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.

district court found that this statute violates due process because it could lead to a presumption that the parent is unfit, for purposes of terminating the parent-child relationship, without any consideration of present circumstances. Petitioner Washoe County Human Services Agency (WCHSA) filed a petition for writ of mandamus asking this court to determine that NRS 432B.393(3)(c) is constitutional and to vacate the district court's order.

We conclude that NRS 432B.393(3)(c), insofar as it relieves an agency of making reunification efforts, does not infringe on the fundamental liberty interest a parent has in the care and custody of his or her child and therefore does not violate due process. We thus determine that the district court erred but deny WCHSA's petition as the matter is moot.

BACKGROUND

In August 2020, WCHSA removed real party in interest/minor child L.S.C. from the care and custody of her biological parents, real parties in interest Porsha C.-S. and Rolando C.-S., and placed her in foster care.[2] The next month, WCHSA filed a motion with the district court for a finding under NRS 432B.393(3)(c) that WCHSA was relieved of its statutory obligation to undertake reasonable efforts to reunify L.S.C. with her biological parents. WCHSA asserted that Porsha and Rolando had their parental rights involuntarily terminated as to L.S.C.'s sibling the year before and the order of termination was not under appeal. WCHSA argued that, in light of these facts, the district court was required by NRS 432B.393(3)(c) to find that WCHSA was relieved from its obligation under NRS 432B.393(1) to undertake reasonable efforts to reunify L.S.C. with her parents. Porsha and Rolando opposed the motion, arguing that NRS 432B.393(3)(c) infringes on their fundamental liberty interest in the care, custody, and control of their child without the due process of law.

A court master recommended that the district court find NRS 432B.393(3)(c) unconstitutional and deny WCHSA's motion that it be relieved of its obligation to make reasonable reunification efforts with L.S.C. The court master found that NRS 432B.393(3)(c) infringes on the parent-child relationship—a fundamental right—and is not narrowly tailored to serve the compelling state interest of protecting the health and safety of children, as it does not allow a court any discretion to consider the circumstances of the past involuntary termination. Her determination that the statutory provision is unconstitutional was based on the fact that a finding under NRS 432B.393(3)(c) results in an expedited permanency hearing and may be used to prove parental fault for the termination of parental rights

[2]The record inconsistently reflects real parties in interest's family names. We identify real parties in interest according to the names used in the petition.

in proceedings instituted under NRS Chapter 128. The district court entered an order adopting these recommendations over WCHSA's objection.

Later, the court master held a permanency hearing under NRS 432B.590, after which she recommended that the district court adopt the agency's permanency plan of adoption for L.S.C. In making this recommendation, the court master found that WCHSA was relieved of making reasonable efforts to reunify L.S.C. with her family under NRS 432B.393(1), as such efforts were inconsistent with the permanency plan efforts. The district court adopted these recommendations but made no further findings regarding the constitutionality of NRS 432B.393(3)(c).

WCHSA petitioned this court for a writ of mandamus to overturn the district court's declaration that NRS 432B.393(3)(c) is unconstitutional. Porsha, Rolando, and L.S.C. timely filed answers to the petition, as directed.[3]

DISCUSSION

We elect to consider the merits of this petition for a writ of mandamus

"Writ relief is an extraordinary remedy that is only available if a petitioner does not have a plain, speedy and adequate remedy in the ordinary course of law." *In re William J. Raggio Family Tr.*, 136 Nev. 172, 175, 460 P.3d 969, 972 (2020) (internal quotation marks omitted); *see also* NRS 34.170. This court has considered writ petitions when doing so "will clarify a substantial issue of public policy or precedential value," *Walker v. Second Judicial Dist. Court*, 136 Nev. 678, 684, 476 P.3d 1194, 1199 (2020) (internal quotation marks omitted), and "where the petition presents a matter of first impression and considerations of judicial economy support its review," *Dekker/Perich/Sabatini Ltd. v. Eighth Judicial Dist. Court*, 137 Nev. 525, 527, 495 P.3d 519, 522 (2021); *see also Buckwalter v. Eighth Judicial Dist. Court*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010) (additionally noting that the issue before the court was reviewable on mandamus because it was "not fact-bound"). This court "review[s] questions of law . . . de novo, even in the context of writ petitions." *Helfstein v. Eighth Judicial Dist. Court*, 131 Nev. 909, 913, 362 P.3d 91, 94 (2015).

The district court's order concerning the waiver of reunification efforts in an NRS Chapter 432B proceeding is not appealable. *See* NRAP 3A(b); *Clark Cty. Dist. Attorney v. Eighth Judicial Dist. Court*, 123 Nev. 337, 342, 167 P.3d 922, 925 (2007) (considering a petition for extraordinary relief after recognizing that the challenged order, entered under NRS Chapter 432B, was not appealable). Further, whether NRS 432B.393(3)(c) is unconstitutional is a

[3]L.S.C.'s appearance in the district court proceedings was waived at the request of her counsel.

purely legal issue of first impression and has substantial precedential value. *See Lyft, Inc. v. Eighth Judicial Dist. Court*, 137 Nev. 832, 834, 501 P.3d 994, 998 (2021) (considering a petition for writ of mandamus because the question of whether the statute at issue superseded a procedural rule "present[ed] a novel question of law requiring clarification"). For these reasons, we elect to hear this petition for a writ of mandamus to address the constitutionality of NRS 432B.393(3)(c).

While the matter is moot, it falls under the capable-of-repetition-yet-evading-review exception to the mootness doctrine

"The question of mootness is one of justiciability" and requires that this court render judgments only on actual controversies. *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). Although controversies may exist at the beginning of a case, they can be rendered moot by subsequent events. *Id.* This case was rendered moot when the district court found that WCHSA was relieved of providing reasonable reunification efforts to Porsha and Rolando with respect to L.S.C. on grounds other than NRS 432B.393(3)(c).

However, cases involving moot controversies may still be considered by this court if they concern "a matter of widespread importance capable of repetition, yet evading review." *Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. 328, 334, 302 P.3d 1108, 1113 (2013). "To satisfy the exception to the mootness doctrine, [petitioner] must show that (1) the duration of the challenged action is relatively short, (2) there is a likelihood that a similar issue will arise in the future, and (3) the matter is important." *Degraw v. Eighth Judicial Dist. Court*, 134 Nev. 330, 332, 419 P.3d 136, 139 (2018) (internal quotation marks omitted).

We conclude that this petition meets the elements of this exception to mootness. First, the duration of the challenged action is relatively short given the expedited nature of dependency proceedings under NRS Chapter 432B. Particularly, under NRS 432B.590(1)(b), "[w]ithin 30 days after making any of the findings set forth in subsection 3 of NRS 432B.393," the court must hold a permanency hearing. A permanency hearing will moot a dispute regarding NRS 432B.393(3)(c) by making a reasonable-efforts finding on a different basis, as was the case here. Thus, we conclude that the time period to challenge an order made pursuant to NRS 432B.393(3)(c) is necessarily limited by law.[4] *See Degraw*, 134 Nev.

[4]While the hearing master's findings of fact and recommendations regarding the permanency hearing here were titled "Masters Findings of Fact and Recommendations After 12-Month Permanency Hearing" and only broadly cited to NRS 432B.590 as the legal basis for its permanency hearing, we note that NRS 432B.590(1)(a)'s requirement that the courts hold an annual permanency hearing after the removal of a child from the child's home does not

at 332, 419 P.3d at 139 (determining that the duration element was met because "the time period to challenge the [action at issue] may be limited"). Second, as for whether there is a likelihood that the issue will arise in the future, this court typically does not rely on the assurances of the parties alone that an issue will recur. *Id*. at 333, 419 P.3d at 139; *Personhood Nev.*, 126 Nev. at 602, 245 P.3d at 574. Still, this court has measured the likelihood of recurrence contextually, i.e., from how common the issue at hand is to the larger body of disputes, such as the ubiquitous relevancy of bail issues in criminal cases. *See Valdez-Jimenez v. Eighth Judicial Dist. Court*, 136 Nev. 155, 160, 460 P.3d 976, 983 (2020) (determining that "the second factor of the mootness exception" had been satisfied "[b]ecause the constitutional issues concerning the inquiries and findings required for setting bail are relevant in many criminal cases[and] will arise in the future"). Similarly, issues regarding a child welfare agency's duty to provide reasonable efforts to reunify children with their parents are relevant to a variety of child welfare cases that have previously, and will likely continue to, come before this court. *See, e.g.*, *In re Parental Rights as to A.G.*, 129 Nev. 125, 132, 295 P.3d 589, 593 (2013).

Lastly, we determine that the third factor—importance of the matter—is satisfied, as the matter involves the constitutionality of a statutory provision that is part of a larger statutory scheme governing the protection of Nevada's children from abuse and neglect. *See* NRS Chapter 432B. For these reasons, we elect to hear this matter under the capable-of-repetition-yet-evading-review exception to the mootness doctrine.

NRS 432B.393(3)(c) does not violate due process because it does not infringe on a fundamental liberty interest

The Due Process Clauses of the United States and Nevada Constitutions prohibit the state from depriving any person "of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; Nev. Const. art. 1, § 8(2). Statutes are presumed constitutional, and the party challenging a statute has the burden of showing otherwise. *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 552 (2010), *modified on other grounds on denial of reh'g*, No. 52911, 2010 WL 5559401 (Nev. Dec. 22, 2010) (Order Denying Rehearing and Modifying Opinion).

"Substantive due process protects certain individual liberties against arbitrary government deprivation regardless of the fairness of the state's procedure." *Eggleston v. Stuart*, 137 Nev. 506, 510, 495 P.3d 482, 489 (2021). In the context of a substantive due process challenge to a statute, courts apply strict scrutiny if the statute

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discharge the courts from holding a permanency hearing within 30 days of making any findings under NRS 432B.393(3) per NRS 432B.590(1)(b).

infringes on a fundamental constitutional right; otherwise, the statute is reviewed under the rational basis test and will be upheld it if it is rationally related to a legitimate state interest. *State v. Eighth Judicial Dist. Court (Logan D.)*, 129 Nev. 492, 501-03, 306 P.3d 369, 375-77 (2013). "Procedural due process claims arise where the State interferes with a liberty or property interest and the State's procedure was constitutionally insufficient." *Eggleston*, 137 Nev. at 511, 495 P.3d at 489. Therefore, with respect to both substantive and procedural due process, the threshold issue regarding NRS 432B.393(3)(c)'s validity is whether that statute infringes on a fundamental liberty interest.

Here, the district court found that NRS 432B.393(3)(c) infringes on the fundamental liberty interest that parents have in the care, custody, and control of their children because a finding under NRS 432B.393(3)(c) can be used as a basis for finding parental fault in a termination of parental rights proceeding under NRS 128.105(1).[5] The district court applied strict scrutiny and found that NRS 432B.393(3)(c) is not narrowly tailored to serve the compelling interests of the health and safety of children because it presumes parental unfitness based on a prior termination of parental rights without any consideration of the individual circumstances of that prior termination. Based on this finding, it found that NRS 432B.393(3)(c) facially violated both substantive and procedural due process. While the district court considered the application of NRS 432B.393(3)(c) to the parties' individual circumstances, it did not find that NRS 432B.393(3)(c) violated due process as applied to them, but rather that it facially violated procedural and substantive due process.

WCHSA argues that NRS 432B.393(3)(c) does not implicate the fundamental liberty interest that parents have in the care, custody, and control of their children because a finding under that statute does not result in the deprivation of parental rights. WCHSA acknowledges that the parental fault prong of NRS 128.105 can be established by a prior finding under NRS 432B.393(3)(c), but it contends that if this finding infringes on a fundamental right, then NRS 128.105 is the offending statute, not NRS 432B.393(3)(c). We agree.

It is well-established that the parent-child relationship is a fundamental liberty interest. *See In re Parental Rights as to A.G.*, 129 Nev. at 135, 295 P.3d at 595 (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). Thus, parents are entitled to due process protections before being deprived of the custody of their child or having their parental rights terminated. *Id.* A finding under NRS 432B.393(3)(c),

[5]NRS 128.105(1) allows parental rights to be terminated where the court finds that (1) termination is in the best interest of the child, and (2) parental fault exists. Parental fault exists where, among other things, "[t]he conduct of the parent or parents was the basis for a finding made pursuant to subsection 3 of NRS 432B.393." NRS 128.105(1)(b).

however, does not terminate parental rights or alter the custody of the children. Rather, it relieves the agency from providing reunification efforts.

In finding that the statute infringes on a parent's fundamental right, the district court relied on NRS 128.105(1), which provides that a finding under NRS 432B.393(3)(c), among other things, may establish parental fault in a parental rights termination proceeding. The court reasoned that a parent could have his or her parental rights terminated under NRS 128.105(1) based on NRS 432B.393(3)(c)'s presumption that a parent whose parental rights were previously terminated remains unfit for life. The constitutionality of NRS 128.105(1), however, was not before the district court in this NRS Chapter 432B proceeding. No parental rights termination proceedings had been instituted against Porsha and Rolando when WCHSA moved for a finding under NRS 432B.393(3)(c). The concern that NRS 128.105(1) infringes on a parent's fundamental right by allowing parental fault to be presumed from a prior termination pursuant to NRS 432B.393(3)(c) is a basis for challenging NRS 128.105, not NRS 432B.393(3)(c). Unlike NRS 128.105, NRS 432B.393(3)(c) does not facially infringe on a parent's fundamental right to the care and custody of his or her children, as it involves neither the removal of a child from a parent's custody or the termination of parental rights.[6]

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[6]During oral argument before this court, counsel for L.S.C. argued for the first time that NRS 432B.393(3)(c) infringes on her client's fundamental liberty interest in being reunited with her family of origin if safe and appropriate. Because this argument was not properly raised in L.S.C.'s appellate brief or below, we decline to consider it. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

Additionally, Porsha argues on appeal that NRS 432B.393(1) creates a right to reasonable reunification efforts. This argument was not raised before the district court or considered by the district court in determining that NRS 432B.393(3)(c) is unconstitutional, and we thus decline to consider it as well. However, we note, as other jurisdictions have, that "[t]he statutory directive to employ reasonable services, absent aggravated circumstances, does not give rise to a constitutional right." *In re K.R.*, No. 99-2009, 2000 WL 854325, at *2 (Iowa Ct. App. 2000) (citing *Suter v. Artist M.*, 503 U.S. 347, 363 (1992) (determining that the term "reasonable efforts," as it appeared in the federal Adoption Assistance and Child Welfare Act, did not confer a federally enforceable right upon the act's beneficiaries)); *accord In re Eden F.*, 741 A.2d 873, 886 n.22 (Conn. 1999) ("At no time did the [Supreme C]ourt suggest that a showing of reasonable or diligent efforts at reunification was itself constitutionally mandated."). We do recognize that other jurisdictions have suggested that the discharge of reunification efforts can affect a parent's right to the care, custody, and control of his or her child in other contexts. *See, e.g.*, *In re ECH*, 423 P.3d 295, 302 (Wyo. 2018) ("A change in permanency plan is not termination; however, as we [have] recognized[,] . . . the decision to halt reunification efforts certainly affects a parent's substantial rights, as it will likely have a significant impact on a termination decision." (citation omitted)).

Because NRS 432B.393(3)(c) does not infringe on a fundamental liberty interest, it cannot deprive any party of a fundamental liberty interest without the due process of law, unless it violates substantive due process under the lenient rational basis test. *Logan D.*, 129 Nev. at 503, 306 P.3d at 377. Since NRS 432B.393(3)(c) rationally relates to the legitimate interest that Nevada has in preventing the return of children to a dangerous home or from languishing too long in foster care, we end our analysis here and conclude that NRS 432B.393(3)(c) does not violate due process.

CONCLUSION

We elect to hear this petition for writ of mandamus to address a legal issue of statewide public importance: whether NRS 432B.393(3)(c) violates due process. Because this statute does not infringe on a fundamental liberty interest and survives the rational basis test, we conclude that it does not violate due process. The district court therefore erred in determining otherwise. Because WCHSA had its obligation to provide reasonable reunification efforts discharged on another basis, we deny this petition for writ of mandamus as being moot. *See, e.g.*, *Valdez-Jimenez*, 136 Nev. at 167, 460 P.3d at 988 (reaching the merits of petitions for writs of mandamus under the capable-of-repetition-yet-evading-review exception to mootness, but nonetheless denying the petitions as no relief remained to be granted).

Parraguirre, Stiglich, Cadish, Pickering, and Herndon, JJ., and Gibbons, Sr. J., concur.

REPUBLICAN NATIONAL COMMITTEE, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE TIMOTHY C. WILLIAMS, District Judge, Respondents, and CLARK COUNTY; CLARK COUNTY ELECTION DEPARTMENT; JOE P. GLORIA, in His Official Capacity as THE CLARK COUNTY REGISTRAR OF VOTERS; DSCC; and DCCC, Real Parties in Interest.

No. 85604

December 29, 2022 521 P.3d 1212

Original petition for a writ of mandamus seeking relief related to the political composition of the group of persons verifying signatures used for mail ballots in Clark County.

Petition denied.

Pisanelli Bice PLLC and *Jordan T. Smith*, Las Vegas, for Petitioner.

Steven B. Wolfson, District Attorney, and *Lisa Logsdon*, Deputy District Attorney, Clark County, for Real Parties in Interest Clark County and Joe P. Gloria.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *Bradley S. Schrager* and *Daniel Bravo*, Las Vegas; *Elias Law Group LLP* and *Christopher Dodge*, Washington, D.C., for Real Parties in Interest DSCC and DCCC.

Snell & Wilmer L.L.P. and *V.R. Bohman*, Las Vegas, for Amicus Curiae Restoring Integrity and Trust in Elections, Inc.

Before the Supreme Court, Hardesty, C.J., and Parraguirre, Stiglich, Cadish, Pickering, and Herndon, JJ.

OPINION[1]

Per Curiam:

This emergency, original petition for a writ of mandamus challenges a district court decision, reflected in November 3, 2022, minutes, denying petitioner's request for mandamus or injunctive relief related to the political composition of the persons verifying

[1]We originally resolved this petition on November 8, 2022, in an order denying petition. Petitioner filed a motion to publish the order as an opinion. The motion was granted, and we now issue this opinion in place of the order. *See* NRAP 36(f).

signatures used for mail ballots in Clark County.[2] Respondents timely filed a response, as directed. Because no clear legal right to the relief requested has been demonstrated, we deny the petition.

FACTS AND PROCEDURAL HISTORY

The Clark County Registrar, real party in interest Joe P. Gloria, initially hired 64 temporary workers from employment agencies to verify the signatures on returned mail ballots; of these, 23 are Democrats, 8 are Republicans, and 33 are Nonpartisans. An additional 6 Republican workers were later hired to verify signatures. Nevertheless, given these figures, petitioner Republican National Committee (RNC) asserts that the signature verifiers' composition disproportionately excludes Republicans and, consequently, the Registrar has violated his duty under NRS 293B.360(2) to ensure that the "members of each [special election] board must represent all political parties as equally as possible."

RNC sought relief from the district court, and the district court denied RNC's petition but has not yet entered a written order reflecting its decision. Consequently, RNC has sought emergency writ relief from this court, which petition we will consider, given the urgent mid-election circumstances and lack of a written order. *Las Vegas Review-Journal v. Eighth Judicial Dist. Court*, 134 Nev. 40, 43, 412 P.3d 23, 26 (2018) (entertaining a petition for writ relief from the district court's oral preliminary injunction, because the oral pronouncement could not be immediately appealed and a later appeal could not afford adequate relief). Although the Registrar explained that the makeup of the team varies significantly each day due to personal employee reasons, RNC seeks an order mandating immediate compliance with NRS 293B.360(2) going forward because, it claims, signature verification is currently ongoing and there is no assurance that the Registrar will continue to hire and schedule signature verifiers in a manner that effectuates NRS 293B.360(2)'s equal representation requirement.

DISCUSSION

As petitioner, it is RNC's burden to demonstrate a clear legal right to the relief requested. *Halverson v. Sec'y of State*, 124 Nev. 484, 487, 186 P.3d 893, 896 (2008) ("A petition will only be granted when the petitioner has a clear right to the relief requested."); *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) ("Petitioners carry the burden of demonstrating that

[2]Restoring Integrity and Trust in Elections, Inc. (RITE) has filed a motion for leave to file an amicus curiae brief in support of petitioner. The motion is granted; the amicus brief was filed on November 8, 2022.

extraordinary relief is warranted."). We review issues of statutory interpretation de novo, even in the context of a writ petition. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008).

NRS 293B.360(1) provides that the Registrar "shall create" a computer program and processing accuracy board and "may create" other boards, including a "mail ballot inspection board" and "[s]uch additional boards . . . as the [Registrar] deems necessary for the expeditious processing of ballots."[3] With respect to such boards, the Registrar must ensure that the members "represent all political parties as equally as possible." Nothing in NRS 293B.360 fashions or addresses any board for signature verification purposes or requires the Registrar to create a board of signature verifiers. *See also* NRS 293B.365 & NRS 293B.370 (repealed) (defining the duties of the central ballot inspection board and the absent ballot mailing precinct inspection board, respectively, neither of which mention signature verification).

Rather, a different statute, NRS 293.269927, specifically governs the procedures for verifying the signatures used for mail ballots. When mail ballots are returned, "the clerk or an employee in the office of the clerk" is charged with verifying the voter's signature on the return envelope. NRS 293.269927(1). In Clark County, the signatures on mail ballot return envelopes are initially checked by electronic means. If the electronic device is unable to match the voter's signature against the voter application signatures on file with the county clerk, the signature must be verified manually. *See* NRS 293.269927(2). To do this, "[t]he clerk or employee" reviews the signature used for the ballot against all the signatures available in the clerk's records, and "[i]f at least two employees in the office of the clerk" discern a reasonable question as to whether the signatures match, the clerk must contact the voter for confirmation that the signature belongs to the voter. NRS 293.269927(3). Thus, NRS 293.269927 provides that the Registrar and his employees will conduct the signature verification process, and it appears that this is the process being followed by the Registrar. The statute contains no requirement that a board verify the signatures, nor is there any requirement therein that signature verification on mail ballot returns is done by persons of different political parties. *Cf.* NRS 293.277 (signature verification at polling places to be conducted by election board officers); NRS 293.217 (requiring merely that election boards at polling places "must not all be of the same political party"). The Legislature has placed such express requirements in other statutes governing the election process, and it is for the Legislature, not this court, to determine whether similar requirements are warranted for signature verification of mail ballots.

[3]"Clerk" and "Registrar" are used interchangeably. *See* NRS 293.044.

Nevertheless, RNC insists that, even if the creation of a board was not required, the Registrar necessarily created a board when he hired a group of temporary workers to assist him with conducting the election based on NRS 293B.027, which defines "election board": "'Election board' means the persons appointed by each county or city clerk to assist in the conduct of an election." Essentially, RNC appears to argue that anyone assisting the Registrar in election efforts is necessarily an election board to which NRS 293B.360(2) applies. We decline to read such a substantive requirement into a definitional statute in this manner, without consideration of the statutory scheme specifically governing elections and the verification of mail ballot signatures discussed above. *See generally Williams v. State, Dep't of Corr.*, 133 Nev. 594, 601, 402 P.3d 1260, 1265 (2017) (explaining that "the more specific statute will take precedence" over a general statute). Although an election board is comprised of persons appointed to assist with an election, the definitional statute does not impose a requirement that all persons verifying mail ballot signatures constitute a board that must comply with NRS 293B.360(2). Accordingly, RNC has not demonstrated a clear legal right to the relief requested, and we deny the petition.

IN THE MATTER OF THE TRUST AGREEMENT OF THE LIVING TRUST OF DAVID FRANCIS DAVIES III, DATED MAY 12, 2020.

MICHAEL C. DAVIES; AND DAVID J. DAVIES, APPELLANTS, *v.* CATHY CODNEY; AND THE TRUST AGREEMENT OF THE LIVING TRUST OF DAVID FRANCIS DAVIES III, DATED MAY 12, 2020, RESPONDENTS.

No. 83581

December 29, 2022 522 P.3d 427

Appeal from a district court order adopting the Clark County Probate Commissioner's report and recommendation to confirm title to decedent's real property in his trust. Eighth Judicial District Court, Clark County; Jessica K. Peterson, Judge.

Affirmed.

Grant Morris Dodds PLLC and *Robert L. Morris*, Henderson, for Appellants.

Bowler Dixon & Twitchell and *Travis K. Twitchell* and *Christopher D. Harris*, Las Vegas, for Respondents.

Before the Supreme Court, CADISH and PICKERING, JJ., and GIBBONS, Sr. J.[1]

OPINION

By the Court, PICKERING, J.:

Six months before his death, David F. Davies III executed a revocable living trust agreement, which he and the named trustee both signed. The agreement states that "Grantor has transferred, assigned, conveyed and delivered to the Trustee the property described in Schedule A attached"; under the heading "Real Property," Schedule A lists as a trust asset Davies' "House," valued at $245,000. Davies did not prepare or record a formal deed conveying the House to the trust. Nonetheless, over the objections of Davies' intestate heirs, the district court held that the agreement was effective to establish the House—Davies' only real property—as an asset of the trust under Nevada law and to the satisfaction of the relevant statute of frauds. Because NRS 163.002 and NRS 163.008, the Restatement (Third) of Trusts, and persuasive California authorities support the district court's decision that the trust agreement sufficiently established Davies' House as trust property, we affirm.

[1]The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.

I.

On May 12, 2020, David Francis Davies III created a living trust agreement between himself as "Grantor" and Robert Ray Gonzales as "Trustee." Article III of the agreement, entitled "Funding of Trust," states that "Grantor has transferred, assigned, conveyed and delivered to the Trustee the property described in Schedule A, attached and made a part hereof" and that "said property . . . is intended to constitute the trust estate and to be held by the Trustee IN TRUST for the uses and purposes and subject to the terms and conditions hereinafter set forth." Schedule A lists the trust assets as follows:

> Name: Real Property
> Value: $245,000
> Description: House
>
> Name: Home Furniture
> Value: $10,000
> Description: Home furniture

Davies died intestate on September 22, 2020. It is undisputed that the only real property Davies owned both when he created the trust and when he died was his residence at 9300 Mount Cherie Avenue in Las Vegas (the House), last valued at $180,163 by the county assessor.

The trust agreement named Davies' sister as the sole survivor beneficiary. In the agreement, Davies acknowledged his two children and stated, "The failure of this Trust to provide for any distribution to the Grantor's children[,] David J. Davies and Michael C. Davies[,] is intentional." Both Davies and the original named trustee, Gonzales, signed the trust agreement and had their signatures notarized. Respondent Cathy Codney later assumed the role of trustee.

After Davies died intestate, Codney petitioned the district court to assume jurisdiction of the trust and to confirm Codney as trustee and the House as trust property. *See* NRS 164.010 (providing for the court to assume jurisdiction over an express trust on petition of the trustee); NRS 164.015 (providing for proceedings on petition "for a ruling that property not formally titled in the name of a trust or its trustee constitutes trust property pursuant to NRS 163.002"). Davies' sons, appellants David and Michael Davies (the heirs), objected, arguing that a trust could not be created as to real property except by deed and that Schedule A's vague description of Davies' real property violated the statute of frauds. The probate commissioner disagreed, recommending that title to the House be formally conveyed to the trust by order incorporating the description of the property from the county assessor's records. The district court adopted the commissioner's recommendation and entered an order confirming the House as trust property. The heirs appealed, raising two questions regarding trusts and real property: Can a

written instrument fund a trust with real property absent a separate deed under NRS 163.002 (defining acceptable methods of trust creation) and NRS 163.008 (defining the applicable statute of frauds for trusts funded by real property)? And if so, how specifically must the instrument describe the property to comport with the statute of frauds?

II.

NRS 163.002 and NRS 163.008 govern the methods of creating, and evidentiary requirements for, trusts funded by real property, including the Davies trust. The heirs' appeal turns on the proper interpretation of those statutes; specifically, the heirs argue that to create a trust in relation to real property, the settlor must execute and record a formal deed conveying the property to the trust. They also argue in the alternative that if another type of written instrument can fund a trust with real property, the agreement must include a legal description of the property to comport with the statute of frauds. While we defer to the district court's findings of fact in probate matters, de novo review applies to the questions of statutory interpretation and law that this case presents. *Waldman v. Maini*, 124 Nev. 1121, 1129-30, 195 P.3d 850, 856 (2008).

A.

A valid express trust in Nevada requires a settlor, trust intent, trust property, and a beneficiary. NRS 163.003 (requiring that the settlor properly manifest an intention to create a trust, and trust property); NRS 163.006 (requiring a beneficiary). If these requirements are met, NRS 163.002(1) provides in relevant part that "a trust may be created by . . . (a) [a] declaration by the owner of the property that he or she or another person holds the property as trustee [or] (b) [a] transfer of property by the owner during his or her lifetime to another person as trustee." A trust created in relation to real property must arise by operation of law or be evidenced by "[a] written instrument signed by the trustee" or "[a] written instrument . . . conveying the trust property and signed by the settlor." NRS 163.008(1)(a), (b). Nothing in the text of these statutes requires a formal deed to create a trust as to real property—and California cases construing the California statutes from which NRS 163.002 and NRS 163.008 derive have so held. *See Carne v. Worthington*, 200 Cal. Rptr. 3d 920, 927 (Ct. App. 2016) (holding that the California Probate Code permits the transfer of real property to a trust by the trust instrument, given the lack of "any statutory provisions requiring additional formalities in order to convey real property" or affirmatively requiring conveyance by deed); *Estate of Heggstad*, 20 Cal. Rptr. 2d 433, 436 (Ct. App. 1993) (concluding that "a written declaration of trust by the owner of real

property, in which he names himself trustee, is sufficient to create a trust in that property, and that the law does not require a separate deed transferring the property to the trust").

We have spoken on this issue only once and in passing. In determining the viability of a handwritten note as a holographic will, we stated in dicta, "[A]t no time was the condominium ever deeded to respondent [trustee], and it therefore did not become a part of the trust estate," implying that real property must be conveyed to a trust by deed. *Dahlgren v. First Nat'l Bank of Nev.*, 94 Nev. 387, 390, 580 P.2d 478, 479 (1978). However, the issue was not squarely presented, and nothing in the opinion suggests that the *Dahlgren* trust agreement even attempted to convey the condominium to the trust, as the agreement did in this case. *See Carne*, 200 Cal. Rptr. 3d at 930 (distinguishing *Dahlgren* on this basis). Moreover, *Dahlgren* was decided before the 1991 passage of NRS 163.002 and NRS 163.008. *Dahlgren* therefore does not advance the heirs' position, but neither are we guided by any other relevant Nevada precedent.

We are, however, helped by cases interpreting California Probate Code Sections 15200(a)-(b) (governing trust creation) and 15206 (governing the applicable statute of frauds for trusts funded by real property), from which NRS 163.002(1)(a)-(b) and NRS 163.008(1) were drawn. In *Carne*, the California Court of Appeals analyzed a trust instrument that stated in relevant part, "I transfer to my Trustee the property listed in Schedule A, attached to this agreement." 200 Cal. Rptr. 3d at 927. Schedule A listed the legal address of real property, so the parties did not dispute the sufficiency of the description. *Id.* But similar to this case, the appellant in *Carne* contended that the disputed trust was not valid because the settlor "had not properly transferred title to the only asset" in the trust, the parcel of real property. *Id.* at 922.

In analyzing sections 15200 and 15206 of the California Probate Code, the *Carne* court relied on section 16, comment b, of the Restatement (Third) of Trusts and the attendant illustration. *Id.* at 926. Section 16, comment b advises that:

> Good practice certainly calls for the use of additional formalities . . . [such as] the execution and recordation of deeds to land. Nevertheless, a writing signed by the settlor, or a trust agreement signed by the settlor and trustee, manifesting the settlor's present intention thereby to transfer specified property (such as all property listed on an attached schedule) is sufficient to create a trust.

Restatement (Third) of Trusts § 16 cmt. b (Am. Law Inst. 2003). The comment further directs attention to Illustration 5:

> The owner of certain property executes and signs a writing stating that he thereby transfers that property to T in trust for B

> for life, with remainder thereafter to B's issue, and delivers the writing to T. In the absence of applicable statutory provisions requiring additional formalities, a trust is created.

Id. cmt. b, illus. 5.

Guided by these common law principles, *Carne* concluded that the trust agreement effectively transferred the property from the settlor to the third-party trustees, without requiring the settlor to execute a separate deed. *Carne*, 200 Cal. Rptr. 3d at 927-28. As a matter of common law, the grant clause effectively manifested the settlor's present intention to transfer the property into trust. *Id.* at 927.[2] And the trust instrument was signed by both the settlor and the trustees and appropriately listed the disputed property in Schedule A. The instrument therefore met the statutory requirements for trust creation by transfer, Cal. Prob. Code § 15200(b) (providing that "a trust may be created by . . . [a] transfer of property by the owner during the owner's lifetime to another person as trustee"), and the applicable statute of frauds, Cal. Prob. Code § 15206 (providing that "[a] trust in relation to real property is not valid unless evidenced by . . . a written instrument signed by the trustee [or] a written instrument conveying the trust property signed by the settlor").

Nevada's statutes governing real property transfers into trust are almost identical to California's. *See* NRS 163.002(1)(b) (providing that "a trust may be created by . . . [a] transfer of property by the owner during his or her lifetime to another person as trustee"); NRS 163.008(1) (providing that "[a] trust created in relation to real property is not valid unless . . . evidenced by . . . a written instrument signed by the trustee [or] a written instrument . . . conveying the trust property and signed by the settlor"). *Carne* is therefore on all fours with this case insofar as it holds that a settlor can create a valid trust in respect to the real property by transfer without need of separate deed. However, *Carne* also analyzed whether the at-issue trust agreement created a trust by *declaration* and concluded it did not. *Carne*, 200 Cal. Rptr. 3d at 928. We do not adopt Carne's holding as to declarations, because the Nevada statute governing creation

[2]The *Carne* trust differs from the Davies trust in that it uses the present tense—"I transfer to my Trustee the property listed in Schedule A," *Carne*, 200 Cal. Rptr. 3d at 927, whereas the Davies trust reads, "Grantor has transferred, assigned, conveyed and delivered to the Trustee the properly listed in Schedule A." But words of grant "may be in either the past or the present tense" without compromising their operative effect. 2 Joyce Palomar & Haskell A. Holloman, *Patton & Palomar on Land Titles* § 343 (3d ed. 2003); 26A C.J.S. *Deeds*, § 33, at 64-65 (2020) (noting that a conveyance must contain "operative words of grant, which may be in either the past or the present tense" (footnote omitted)). The distinction between present and past tense might make a difference if an oral transfer predated Davies' and his trustee's execution of the trust agreement and an event affecting equitable title occurred in the interim, *see* Restatement (Third) of Trusts § 23 (entitled "Signing Requirement: When and By Whom?"), but there is no such evidence or argument in this case.

of trusts by declaration differs materially from its California counterpart.

Under common and California law, a settlor can create a trust by declaration only when the settlor and the trustee are the same person; if the trustee is a third party, the settlor must proceed by transfer. Cal. Prob. Code § 15200(a) (providing that a trust may be created by "[a] declaration by the owner of property that the owner holds the property as trustee"); *see Heggstad*, 20 Cal. Rptr. 2d at 435-36 (interpreting Cal. Prob. Code § 15200(a) and holding the settlor can create a trust by declaration if the settlor is also the trustee); Restatement (Third) of Trusts § 10(c) & cmt. e (defining "declaration of trust" as an instrument wherein the "owner of [the] property declares himself or herself trustee"); Helene S. Shapo, George Gleason Bogert, George Taylor Bogert & Amy Morris Hess, *The Law of Trusts and Trustees* § 141 (3d rev. ed. 2022) (explaining that a transfer is unnecessary when the settlor and trustee are the same because the settlor, by declaration, can simply transmute his property interest as an owner into a "bare legal interest" as a trustee). Because the settlor in *Carne* was not also the trustee, he could not proceed by declaration under California Probate Code section 15200(a). *Carne*, 200 Cal. Rptr. 3d at 928.

Nevada law, by contrast, allows a settlor to create a real property trust by declaration whether the trustee is the settlor or a third party. This expansion of the common law derives from NRS 163.002(1)(a), which adds the phrase "or another person" in stating that a settlor can create a trust by declaration: "[A] trust may be created by . . . [a] declaration by the owner of property that he or she *or another person* holds the property as trustee." (emphasis added). The 2017 Legislature added "or another person" to NRS 163.002(1)(a) in response to efforts by the state bar's probate law section to "clarify ambiguities" faced by probate practitioners by allowing "a declaration by a property owner that someone else [holds] the property as trustee" and "codif[ying] common law to clarify the types of declarations acceptable for the transfer of property into a trust." Hearing on A.B. 314 Before the S. Comm. on Judiciary, 79th Leg., at 2 (Nev., May 2, 2017) (statement of Julia S. Gold, Co-Chair, Probate and Trust Law Section, State Bar of Nevada) (second quote); Leg. Comm. of the Probate & Trust Section of the State Bar of Nev., A.B. 314 Executive Summary E5 (2017) (third and fourth quotes). This amendment allows a Nevada settlor like Davies to create a trust by declaration whether the settlor is also the trustee, as in *Heggstad*, or has named a third party as trustee, as Davies did here. *See also* Edmund J. Gorman, *Where There's a (Pour-Over) Will, There's a Way: Nevada's New Approach to Avoiding Probate With Revocable Trusts*, Nevada Lawyer, Nov. 2022, at 15 (discussing Nevada's codification of *Heggstad*).

Permitting the creation of a trust in relation to real property by declaration or transfer without requiring a separate deed serves "the long-standing objective of this court to give effect to a testator's intentions to the greatest extent possible." *In re Estate of Melton*, 128 Nev. 34, 51, 272 P.3d 668, 679 (2012). "Good practice certainly calls for the use of additional formalities," Restatement (Third) of Trusts § 16, cmt. b, and self-represented settlors would benefit from specificity in the trust instrument, including the legal address and assessor's parcel number, and the execution and recording of formal deeds conveying property into trust to give notice of the conveyance to outsiders. But revocable trusts make up an increasingly significant percentage of estate planning tools used by unrepresented individuals, and formalities should not raise an unnecessary barrier to their desired estate disposition. *See* Emily S. Taylor Poppe, *Surprised by the Inevitable: A National Survey of Estate Planning Utilization*, 53 U.C. Davis L. Rev. 2511, 2545-46 (2020) (finding that trusts are self-prepared at a higher rate than wills, and that over 50% of trusts are self-drafted or prepared with the help of a fill-in form, mobile app, or nonlawyer).

In the circumstances of this case, the statement in the Davies trust agreement that he "has transferred, assigned, conveyed and delivered to the Trustee the property described in Schedule A," which is "to be held by the Trustee IN TRUST," qualifies as both a "declaration" of trust under NRS 163.002(1)(a), *see* NRS 163.002(2) (providing that a "declaration pursuant to subparagraph (a) of subsection 1 may . . . include a schedule or list of assets . . . that is incorporated by reference into a document that is signed by the owner of the property"), and a "transfer of property by the owner during his or her lifetime to another person as trustee" under NRS 163.002(1)(b). The trust agreement is a "written instrument signed by the trustee," NRS 163.008(1)(a), and a "written instrument . . . conveying the trust property and signed by the settlor," NRS 163.008(1)(b).

As in *Heggstad* and *Carne*, we find no additional authority that would require a separate conveyance by deed to effectively convey the property or to comport with the statute of frauds. NRS 111.105 (governing conveyances by deed) provides only that a conveyance of land *may* be by deed. NRS 111.205(1)[3] (governing interests in real property) requires only that the interest be transferred "by act or operation of law, or by deed or conveyance, in writing" and signed by the grantor. NRS 163.002(1)(a)-(b) (governing trust creation) requires only a "declaration" or "transfer." And NRS 163.008(1)

[3]NRS 111.210(1) governs the statute of frauds for land sale contracts and leases but has never been applied by this court to an express trust. *See* 4 Caroline N. Brown, *Corbin on Contracts* § 17.6 (Joseph M. Perillo, ed., rev. ed. 1997) ("When an owner transfers land to another in trust for the grantor . . . such a transaction may not be regarded as a 'contract or sale' of an interest in land.").

(governing the statute of frauds for trusts created in relation to real property) requires only a written instrument conveying the trust property signed by the settlor or a written instrument signed by the trustee.

In the absence of any additional statutory requirements, the disposition of Davies' House follows easily from our analysis of NRS 163.002(1)(b) and NRS 163.008(1). The trust agreement can properly be characterized either as a declaration that the House is held in trust or as a transfer of that property to the trust, and it is in writing and signed by the grantor and trustee. It therefore effectively funds the real property listed in Schedule A to the Davies trust.

B.

The heirs argue in the alternative that even if a trust instrument can fund a trust with real property, the references to "real property" and the "House" in Schedule A of the agreement fail to meet the requirements of the common law statute of frauds, *see* NRS 111.205 (codifying the common law statute of frauds for interests in land), and NRS 163.008, the statute of frauds specific to trusts funded by real property. We review de novo a district court's application of the statute of frauds. *Khan v. Bakhsh*, 129 Nev. 554, 557, 306 P.3d 411, 413 (2013).

1.

NRS 163.008(3) reads:

> This section *must not be construed* to require a declaration by an owner of property pursuant to NRS 163.002 that specifically identified real property is held in trust to be in writing. As used in this subsection, "specifically identified real property" includes property that is identified by legal description, street address or the applicable assessor's parcel number.

(emphasis added). The heirs read this subsection to *require* that trusts conveying real property specifically identify the property using the legal description, street address, or assessor's parcel number. But the phrase "must not be construed" *relieves* the property owner from any obligation to the requirement of stating "that specifically identified real property is held in trust." There is no need to look beyond this exceedingly plain language to see the flaw in the heirs' position. *See In re Estate of Black*, 132 Nev. 73, 75, 367 P.3d 416, 417 (2016) ("Language in a statute must be given its plain meaning if it is clear and unambiguous."). Therefore, as matter of statutory interpretation, Schedule A of the Davies trust does not violate the relevant statute of frauds laid out in NRS 163.008 by failing to provide any of the categories of information listed in NRS 163.008(3).

2.

The common law regarding the adequacy of property descriptions in relation to the statute of frauds further undercuts the heirs' position. *Compare Ray Motor Lodge, Inc. v. Shatz*, 80 Nev. 114, 118, 390 P.2d 42, 44 (1964) (considering the adequacy of the property description under NRS 111.210(1), which codifies the common law statute of frauds for land sales contracts), *with Ukkestad v. RBS Asset Fin., Inc.*, 185 Cal. Rptr. 3d 145, 148-51 (Ct. App. 2015) (applying contractual statute of frauds jurisprudence to trusts). Foremost, Nevada has long maintained a generous approach to compliance with the statute of frauds in the context of other transfers of real property, specifically, land sale contracts. *See Wiley v. Cook*, 94 Nev. 558, 563, 583 P.2d 1076, 1079 (1978) ("A trial court may . . . construe an ambiguity in the writing by receiving parol evidence."); *Roberts v. Hummel*, 69 Nev. 154, 159, 243 P.2d 248, 250 (1952) ("[I]f it is possible to make a description certain by using the guideposts given in the writing, the court will construe the written instrument and the extrinsic evidence to be one instrument so as to effectuate the intention of the parties."); *see, e.g.*, *Ray Motor Lodge*, 80 Nev. at 118, 390 P.2d at 44 (looking to letters between the contracting parties for the property's legal address); *Roberts*, 69 Nev. at 159-60, 243 P.2d at 250 (looking to parol evidence of the parties' mutual understanding of the property's boundaries).

Our approach accords with the "clear trend . . . towards a more realistic interpretation" of the statute of frauds, rather than one which "make[s] a fetish of requiring a perfect written contract." 10 Richard A. Lord, *Williston on Contracts* § 29.20 (4th ed. 2011) (quoting, in second passage, *Doyle v. Wohlrabe*, 66 N.W.2d 757, 761 (Minn. 1954)). The statute of frauds is meant to "guard against the perils of perjury and error," not to act "as a bar to a contract fairly, and admittedly, made." *Sterling v. Taylor*, 152 P.3d 420, 428 (2007) (internal quotation marks omitted); *see Wainwright v. Dunseath*, 46 Nev. 361, 366-68, 211 P. 1104, 1106-07 (1923). More specific to this case, modern state courts have frequently held that a description akin to Davies' (e.g., "my land" or "my property") satisfies the statute of frauds, particularly "when it is shown by extrinsic evidence that . . . only one tract of land satisfies the description." 10 *Williston on Contracts* § 29.20, n.20 (quoting *Pick v. Bartel*, 659 S.W.2d 636, 637 (Tex. 1983)).

Because California shares Nevada's generous approach to the common law statute of frauds regarding interests in land, and because Nevada statute of frauds jurisprudence has long reflected the pragmatism of common law treatises, we are persuaded that the description of real property held in trust satisfies the statute of frauds when it provides sufficient means to identify the property using extrinsic or parol evidence. *Ukkestad v. RBS Asset Finance,*

Inc., 185 Cal. Rptr. 3d 145, 148-51 (Ct. App. 2015), is instructive. There, a trust instrument conveyed all the settlor's "right, title and interest" to "all of his real and personal property to the trustee," without any further identification of the real property. *Ukkestad*, 185 Cal. Rptr. 3d at 146-47. The court held that, as a matter of common law, the statute of frauds required only that the language of the trust instrument provide "a sufficient means or key by which extrinsic or parol evidence could be used to define the property." *Id.* at 149-50 (quoting *Alameda Belt Line v. City of Alameda*, 5 Cal. Rptr. 3d 879, 883 (Ct. App. 2003)). Given that publicly available records showed that the two disputed parcels constituted "all of" the settlor's real property, the court concluded that the trust instrument comported with the statute of frauds. *Id.* at 151.

Here, Davies lived in his Mount Cherie Avenue house, his only real property, until his death. A detailed description of the parcel is easily available through the county assessor, and neither the probate commissioner nor the district court had any trouble ascertaining that description. Therefore, Schedule A provided sufficient means to identify the "House" through extrinsic evidence, and the agreement satisfies the common law statute of frauds as codified in NRS 111.205(1).

III.

NRS 163.002 and NRS 163.008 permit a settlor to create a trust as to real property via trust instrument, and a description of real property held in trust satisfies the statute of frauds if it can be identified through extrinsic or parol evidence. Given these conclusions, Davies' living trust agreement funded the trust with his property on Mount Cherie Avenue, and we accordingly affirm the district court order confirming the House as trust property.

Cadish, J., and Gibbons, Sr. J., concur.

THE STATE OF NEVADA, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE TIERRA DANIELLE JONES, District Judge, Respondents, and JOHN EUGENE DOANE, Real Party in Interest.

No. 84134

December 30, 2022 521 P.3d 1215

Original petition for a writ of mandamus and/or prohibition challenging a district court order denying a motion to admit evidence of a prior conviction.

Petition granted.

[Rehearing denied January 30, 2023]

[En banc reconsideration denied February 27, 2023]

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Taleen Pandukht*, Chief Deputy District Attorney, Clark County, for Petitioner.

Darin F. Imlay, Public Defender, and *David Lopez-Negrete*, Deputy Public Defender, Clark County, for Real Party in Interest.

Before the Supreme Court, Hardesty, C.J., Stiglich and Herndon, JJ.

OPINION

By the Court, Stiglich, J.:

This original petition for a writ of mandamus and/or prohibition concerns the admissibility of evidence of a defendant's separate sexual offense to show the defendant's propensity to commit a presently charged sexual offense under NRS 48.045(3). Although prior bad acts generally cannot be admitted to show a defendant's inclination to commit crimes, NRS 48.045(3) provides an exception to this general rule: evidence of separate sexual offenses can be admitted to show a defendant's propensity to commit sexual offenses. Recognizing the highly probative yet prejudicial nature of such evidence, in *Franks v. State*, we outlined procedural safeguards a district court must follow prior to admitting evidence of a separate sexual offense under NRS 48.045(3), including the weighing of the evidence's probative value against its prejudicial effect. 135 Nev. 1, 432 P.3d 752 (2019).

We now further clarify the mechanics of NRS 48.045(3). First, NRS 48.045(3) is applicable whenever a criminal defendant is

charged with a sexual offense. Thus, the district court should consider only the charging document, and not the facts or evidence underlying the charge, in making its initial determination as to whether NRS 48.045(3) is implicated in the case. Second, we reiterate that the district court must ensure that *Franks*' procedural safeguards are followed before determining whether to admit evidence of a prior sexual offense under NRS 48.045(3).

In refusing to admit evidence of a prior conviction for a sexual offense in the instant case, the district court looked beyond the charges the defendant faced to determine that the State's evidence did not establish that a sexual offense occurred in the current prosecution. We conclude that this was a clearly erroneous application of the law and therefore a manifest abuse of discretion. The district court also found the evidence inadmissible because its prejudicial effect outweighed its probative value. We conclude that this too was a manifest abuse of discretion, as the other sexual offense was more probative than prejudicial under the factors adopted in *Franks*. Accordingly, we grant the State's petition for a writ of mandamus requesting that we order the district court (1) to vacate its orders denying the State's motion to admit evidence of prior crimes and the State's motion to reconsider and (2) to enter an order granting the State's motion to admit evidence of prior crimes.

FACTS AND PROCEDURAL HISTORY

Real party in interest, John Eugene Doane, was charged by way of indictment with murder under alternative theories of willful, deliberate, and premeditated killing and felony murder occurring during the perpetration or attempted perpetration of a sexual assault. The charges stem from a cold case involving a 14-year-old victim who was discovered murdered in the desert in 1978. Evidence suggested that the victim was struck with an object and strangled to death. Although no evidence of sexual assault was apparent from the victim's autopsy, the victim's underwear had been removed from her body and contained semen. In 2019, the semen on the underwear was tested for DNA, and the DNA profile was matched to Doane, who was in prison in Nevada for crimes committed in 1979.

Before trial, the State filed a motion to admit Doane's 1979 conviction for sexual assault causing substantial bodily harm with the use of a deadly weapon. The facts underlying that conviction were that Doane offered a 14-year-old girl a ride to school, but after she got into his car, he threatened her and proceeded to drive her to the desert, where he repeatedly sexually assaulted her, struck her with a rock, and strangled her until she was unconscious, leaving her with substantial permanent injuries. The State asserted that the 1979 offense was relevant and highly probative, as it and the instant offense both involved sexual acts against teen girls and occurred

within three months of each other. The defense opposed the motion, arguing that the 1979 offense was qualitatively different from the charged offense and substantially more prejudicial than probative.

The district court denied the State's motion, determining that the State did not charge Doane with a crime constituting a "sexual offense" in the instant case and, therefore, NRS 48.045(3) did not apply. The State filed a motion for reconsideration, arguing that the felony-murder theory charged in this case, which was predicated on the perpetration or attempted perpetration of sexual assault, is a "sexual offense" as defined by NRS 48.045(3) and NRS 179D.097(1)(b). The district court denied the motion for reconsideration. In its written order, the district court determined that the facts did not support the State's theory that a sexual assault occurred in this case. The district court further stated that it had analyzed the 1979 offense under NRS 48.045(3) and *Franks*, had weighed the relevant considerations, and concluded that admitting the evidence "to further the State's theory [would] result[ ] in unfair prejudice that substantially outweighs its probative value." The State filed the instant petition for a writ of mandamus challenging the district court's denial of its motion and motion for reconsideration.[1]

DISCUSSION

The State's petition challenges the district court's orders denying the State's motion to admit Doane's prior conviction for propensity purposes pursuant to NRS 48.045(3) and the State's motion to reconsider. The State argues that its felony-murder theory, which is based on the perpetration or attempted perpetration of a sexual assault, clearly qualifies as a sexual offense and thus NRS 48.045(3) applies. The State asserts that the district court improperly considered the evidence underlying the charge, rather than the nature of the charge itself, in finding that this case does not involve a sexual offense. Additionally, the State argues that the district court erred in concluding that the danger of unfair prejudice substantially outweighed the probative value of the other bad act evidence under *Franks*. After first addressing a few preliminary considerations, we address each of the State's arguments in turn.

We exercise our discretion to consider this writ

The State argues that writ relief is warranted because it cannot appeal from a final judgment in a criminal case and therefore lacks a remedy at law to challenge the district court's evidentiary ruling. Doane does not argue that the State has an alternative remedy at law for challenging the district court's ruling.

[1]The State alternatively seeks a writ of prohibition. Because we conclude that the State is entitled to a writ of mandamus, we need not address the State's alternative request for relief.

"A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, NRS 34.160, or to control a manifest abuse or arbitrary or capricious exercise of discretion." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 779 (2011). A writ will not issue if the petitioner has "a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170. Mandamus relief is an extraordinary remedy, and it is within the sole discretion of this court to entertain a writ petition. *State v. Eighth Judicial Dist. Court (Taylor)*, 116 Nev. 374, 379, 997 P.2d 126, 130 (2000).

NRS 177.015, which outlines the availability of an appeal for a party aggrieved in a criminal action, does not provide for an appeal from a district court order denying the State's motion to admit evidence of a prior sexual offense, nor does it permit the State to appeal from an eventual jury verdict. This court has previously exercised its discretion to entertain a mandamus petition where the State could not appeal the challenged district court decision in a criminal case. *See, e.g.*, *Taylor*, 116 Nev. at 379-80, 997 P.2d at 130. Likewise, here, the State cannot appeal the district court's determination, and it therefore lacks a plain, speedy, and adequate remedy at law. *See* NRS 34.170. Furthermore, the interplay between NRS 48.045(3) and the procedural safeguards set forth in *Franks* is an issue of statewide significance that requires clarification. *See State v. Fourth Judicial Dist. Court (Martinez)*, 137 Nev. 37, 38, 481 P.3d 848, 850 (2021) (citing the presentation of "an unsettled legal issue of statewide significance" as a reason to undertake merits-based writ review). Accordingly, we conclude that the State's petition warrants consideration.

Standard of review

A district court's decision to admit or exclude evidence is discretionary. *Armstrong*, 127 Nev. at 931, 267 P.3d at 780. Where a discretionary act is challenged, this court may issue a writ of mandamus to control a district court's decision that this court deems to be a manifest abuse, arbitrary, or capricious exercise of the district court's discretion. *Id*. at 931, 267 P.3d at 779. "A manifest abuse of discretion is '[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.'" *Id*. at 932, 267 P.3d at 780 (alteration in original) (quoting *Steward v. McDonald*, 958 S.W.2d 297, 300 (Ark. 1997)).

The district court manifestly abused its discretion in ruling that Doane's prior conviction was inadmissible under NRS 48.045(3)

We now turn to the crux of this writ petition. We note at the outset that the district court's orders are not the paragon of clarity. In its order denying the State's motion to admit evidence of Doane's prior conviction, the district court concluded that NRS 48.045(3)

was wholly inapplicable because "the evidence presented [did] not establish that a sexual assault occurred in the instant case and there [were] no charges of sexual assault in the instant case." It nevertheless cited *Franks* and the factors adopted in *Franks* in evaluating whether the evidence was unfairly prejudicial and ruled that Doane's prior conviction was inadmissible.

In its order denying the State's motion for reconsideration, the district court acknowledged that the State was pursuing a theory of felony murder that included the perpetration of a sexual assault. However, it ruled that "the facts do not support such a finding" for the purposes of admitting Doane's prior conviction. The court expressly stated that it had "weigh[ed] the relevant considerations" under NRS 48.045(3) and *Franks* and concluded that the resulting unfair prejudice of admitting the 1979 conviction substantially outweighed the conviction's probative value.

In this original proceeding, the parties frame the issues as though the district court made two alternative rulings: (1) that NRS 48.045(3) is inapplicable because the State's evidence does not support a charge of a sexual offense in the instant case, and (2) that admitting Doane's prior conviction would result in unfair prejudice substantially outweighing the conviction's probative value. We therefore address each of those two arguments below. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("[I]n both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decisions and assign to courts the role of neutral arbiter of matters the parties present.").

The district court manifestly abused its discretion in looking beyond the charge Doane faced to consider whether the State's evidence might support the charge

The State argues the district court manifestly abused its discretion in ruling that NRS 48.045(3) did not apply in this case. It argues the district court looked beyond the charges brought against Doane to make a ruling on the merits as to whether the State could prove a charge for a sexual offense. The State argues that such an inquiry is not a part of the *Franks* framework for admitting evidence of a separate sexual offense. It further argues that the grand jury found probable cause for a charge of murder committed during the perpetration of a sexual assault or attempted sexual assault and that there exists ample evidence to support that charge. Doane counters that the district court acted within its wide discretion in ruling that evidence of Doane's prior conviction was inadmissible.

Other bad act evidence is generally inadmissible to prove a defendant's propensity to commit the charged crime. NRS 48.045(2). However, "NRS 48.045(3) allows for the admission of evidence of a prior bad act constituting a sexual offense 'to prove the character

of a person in order to show that the person acted in conformity therewith' that would otherwise be barred under NRS 48.045(2)." *Franks*, 135 Nev. at 4, 432 P.3d at 755 (quoting NRS 48.045(2)).[2]

NRS 48.045(3) applies in "a criminal prosecution for a sexual offense." For the purposes of NRS 48.045(3), a "sexual offense" is any of the offenses listed in NRS 179D.097(1). That list includes the State's theory of felony murder with which Doane was charged—murder "committed in the perpetration or attempted perpetration of sexual assault." NRS 179D.097(1)(a). Accordingly, Doane was charged with a sexual offense, and NRS 48.045(3) applies.

In reaching the opposite conclusion, the district court found that the evidence and facts did not support the charge that a sexual assault had occurred. The relevant consideration for determining if NRS 48.045(3) applies to a criminal prosecution, however, is simply whether the defendant has been charged with a sexual offense, not whether there is sufficient evidence to support the charge. Nothing in the plain language of NRS 48.045(3) permits a district court to look beyond the charged crimes to consider the evidence the State may present to support the charges. *See Blackburn v. State*, 129 Nev. 92, 95, 294 P.3d 422, 425 (2013) ("Our analysis begins and ends with the statutory text if it is clear and unambiguous."). Because the indictment clearly charged Doane with a sexual offense, the district court manifestly abused its discretion in finding that the prosecution did not involve a sexual offense and thus did not implicate NRS 48.045(3).

That NRS 48.045(3) is implicated in a criminal prosecution, however, does not end the district court's inquiry into whether evidence of a separate sexual offense is admissible. Rather, as discussed below, before admitting evidence under NRS 48.045(3), the district court must apply the stringent procedural requirements that we outlined in *Franks*.

The district court manifestly abused its discretion in concluding that the resulting prejudice from admitting Doane's prior conviction substantially outweighed the prior conviction's probative value

The State argues the district court manifestly abused its discretion in ruling that evidence of Doane's prior conviction was inadmissible under *Franks* because it was unfairly prejudicial. It argues that each of the factors adopted in *Franks* for evaluating whether the evidence is unfairly prejudicial weighed in favor of admitting evidence of Doane's conviction. Doane counters that each factor weighed against admitting evidence of his conviction.

[2]NRS 48.045(3) reads, in part, as follows: "Nothing in this section shall be construed to prohibit the admission of evidence in a criminal prosecution for a sexual offense that a person committed another crime, wrong or act that constitutes a separate sexual offense."

As explained above, in *Franks*, we recognized "that NRS 48.045(3) unambiguously permits the district court to admit prior sexual bad acts for propensity purposes in a criminal prosecution for a sexual offense." 135 Nev. at 4, 432 P.3d at 755. However, because of the inherent risks involved with propensity evidence, we set forth procedural safeguards to guide district courts in deciding whether to admit evidence under NRS 48.045(3). *Id.* at 5-6, 432 P.3d at 756. Before admitting evidence of a separate sexual offense under NRS 48.045(3), the district court must determine that (1) the other sexual offense is relevant to the crime charged, (2) the other offense is proven by a preponderance of evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *Id.* at 2, 432 P.3d at 754. As to the third prong, the district court should consider the factors articulated by the United States Court of Appeals for the Ninth Circuit in *LeMay*, which include the following:

> (1) the similarity of the prior acts to the acts charged, (2) the closeness in time of the prior acts to the acts charged, (3) the frequency of the prior acts, (4) the presence or lack of intervening circumstances, and (5) the necessity of the evidence beyond the testimonies already offered at trial.

Id. at 6, 432 P.3d at 756 (quoting *United States v. LeMay*, 260 F.3d 1018, 1028 (9th Cir. 2001) (quotation marks omitted)).

Here, the district court did not specifically address each of these factors. Upon review, we conclude that the consideration of the *LeMay* factors as a whole demonstrates that the probative value of Doane's 1979 conviction is not substantially outweighed by the danger of any prejudice that admitting evidence of the conviction may cause. We note the importance for district courts to evaluate each *LeMay* factor in determining whether to admit evidence of a separate sexual offense. *See, e.g.*, *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1268-69 (9th Cir. 2000) ("In light of the sensitive nature of the evidence proffered, it is important that the district court fully evaluate the factors enumerated above, and others that might arise on a case-by-case basis, and make a clear record concerning its decision whether or not to admit such evidence."). Although the district court did not delineate its consideration of each factor, we now address each factor in turn.

Similarity of the other acts to the acts charged

In the charged offense, the 14-year-old victim was found in a remote area of the desert. She appeared to have been struck in the face and died by way of manual strangulation. Her underwear was removed, and Doane's semen was found on it. As to the facts underlying Doane's 1979 conviction, the victim, also 14 years old, was

similarly taken to the desert, where Doane sexually assaulted her multiple times. And although the victim did not die from her injuries, Doane struck her in the face and strangled her until she lost consciousness. The facts of each offense are sufficiently similar that the first *LeMay* factor weighs in favor of admitting evidence of the prior conviction. *See, e.g.*, *United States v. Halamek*, 5 F.4th 1081, 1089 (9th Cir. 2021) (finding sufficient similarity between two sexual offenses where the victims were approximately the same age and were subjected to similar sexual acts); *United States v. Thornhill*, 940 F.3d 1114, 1118-19 (9th Cir. 2019) (finding sufficient similarity between a prior conviction for sexual abuse of a minor and the current charge of receipt of child pornography based on the similar ages of the victims and the kinds of abuse that occurred or were depicted).

Closeness in time between the other offense and the charged offense

We turn now to the second *LeMay* factor. Here, the acts leading to Doane's sexual assault conviction and the instant charged offense occurred only three months apart. This is a very short gap in time, particularly considering the extreme nature of the acts. This factor therefore also weighs in favor of admitting the evidence of Doane's prior conviction.

The frequency of the other offense

The third *LeMay* factor is not strongly implicated in this case, as the acts underlying his prior conviction occurred only once. This is dissimilar to other cases where, for example, a defendant subjected a victim to multiple instances of abuse over a period of time. *See, e.g.*, *Halamek*, 5 F.4th at 1089 (stating that the defendant sexually abused his stepdaughter "a few times a week" over a period of time); *Franks*, 135 Nev. at 2, 432 P.3d at 754 (recounting that the defendant inappropriately touched his 12-year-old niece five times). Therefore, this factor does not weigh in favor of admitting evidence of Doane's prior conviction.

The presence or lack of intervening circumstances

The fourth *LeMay* factor is not implicated in this case. The State asserts that Doane's incarceration is an intervening circumstance because it prevented him from committing additional sexual assaults. However, his incarceration began after the sexual offenses occurred and thus cannot be deemed an intervening circumstance. For his part, Doane argues that the gap between the two offenses "allows for a host of intervening circumstances," but he fails to give an example of any.

The necessity of the evidence beyond the testimonies offered at trial

Finally, we turn to the fifth *LeMay* factor. As the Ninth Circuit explained in *LeMay*, evidence of a separate sexual offense "need not be *absolutely necessary* to the prosecution's case"; rather, such evidence may be introduced if it is simply helpful or practically necessary. 260 F.3d at 1029. In *Franks*, we held that evidence of a defendant's prior sexual offense is helpful to the State's case if it establishes that the defendant had a propensity to commit the charged crime. 135 Nev. at 7, 432 P.3d at 757. Likewise, here, the evidence of Doane's conviction for sexual assault will help the State establish that Doane had a propensity to commit the charged crime. The fifth *LeMay* factor therefore weighs in favor of admitting the evidence.

We conclude that three of the four relevant *LeMay* factors weigh in favor of admitting the evidence of Doane's prior conviction. And while these factors are nonexhaustive, Doane has not provided any other factor that would cut in his favor against admitting the evidence. Accordingly, on balance and considering all of the circumstances, we conclude that the probative value of Doane's prior conviction is not substantially outweighed by any unfair prejudice that would result in admitting evidence of the conviction under NRS 48.045(3) and *Franks*. The district court manifestly abused its discretion in ruling otherwise, and we therefore grant the State's petition for a writ of mandamus.

CONCLUSION

NRS 48.045(3) is implicated in any case where a defendant is charged with a sexual offense and the State seeks to admit evidence of a separate sexual offense. Prior to admitting evidence of the other sexual offense, the district court must apply the procedural safeguards we outlined in *Franks*. Here, we conclude that the district court manifestly abused its discretion in finding that NRS 48.045(3) did not apply and in ruling that the evidence of Doane's prior conviction was inadmissible under NRS 48.045(3) and *Franks*. Accordingly, we grant the State's petition for a writ of mandamus. The clerk of this court shall issue a writ of mandamus instructing the district court to vacate its orders denying the State's motion to admit evidence of prior crimes and the State's motion to reconsider and enter an order granting the State's motion to admit evidence of prior crimes.

Hardesty, C.J., and Herndon, J., concur.