SR CONSTRUCTION, INC., a Nevada Domestic Corporation, Appellant, *v.* PEEK BROTHERS CONSTRUCTION, INC., a Nevada Domestic Corporation, Respondent.

No. 82786

June 2, 2022 510 P.3d 794

Appeal from a district court order denying a motion to compel arbitration. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

Reversed and remanded.

Allison Law Firm Chtd. and *Noah G. Allison* and *Heather Caliguire Fleming*, Henderson, for Appellant.

Viloria, Oliphant, Oster & Aman LLP and *Nathan J. Aman* and *Emilee N. Hammond*, Reno, for Respondent.

Before the Supreme Court, Silver, Cadish, and Pickering, JJ.

OPINION

By the Court, Pickering, J.:

This is an appeal from an order denying a motion to compel arbitration. Appellant SR Construction, Inc., argues that the district court erroneously denied its motion to compel because its master subcontract agreement (MSA) with respondent Peek Brothers Construction, Inc., includes a valid arbitration provision that applies to the parties' underlying dispute. Peek contends the district court properly held that the underlying dispute falls outside the bounds of the parties' arbitration agreement. The parties do not contest the validity of the MSA or its arbitration provision, thus posing a single question to this court in this appeal: Does the parties' dispute fit within the scope of the arbitration provision contained in the MSA?

I.

SR (a general contractor) and Peek (a subcontractor) executed the MSA to establish the general terms and conditions of their future work together. The MSA includes an arbitration provision:

> (a) Contractor and Subcontractor shall not be obligated to resolve disputes arising under this Subcontract by arbitration, unless:
>
> (i) the prime contract has an arbitration requirement; and
>
> (ii) a particular dispute between Contractor and Subcontractor involves issues of fact or law which *the*

> *Contractor* is required to arbitrate under the terms of the prime contract.

(emphasis added). SR later executed an agreement (the prime contract) with Sparks Family Medical Center, Inc., an affiliate of United Health Services of Delaware (UHS, the project owner), to construct a major medical center in Reno (the project). The prime contract consists of two documents—American Institute of Architects (AIA) Document A133–2009 and AIA Document A201–2017—each of which incorporates the other by reference. The prime contract is a "cost-plus" agreement with a guaranteed maximum price (GMP), meaning that UHS as the project owner bears all project costs up to the GMP. *Cost-Plus Contract*, *Black's Law Dictionary* (11th ed. 2019) ("[A] contract in which payment is based on a fixed fee or a percentage added to the actual cost incurred; esp., a construction contract in which the owner pays to the builder the actual costs of material and labor plus a fixed percentage over that amount."). The parties may seek to increase the GMP and recover additional "necessarily incurred" costs using written change orders. If costs exceed the GMP as modified by any approved change orders, then SR is responsible for the excess costs.

The prime contract also includes an arbitration provision, which states as follows:

> Arbitration shall be utilized as the method for binding dispute resolution in the Agreement[.] [A]ny *Claim* subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement.

(emphasis added). A "claim" under the contract is "a demand or assertion by one of the parties seeking, as a matter of right, payment of money, a change in the Contract Time, or other relief with respect to the terms of the Contract . . . [and] other disputes and matters in question between the Owner and Contractor *arising out of or relating to the Contract*." (emphasis added). The prime contract further permits SR to include subcontractors in arbitration of a claim:

> Arbitration, at the Contractor's election, may include Subcontractors to Contractor that Contractor deems relevant to the matter in dispute and upon Contractor's request, the Arbitrator shall decide all or a particular portion of a dispute between the Contractor and a Subcontractor and, as Contractor may request, the Arbitrator shall speak to the extent to which the Arbitrator's decisions regarding a dispute between Contractor and Owner and the dispute between Contractor and Subcontractor are inter-related.

After executing the prime contract with UHS, SR executed a work order with Peek to complete the core and shell civil work for the project, which included bringing the building pad to the proper subgrade elevation. SR agreed to pay Peek $3,062,000 for its work, and the work order expressly incorporated the MSA's terms and obligations by reference.

The dispute underlying SR's motion to compel arbitration arose when—for reasons the parties contest—Peek deviated from the means and methods it used to bid the project in elevating the building pad. Peek states that it bid the project assuming it would mass-grade the building pad to a few feet below the required elevation, dig the building footings and plumbing trenches, and then use the "spoils" from excavating the footings and trenches to backfill and grade the pad to the proper subgrade elevation. Instead, Peek imported approximately 150,000 square feet of additional material to raise the pad to the proper subgrade elevation *before* digging the footings and trenches. Peek alleges that it deviated from its bid-based plans when an SR employee directed it to obtain extra material to raise the pad earlier because SR did not want to wait for Peek to excavate the footings and trenches. SR alleges that Peek did not know the pad's elevation from the start and thus imported additional material under the incorrect assumption that it needed it.

The above-described changes added $140,000 to Peek's costs, which it sought to recover from SR after the fact in two written change orders. SR relayed the change orders to UHS, who deemed the changes unnecessary, rejected the change orders, and directed SR to initiate dispute resolution with Peek. Before SR could do so, Peek sued SR in district court, alleging breach of contract, unjust enrichment, and violation of NRS Chapter 624 and seeking over $140,000 in damages and attorney fees. SR filed a demand for arbitration with the American Arbitration Association (AAA), in which it named UHS and Peek as defendants, and in tandem with its demand, SR moved to compel arbitration in district court. The district court denied SR's motion. It held that the prime contract required arbitration only of disputes between UHS and SR, so Peek's dispute with SR was not arbitrable under the MSA because it did not involve UHS and, therefore, could not involve common issues of fact or law that SR must arbitrate under the prime contract. SR appeals, and we reverse.[1]

II.

On appeal, SR argues that Peek's dispute involves issues of fact and law about the reasonableness of its additional costs that SR must arbitrate with UHS under the prime contract, so this dispute is there-

[1]This court stayed litigation below pending resolution of this appeal, which order we now vacate.

fore arbitrable as between SR and Peek under the MSA provision. SR further argues that the district court ignored the presumption of arbitrability when it denied the motion to compel and that Peek cannot artfully plead its way out of arbitration by omitting UHS as a defendant. Peek argues that this dispute does not involve UHS because SR is solely responsible for its additional costs, and the district court therefore correctly concluded that this dispute is not arbitrable under the MSA provision because the prime contract only mandates arbitration of disputes between UHS and SR. Peek further argues that SR's interpretation of the MSA provision would create the absurd result of forcing SR and Peek to arbitrate all disputes.

To compel arbitration, a moving party must establish that there is an enforceable agreement to arbitrate and that the dispute fits within the scope of the arbitration agreement. 4 Am. Jur. 2d *Alternative Dispute Resolution* § 100 (2018); *see also Phillips v. Parker*, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990). Here, the parties agree that the MSA includes a valid and enforceable arbitration provision, so we address the narrow issue of whether this particular dispute fits within the provision's scope. The arbitrability of a dispute presents a question of contract construction that this court reviews de novo. *Masto v. Second Judicial Dist. Court*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009). That review only addresses arbitrability, not the merits of the underlying dispute. *Clark Cty. Pub. Emps. Ass'n v. Pearson*, 106 Nev. 587, 591, 798 P.2d 136, 138 (1990).

A.

There is a strong presumption in favor of arbitrating a dispute where a valid and enforceable arbitration agreement exists between the parties. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986); *Int'l Ass'n of Firefighters, Local No. 1285 v. City of Las Vegas*, 112 Nev. 1319, 1323, 929 P.2d 954, 957 (1996) ("Nevada courts resolve all doubts concerning the arbitrability of the subject matter of a dispute in favor of arbitration.") (internal quotation marks omitted); *cf. Gore v. Alltel Commc'ns, LLC*, 666 F.3d 1027, 1032 (7th Cir. 2012) (holding that no presumption of arbitrability arises when the court is determining whether an arbitration agreement exists in the first place). This presumption applies differently based on the scope of the arbitration agreement. 1 Thomas H. Oehmke & Joan M. Bovins, *Commercial Arbitration* § 6:9 (3d ed. 2021) (noting that the scope of the clause indicates the parties' intent to arbitrate a particular dispute); 7 Philip L. Bruner & Patrick J. O'Connor, Jr., *Bruner & O'Connor on Construction Law* § 21:122 (2014) (explaining that the presumption of arbitrability applies differently under broad versus narrow arbitration clauses). Under a broad arbitration provision—i.e., one that encompasses all disputes related to or arising out of an agreement—a presumption

of arbitrability applies and "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Clark Cty. Pub. Emps. Ass'n*, 106 Nev. at 591, 798 P.2d at 138 (quoting *AT&T Techs., Inc.*, 475 U.S. at 650 (holding that only the strongest evidence against arbitration will remove a dispute from the purview of a broad arbitration clause)). Even matters tangential to the subject agreement will be arbitrable under a broad provision. 1 Oehmke, *supra*, § 6:10 (Supp. 2021) ("[W]hen the language of the arbitration provision is broad, a claim will proceed to arbitration if the underlying allegations simply touch upon any matters covered by the provision.").

Given that a strong presumption of arbitrability applies if the MSA provision is deemed broad, Peek argues it is narrow—a plausible position at first blush—because the clause states that a dispute is not arbitrable "unless" two prerequisites are satisfied. *Cf. Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 226 (2d Cir. 2001) (reasoning that words and phrases alone do not dictate whether a clause is broad or narrow, although words of limitation typically indicate a narrower clause). But unlike other narrowly phrased arbitration agreements, the MSA provision does not limit arbitration to specific issues, subject matter, or dollar amounts. Instead, it incorporates the prime contract's terms by looking to (1) whether the prime contract includes an arbitration requirement, and (2) whether the dispute "involves issues of fact or law which [SR] is required to arbitrate under the terms of the prime contract." *See Clark Cty. Pub. Emps. Ass'n*, 106 Nev. at 591, 798 P.2d at 138 (holding that an issue was arbitrable where not expressly excluded from the arbitration provision); *cf. Papalote Creek II, LLC v. Lower Colo. River Auth.*, 918 F.3d 450, 455-56 (5th Cir. 2019) (noting that a narrow arbitration clause limits arbitration to a specific category of disputes at the exclusion of others); 1 Oehmke, *supra*, § 6:11 (Supp. 2021) ("A narrow clause limits the arbitrator's scope of authority by either including specific disputes or excluding other identified issues.").

Accordingly, where a prime contract includes a broad arbitration provision, the MSA provision's purported limits are nearly illusory. The prime contract applicable here includes an expansive arbitration provision that covers all disputes between SR and UHS, including "matters in question . . . arising out of or relating to the contract." *See* 2 Oehmke, *supra*, § 25:17 (stating that the standard AIA Document A201 contract includes a broad arbitration clause). The MSA provision is therefore likewise broad because it requires SR and Peek to arbitrate a "dispute . . . involv[ing] issues of fact or law [that SR] is required to arbitrate under the terms of the prime contract," which in turn includes any dispute or "matter[ ] in question" arising under the agreement. Further, because the MSA provision does not limit its application to disputes involving issues

of fact or law that both the contractor *and subcontractor* must arbitrate under the prime contract, it is irrelevant to determining the MSA provision's scope that UHS is not a defendant to the underlying action and that Peek is not a party to the prime contract's arbitration agreement. *See Clark Cty. Pub. Emps. Ass'n*, 106 Nev. at 591, 798 P.2d at 138. Rather, under the MSA provision's plain language, if SR would have to arbitrate an issue of fact or law under the prime contract with UHS, then in turn, SR and Peek must arbitrate that same issue.

In sum, as applied here, the MSA provision is broad and an attendant presumption of arbitrability applies. Meanwhile, Peek provides no evidence to rebut this presumption and show that the parties intended to exclude this dispute from arbitration. *See Clark Cty. Pub. Emps. Ass'n*, 106 Nev. at 591, 798 P.2d at 138 ("[I]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.") (emphasis and internal quotation marks omitted). Lacking forceful evidence of the parties' intent to exclude this dispute from arbitration, Peek's dispute is presumptively arbitrable under the parties' agreement. This interpretation does not create what Peek characterizes as the absurd result of mandating arbitration of *all* disputes between Peek and SR; it mandates arbitration of only those disputes including common issues of fact or law that SR must arbitrate with UHS under the prime contract, which the parties freely agreed to do. *See Holcomb Condo. Homeowners' Ass'n v. Stewart Venture, LLC*, 129 Nev. 181, 187, 300 P.3d 124, 128 (2013) (recognizing Nevada's interest in protecting persons' freedom to contract).

B.

Even crediting Peek's argument that the MSA provision is narrow, this dispute is arbitrable because it fits within the provision's terms. *Clark Cty. Pub. Emps. Ass'n*, 106 Nev. at 591, 798 P.2d at 138 (holding that where no express provision excluded arbitration the court could not say with "positive assurance" that the issue was not arbitrable (emphasis omitted)); 1 Oehmke, *supra*, § 6:9 (noting that under a narrow clause "the sole issue for the arbiter is a dispute that, on its face, falls within the purview of the clause"). A narrow provision limits arbitration to specific issues or circumstances; unlike under broad provisions, collateral issues to the subject agreement are not arbitrable under narrow provisions. *Cummings v. FedEx Ground Package Sys., Inc*., 404 F.3d 1258, 1261-62 (10th Cir. 2005); 1 Oehmke, *supra*, § 6:11. In further contrast to a broad provision, "a narrow clause indicates a weak presumption of arbitrability." 1 Oehmke, *supra*, § 6:11 (Supp. 2021). But even under a narrow provision, the court "should order arbitration of particular grievances 'unless it may be said with positive assurance that the arbitration

clause is not susceptible of an interpretation that covers the asserted dispute.'" *Int'l Ass'n of Firefighters, Local No. 1285*, 112 Nev. at 1324, 929 P.2d at 957 (quoting *AT&T Techs., Inc.*, 475 U.S. at 650); *Clark Cty. Pub. Emps. Ass'n*, 106 Nev. at 591, 798 P.2d at 138.

Fairly read, consistent with even a weak presumption of arbitrability, the MSA provision covers Peek's dispute because it raises issues of fact and law regarding the reasonableness of Peek's change orders that SR must arbitrate with UHS under the prime contract. UHS must compensate SR—and Peek—only for "costs *necessarily* incurred by [SR] in the proper performance of the Work." (emphasis added). *See* W. Henry Parkman, *Cost-Plus Contracting Without a GMP—Contractor's Risks, Owner's Rights?*, 29 No. 11 Construction Litig. Rep. 1, 3-4 (2008) (explaining that a project owner is responsible only for reasonably incurred costs under a cost-plus contract with a GMP). Costs incurred due to a contractor's fault or mismanagement are unnecessary and unreasonable, and therefore, a contractor and owner may dispute whether those costs are reimbursable under the contract. *Id.*; *see also Kerner v. Gilt*, 296 So. 2d 428, 431 (La. Ct. App. 1974) ("In any cost-plus contract there is an implicit understanding between the parties that the cost must be reasonable and proper."). Peek alleges that SR's mismanagement caused its additional costs—i.e., unnecessarily directing Peek to import 150,000 square feet of additional material to elevate the building pad's subgrade. Peek's allegation amounts to a "claim" about whether its costs were reasonably incurred, which involves issues of fact and law that SR would have to arbitrate with UHS when seeking reimbursement for those costs under the prime contract, at least until the GMP is exceeded. The GMP was not exceeded when this claim was filed, and Peek must therefore arbitrate this dispute with SR because SR must arbitrate the dispute with UHS.

C.

Other provisions in the prime contract and MSA confirm the arbitrability of this dispute. *See Eversole v. Sunrise Villas VIII Homeowners Ass'n*, 112 Nev. 1255, 1260, 925 P.2d 505, 509 (1996) ("Contractual provisions should be harmonized whenever possible . . . ."). This court may order consolidation of arbitration to avoid potentially conflicting awards and the additional time and expense involved with separate proceedings if mutual consolidation agreements exist. *Compare Exber, Inc. v. Sletten Constr. Co.*, 92 Nev. 721, 725-27, 732, 558 P.2d 517, 519-20, 524 (1976) (ordering consolidated arbitration where common issues of law existed and all parties agreed to consolidation), *with Pueblo of Laguna v. Cillessen & Son, Inc.*, 682 P.2d 197, 200 (N.M. 1984) (holding that consolidation of arbitration was improper because consolidation was not provided for in any of the contract documents). This court's deci-

sion in *Exber, Inc. v. Sletten Construction Co.* is illustrative: There, as here, the project owner and general contractor entered an AIA Document A201 agreement that included a broad arbitration provision. 92 Nev. at 724, 558 P.2d at 518. The general contractor then entered several subcontracts, which each extended the contractor's right to arbitrate disputes under the prime contract to the subcontractors. *Id.* at 724-25, 558 P.2d at 519. The owner later rejected the contractor's claim seeking to recover its subcontractors' additional costs; the subcontractors accordingly made a demand on the contractor to submit the claim to arbitration, who in turn made an arbitration demand on the owner. *Id.* at 725, 558 P.2d at 519. The owner challenged joint arbitration because it did not have a contractual duty to arbitrate with the subcontractors. *Id.* at 727, 558 P.2d at 520. This court ordered consolidation of the arbitration proceedings because the owner/contractor dispute involved the same evidence, witnesses, and legal issues as those involved in the contractor/subcontractors dispute. *Id.* at 732, 558 P.2d at 524.

The prime contract includes a consolidation-of-arbitration provision in matters involving common legal and factual issues:

> [E]ither party may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) *the arbitrations to be consolidated substantially involve common questions of law or fact*, and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

(emphasis added). Section 15.4.4 of the prime contract further provides that SR may include subcontractors in arbitration under the agreement if SR "deems [the subcontractor] relevant to the matter in dispute." The MSA also includes a consolidation clause, which provides that "the same arbitrator(s) utilized to resolve the dispute between any Owner and Contractor shall be utilized to resolve the dispute under [the MSA] provision." *See* 2 Oehmke, *supra*, § 25:54 (labeling a provision like that used in the MSA as a consolidation clause). And like the intertwined disputes in *Exber*, common questions of law and fact permeate the disputes between Peek/SR and SR/UHS—for example, who is at fault for importing the additional material? Did UHS direct SR to work faster, thus prompting SR's alleged request of Peek? Was importing additional material reasonable in view of the larger project timeline? Did Peek and SR comply with the proper change-order procedures? More than likely, the Peek/SR dispute will require the same witnesses and evidence to answer these same questions in the SR/UHS dispute. This court therefore has the power to order arbitration because mutual consolidation-of-arbitration provisions exist, and common questions of fact and law drive these disputes.

To the extent Peek argues that this dispute is not arbitrable because it does not (and will not) involve UHS, we disagree. UHS has ultimate authority to approve or reject change-order requests up to the GMP, as increased (or not) by earlier change orders. UHS—not SR—rejected Peek's change orders, and UHS cautioned SR against issuing payment to Peek without its approval. Potential outcomes of the Peek/SR dispute implicate UHS's financial interests—e.g., if the finder of fact concludes that Peek's additional costs were reasonable, and SR may seek reimbursement from UHS. Indeed, UHS already raised Peek's dispute as a matter in question between itself and SR under the prime contract, thus permitting consolidation of these common disputes under Section 15.4.4 of the prime contract. It is simply too early to tell if UHS will bear financial responsibility for Peek's costs, and absent necessary facts in this pre-discovery moment, Peek cannot avoid arbitration by strategically omitting UHS from its complaint. *Phillips*, 106 Nev. at 417, 794 P.2d at 718 (holding that a party may not use artful pleading to avoid arbitration); *see also Seal & Co. v. A.S. McGaughan Co.*, 907 F.2d 450, 453-55 (4th Cir. 1990) (holding that subcontractor must comply with alternative dispute resolution provision of the prime contract where the subject dispute involved interpretation of the prime contract's terms); *Frohberg Elec. Co. v. Grossenburg Implement, Inc.*, 900 N.W.2d 32, 38 (Neb. 2017) (holding that issue was arbitrable between subcontractor and contractor even though arbitration clause only referenced disputes between the contractor and owner).

III.

In sum, the MSA provision incorporates the prime contract provision, which is broad, so the presumption of arbitrability applies, which Peek fails to rebut. The dispute is therefore arbitrable. And even construing the MSA provision narrowly, this dispute is arbitrable because it fits within the face of the arbitration provision: SR must arbitrate whether costs included in a change order are reasonable and reimbursable under the prime contract's arbitration agreement. Further, the prime contract and the MSA both include consolidation-of-arbitration provisions, and UHS is involved in this dispute because it has a potential financial interest in it, thus permitting consolidation of the Peek/SR and SR/UHS disputes. We therefore reverse the district court's order denying SR's motion to compel and remand with instructions to the district court to order that this matter proceed to arbitration.

Silver and Cadish, JJ., concur.

DESIRE EVANS-WAIAU, Individually; and GUADALUPE PARRA-MENDEZ, Individually, Appellants, *v.* BABYLYN TATE, Individually, Respondent.

No. 79424

June 16, 2022 511 P.3d 1022

Appeal from a district court defense judgment on a jury verdict in a tort action. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

Affirmed.

Stiglich, J., with whom Silver and Herndon, JJ., agreed, dissented.

Prince Law Group and *Dennis M. Prince* and *Kevin T. Strong*, Las Vegas, for Appellants.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg, Joel D. Henriod*, and *Adrienne Brantley-Lomeli*, Las Vegas; *Winner Booze & Zarcone* and *Thomas E. Winner* and *Caitlin J. Lorelli*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Cadish, J.:

This appeal presents two separate questions—one procedural and one substantive. The procedural question is whether a party must move for a new trial in district court to preserve attorney-misconduct claims on appeal. We recently held in *Rives v. Farris*, 138 Nev. 138, 506 P.3d 1064 (2022), that a party is not necessarily required to move for a new trial to preserve its trial error-based arguments or ability to seek a new trial as an appellate remedy. Respondents argue, however, that our decision in *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008), requires a party to move for a new trial to preserve a specific claim that attorney misconduct warrants a new trial. Respondents read too much into *Lioce* and ignore the procedural posture of that case, for there we were concerned only with whether the complaining parties preserved their attorney misconduct arguments with contemporaneous objections. Although *Lioce* arose from orders resolving motions for new trials, that distinct procedural posture does not encumber our review in the context of an appeal from a final judgment where appellants objected to at least some of the alleged misconduct. Thus, the rule announced in *Rives*

applies. As no procedural shortcomings inhibit us from reaching the substantive merits of the appeal, notably the alleged attorney misconduct, we address appellants' claims of error, and having reviewed the record, we are not persuaded that the challenged conduct or other alleged trial errors warrant reversal. Accordingly, we affirm the district court's judgment.

FACTS AND PROCEDURAL HISTORY

In October 2015, appellant Desire Evans-Waiau was driving westbound on Flamingo Boulevard. She was accompanied by appellant Guadalupe Parra-Mendez, as well as several children who are not parties to this appeal. According to Evans-Waiau, she abruptly stopped to avoid a pedestrian in the crosswalk at the intersection of Flamingo and Linq Lane. Respondent Babylyn Tate was driving westbound on Flamingo Boulevard behind Evans-Waiau. According to Tate, Evans-Waiau "braked hard and abruptly" but Tate did not see a turn signal or a brake light. She testified that she rear-ended Evans-Waiau's car despite braking and swerving to the left to try and avoid a collision. No one reported any injuries at the scene. Evans-Waiau reported the accident to the police, who responded approximately two hours later. After several months passed, during which appellants obtained medical treatment, appellants filed a complaint, alleging that Tate negligently operated her car and caused appellants injury.[1] Tate answered, asserting that Evans-Waiau was comparatively negligent as an affirmative defense and that appellants could not otherwise prove that their medical treatment was causally related to the October accident.

At trial, appellants called Jorge Parra-Meza, who is Evans-Waiau's significant other and Parra-Mendez's brother, as a witness. Parra-Meza owns the vehicle that Evans-Waiau was driving when the accident occurred, and he is the father of the children who were in the vehicle with Evans-Waiau. During his testimony, which primarily focused on Evans-Waiau's injury claims, Parra-Meza stated he had "smoked-out" taillight covers installed on the vehicle after he purchased it. During cross-examination, he affirmed that the vehicle had been rear-ended twice, including this accident, after he added the smoked-out taillights.

Tate introduced an audio/video recording that Parra-Meza made the night of the accident. In the video, Parra-Meza addressed the damage to the vehicle and stated:

> You can see the fuckin' bumper is fuckin' totaled. Look at the shape of this fuckin' big ass dent right here, too. The lights are obviously out. Light's fuckin' out here. I don't know how the

[1]At some point during her treatment, Evans-Waiau was involved in another car accident, and an ambulance transported her to the hospital. Evans-Waiau underwent spinal surgery after the second accident.

> fuck this happened but look, a big ass dent here, a big ass dent here. Fuck.

Appellants objected to its admission as irrelevant hearsay. They also argued that even if it had potential relevancy, it should be excluded because Parra-Meza's use of profanity carried a potential for unfair prejudice that outweighed any probative value the recording may have. The district court concluded that the recording was relevant to the bias of both Parra-Meza and Evans-Waiau because no one reported an injury from the crash until after Parra-Meza made the recording while he wondered who was going to pay for the damage from the wreck. The court concluded the recording was not hearsay because it was not offered for the truth of the matter asserted and that the profanity was not prejudicial, as the jury would likely understand Parra-Meza's frustration with the damage to his vehicle. The court thus allowed Tate to play the video. On questioning, Parra-Meza confirmed that his children were in the background when he made the video. He also confirmed that he was angry and wondered who would pay for the damage to the vehicle when he made the video.

The district court also allowed Tate to ask appellants' medical providers questions "regarding the existence of any past working relationship with [appellants'] counsel involving medical liens only." During trial, Evans-Waiau confirmed that she met with her initial attorney, Paul Powell, before meeting with any doctors, and that Powell referred her to a chiropractor. Powell also referred Evans-Waiau to Dr. Garber, who performed spinal surgery on Evans-Waiau.

Regarding medical liens, Dr. Rosler, a pain management physician, performed a selective nerve block on Evans-Waiau. He referred her to Dr. Khavkin, a neurosurgeon, for a neurosurgical evaluation, which showed a structural disc injury. Dr. Khavkin recommended Evans-Waiau undergo a spinal fusion, which Dr. Garber affirmed when Evans-Waiau visited him for a second opinion.[2] Dr. Rosler billed several thousand dollars, but he treated Evans-Waiau on a medical lien "on any potential settlement" she received. Dr. Khavkin also treated Evans-Waiau on a medical lien.

Tate called Dr. Schifini, a board-certified anesthesiologist, as a witness. He reviewed all available medical records, imaging studies, deposition testimony, accident-related data, and a video. He did not form an opinion on whether the accident caused injuries to either Parra-Mendez or Evans-Waiau because "[t]here was no objective evidence . . . to indicate that there was any injury in this particu-

[2]While Dr. Rosler testified that he referred Evans-Waiau to Dr. Garber for a second opinion regarding the necessity of spinal surgery, Evans-Waiau testified that Powell referred her to Dr. Garber, and on her patient intake form, Evans-Waiau indicated that she learned of Garber's practice from Powell.

lar case." Instead, he gave appellants "the benefit of the doubt" and "assume[d]" that they were injured in the manner described. Based on that assumption, he addressed whether the treatments appellants received were reasonable and necessary.

Appellants moved to strike Dr. Schifini's testimony, arguing that it could not help the jury because he did not opine on whether appellants were injured in the crash. Further, they asserted that his testimony was not proper under *Williams v. Eighth Judicial District Court*, 127 Nev. 518, 262 P.3d 360 (2011), because it did not consider their theory of causation. The district court denied the motion, concluding that Dr. Schifini's testimony satisfied *Williams* because he "assume[d] that [Evans-Waiau] had an injury," yet concluded that it was resolved and likely not caused by the accident. The court also pointed out that appellants failed to contemporaneously object to the testimony, and thus, in the absence of clear error, appellants' motion to strike failed.

Before closing arguments, the district court provided two jury instructions related to Evans-Waiau's potential comparative negligence. First, the district court gave Instruction No. 34, which provided,

> A person shall not drive, move, stop or park any vehicle . . . if such vehicle . . . [i]s not equipped with lamps, reflectors, brakes, horn and other warning and signaling devices . . . required by the laws of this State . . . under the conditions and for the purposes provided in such laws.

Next, the court gave Instruction No. 35, which provided that under Nevada law, "[e]very motor vehicle must be equipped with two tail lamps mounted on the rear, which, when lighted, emit a red light plainly visible from a distance of 500 feet to the rear." The instruction continued that if the jury concluded a party violated that law, "it is your duty to find such violation to be negligence, and you should then consider the issue of whether that negligence was the proximate cause of injury or damage to the plaintiff."

During closing argument, Tate's attorney discussed "the value of the dollar" as it relates to appellants' requested damages. He argued as follows:

> The value of the dollar outside the courtroom is this, if the average family of four makes $50,000 a year, if the average family of four saves $50,000 a year makes $50,000 a year [sic] and let's pretend that family never had to pay a mortgage, never had to pay rent, never had to buy groceries, never ever [sic] to pay for a barber, never had to hail a cab, never went to the movies, never went to a restaurant, never paid a bill. It would take that family that makes $50,000 a year, if they never paid for any clothing, they never paid for children's clothing, never

> paid for schoolbooks, they never made a car payment, they never paid for gas, they never paid for electricity, it would save [sic] that family of four 20 years to save $1 million.

Appellants objected on the basis that the argument improperly suggested that the jury consider Tate's ability to pay any potential judgment, as the clear inference of such an argument was that Tate would not be able to pay appellants' projected damages. The district court sustained the objection as it assumed facts not in evidence but allowed Tate to make a hypothetical argument of how long it would take a family to save the requested damages "[t]o put it in perspective on some level how much money it is."

Following the ruling, Tate argued:

> If that average family of four managed at the end of the year to have $5,000 more in the bank than they have the previous year, they'd be doing—that's better than most of us. That's $5,000 at the end of the year that they didn't have the previous year. A lot of people aren't able to do that.
>
> And if that family was able to save $5,000 a year, how long would it take them to save $1 million? It would take them 200 years to save a million dollars. That's how much money they're asking for. 200 years. A million dollars. That's 1/3 of one element of one of the damages they're claiming in this case.
>
> It would take them 600 years to save $3 million. That's not Monopoly money they're asking for. They're asking for real money. Real money.

Appellants did not object to this argument. The jury returned a general verdict finding Tate not negligent, and the district court entered judgment on the verdict. The court of appeals affirmed, and we granted review.

DISCUSSION

Appellants did not waive their attorney-misconduct claims by not moving for a new trial in district court

Tate argues that appellants waived their attorney-misconduct claims because they did not move for a new trial before filing this appeal. Relying on *Lioce v. Cohen*, 124 Nev. 1, 18, 174 P.3d 970, 981 (2008), Tate contends that a motion for a new trial is required in the attorney-misconduct realm because the district court "must evaluate the evidence and the parties' and the attorneys' demeanor to determine whether a party's substantial rights were affected" by the alleged attorney misconduct. *Lioce*, 124 Nev. at 18, 174 P.3d at 981. We disagree.

We recently addressed whether a party must move for a new trial to raise a preserved issue on appeal in *Rives*, 138 Nev. at 142,

506 P.3d at 1068, and held that "a party need not file a motion for a new trial to raise a preserved issue on appeal or request a new trial as a remedy for alleged errors below." This general rule applies regardless of the alleged trial error, and *Lioce* does not require that a party move for a new trial before pursuing an appeal pertaining specifically to alleged attorney misconduct relating to improper arguments.[3] *Lioce* happened to arise from the post-trial motion process, but that procedural posture does not work as an encumbrance to appellate review, such that a party who timely objected to the alleged misconduct but did not move for a new trial cannot appeal from the final judgment on the basis that the unchecked misconduct resulted in an unfair trial.

In *Lioce*, we addressed "the issue of which standards district courts are to apply *when deciding motions for a new trial* based on attorney misconduct." 124 Nev. at 14, 174 P.3d at 978 (emphasis added). However, we framed the issue that way because the underlying appeals were taken from orders granting or denying motions for a new trial based on alleged attorney misconduct. *Id.* at 8, 10-11, 14, 174 P.3d at 975, 976-77, 978. Thus, *Lioce* arose from the post-trial motion process, and thus, we addressed the applicable standards for such motions, but we did not impose a requirement that a party *must* move for a new trial based on alleged attorney misconduct to preserve that issue for appeal.[4] While Tate raises several prudential arguments that district courts are best situated to make factual findings and appellate review may be enhanced if a party first seeks a new trial in district court, such concerns do not warrant creating a requirement that a party move for a new trial as a prerequisite to raising preserved issues on appeal when the rules do

[3]As we noted in *Rives*, while a party need not move for a new trial before pursuing an appeal, there are several practical benefits to doing so such as allowing a district court to correct alleged errors without pursuing potentially unnecessary appellate litigation or developing a better record for potential appellate review by allowing the district court to articulate its reasoning for its rulings and the parties to "crystallize" their arguments. 138 Nev. at 142 n.3, 506 P.3d at 1069 n.3.

[4]Our prior caselaw does not require a contrary result. First, in *BMW v. Roth*, we reversed a decision to grant a new trial as to one of the plaintiffs because that plaintiff never moved for a new trial or joined the other plaintiff's motion for a new trial, and thus, there was no basis for the district court to grant that plaintiff a new trial. 127 Nev. 122, 132 n.4, 252 P.3d 649, 656 n.4 (2011). Second, in *Bato v. Pileggi*, we concluded that the appellant's failure to *either* contemporaneously object to the attorney misconduct *or* move for a new trial based on attorney misconduct constituted waiver of the claims. No. 68095, 2017 WL 1397327, at *1 (Nev. Apr. 14, 2017). Finally, in *Craig v. Harrah*, we noted that we had not previously held that a party must move for a new trial to preserve an issue for appellate review and concluded that "it is not necessary to so hold in the instant case, or to pass, now, finally upon that question." 65 Nev. 294, 308, 195 P.2d 688, 694 (1948).

not contain such a requirement.[5] Accordingly, we conclude that a party need not move for a new trial as a prerequisite for preserving its attorney-misconduct claims for appeal when that party objected to the misconduct in district court. As appellants raised objections to the conduct they challenge on appeal, we next address their arguments that such misconduct, along with other alleged trial errors, warrants reversal.

Tate did not make an improper ability-to-pay argument

Appellants contend that Tate made an improper ability-to-pay argument in closing that constituted reversible attorney misconduct because it focused on how many years it would take a family to save enough money to cover the requested damages. They also argue that Tate's attorney's comments improperly encouraged jury nullification and that her attorney made an improper golden-rule argument. We disagree.

We review whether an attorney's comments constitute misconduct de novo. *Lioce*, 124 Nev. at 20, 174 P.3d at 982. "A defendant's ability or inability to pay a judgment is no more relevant to the issue of liability than is the fact of insurance." *White v. Piles*, 589 S.W.2d 220, 222 (Ky. Ct. App. 1979). "[T]he ability of a defendant to pay the necessary damages injects into the damage determination a foreign, diverting, and distracting issue which may effectuate a prejudicial result." *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977).

All the cases on which appellants rely focus on whether the defendant explicitly mentioned or asked the jury to consider the defendant's lack of wealth or inability to pay any judgment, which Tate did not do here. *See, e.g.*, *id.* (concluding that the district court erred when it considered the defendant's inability to pay a substantial monetary judgment when fashioning a judgment). Instead, Tate's attorney merely discussed the value of a dollar and "[told] the jury to determine what amount of money" would compensate appellants and "what that money means to them." *A.C. ex rel. Cooper v. Bellingham Sch. Dist.*, 105 P.3d 400, 407 (Wash. Ct. App. 2004). This argument did not ask the jury to reject appellants' claims based on Tate's inability to pay a judgment and did not even discuss Tate's financial circumstances. Accordingly, while such an argument would be improper, Tate did not make an ability-to-pay argument here.

Although appellants contend that this argument also improperly encouraged jury nullification, Tate's attorney "did not implore the jury to disregard the evidence." *Capanna v. Orth*, 134 Nev. 888, 891, 432 P.3d 726, 731 (2018). Jury nullification is the "knowing

[5]*Rives* squarely forecloses Tate's argument that NRAP 3A(a) goes to jurisdiction only, not issue preservation. 138 Nev. at 142, 506 P.3d at 1068.

and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue . . . or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness." *Lioce*, 124 Nev. at 20, 174 P.3d at 982-83 (quoting *Jury Nullification*, *Black's Law Dictionary* (8th ed. 2004)). The argument here, as reframed, provided a hypothetical as context for the damages amount appellants sought, and Tate ultimately argued that evidence did not support negligence or the necessary element of causation; this does not amount to an improper jury-nullification argument. *Cf. Capanna*, 134 Nev. at 890-91, 432 P.3d at 731 (rejecting argument that defendant's counsel advocated for jury nullification, as the record showed that, in context, counsel "merely argued the role of the jury in the deliberative process," and to the extent counsel asked the jury to send a message, the argument was not prohibited because counsel did not ask the jury to ignore the evidence).

As to whether the argument constituted an impermissible golden-rule argument, appellants focus particularly on Tate's statement that if a family was able to save $5,000, "they'd be doing—that's better than most of us." But appellants did not object to this revised closing argument as an improper golden-rule argument, and thus, waiver applies. *See Lioce*, 124 Nev. at 19, 174 P.3d at 981 (holding that a "party must object to purportedly improper argument to preserve this issue for appeal" and explaining that the issue is "generally deem[ed]" waived if the party fails to object to it). While appellants objected to the initial hypothetical, they objected only on the ground that it was an impermissible ability-to-pay argument. They did not make a golden-rule objection, despite that a golden-rule objection is distinct from an ability-to-pay objection. *Compare Lioce*, 124 Nev. at 22, 174 P.3d at 984 (explaining that a golden-rule argument "is an argument asking jurors to place themselves in the position of one of the parties"), *with Geddes*, 559 F.2d at 560 ("[T]he ability of a defendant to pay the necessary damages injects into the damage determination a foreign, diverting, and distracting issue which may effectuate a prejudicial result.").

While a party must object to an improper attorney argument to preserve the issue for appeal, when a party fails to object, we may still review allegations of such misconduct for plain error. *Lioce*, 124 Nev. at 19, 174 P.3d at 981-82. To succeed on plain-error review of unobjected-to attorney misconduct, a party must show "that no other reasonable explanation for the verdict exists." *Id.* at 19, 174 P.3d at 982 (quoting *Ringle v. Bruton*, 120 Nev. 82, 96, 86 P.3d 1032, 1041 (2004)). Here, assuming that Tate's attorney made an improper golden-rule argument by stating that a family able to save $5,000 would be doing better "than most of us," that statement does not offset the evidence supporting the jury's verdict. *See*

id. ("This standard addresses the rare circumstance in which the attorney misconduct offsets the evidence adduced at trial in support of the verdict."). Specifically, the jury considered evidence that (1) Evans-Waiau's vehicle suffered minimal damage and no injuries were apparent at the scene although the parties stayed there for two hours after the accident; (2) Evans-Waiau may have contributed to the accident; (3) appellants did not speak to a doctor until after visiting an attorney; (4) before surgery, Evans-Waiau was in another automobile accident that required immediate transport to a hospital; and (5) appellants' medical care was not reasonable. This evidence supports the jury's verdict such that we cannot conclude that the allegedly improper argument affected appellants' substantial rights, and thus, appellants cannot show plain error. *See id.* at 19 n.32, 174 P.3d at 982 n.32 (explaining that "[i]rreparable and fundamental error . . . is only present when it is plain and clear that no other reasonable explanation for the verdict exists" (internal quotation marks omitted)).[6]

Appellants' remaining arguments do not warrant reversal

Appellants argue that the district court abused its discretion when it (1) admitted the Parra-Meza audio/visual recording, (2) gave two comparative-negligence jury instructions regarding appellants' taillights, and (3) allowed Dr. Schifini to testify as an expert witness.

First, as to the district court's decision to admit the Parra-Meza audio/visual recording, we conclude that the district court did not abuse its discretion, as it properly found that the recording was relevant to Parra-Meza's credibility and motivation in testifying. *See Daisy Tr. v. Wells Fargo Bank, N.A.*, 135 Nev. 230, 232, 445 P.3d 846, 848 (2019) (reviewing a district court's decision admitting evidence for an abuse of discretion). Parra-Meza testified in support

[6]Appellants also argue that Tate's counsel engaged in attorney misconduct by using evidence that appellants were treated on medical liens to argue that appellants' medical care was attorney driven despite the lack of evidence to support that claim. However, the core of this argument is that Tate's counsel violated the district court's order granting a motion in limine, which precluded such an argument absent supporting evidence in the record. Because appellants did not object to this argument at trial, and a motion in limine preserves an error that violates the initial order only if the complaining party objects at trial, *BMW*, 127 Nev. at 137, 252 P.3d at 659, this argument is waived, *Lioce*, 124 Nev. at 19, 174 P.3d at 981. Regardless, as explained above, sufficient evidence supports the jury's verdict, and thus, any error in allowing the argument does not warrant reversal. *See Lioce*, 124 Nev. at 19, 174 P.3d at 981-82. For similar reasons, we reject appellants' contention that Tate's counsel engaged in attorney misconduct by arguing that Evans-Waiau's insistence on waiting for police to respond to the accident undermines her credibility. *See id.* (explaining that unobjected-to attorney misconduct is not reversible unless the complaining party shows "that no other reasonable explanation for the verdict exists" (internal quotation marks omitted)).

of Evans-Waiau's alleged injuries, and the recording and his associated testimony could show Parra-Meza was motivated to inflate Evans-Waiau's injuries, especially in light of the relatively minor damage to the vehicle. *Robinson v. G.G.C., Inc.*, 107 Nev. 135, 143, 808 P.2d 522, 527 (1991) (concluding that evidence of a witness's motivation to testify is admissible for impeachment purposes); *cf. Rish v. Simao*, 132 Nev. 189, 197, 198 n.4, 368 P.3d 1203, 1209, 1210 n.4 (2016) (noting that "even in the absence of supporting expert testimony, there is a common-sense correlation between the nature of the impact and the severity of the injuries," but acknowledging that "[l]ow-impact collisions can cause serious, as well as minor, injuries"). Further, as the evidence was offered to show Parra-Meza's motivation in testifying about Evans-Waiau's injuries, it is not hearsay. NRS 51.035 (defining hearsay as an out-of-court statement "offered in evidence to prove the truth of the matter asserted"). Finally, the use of profanity itself does not make a recording per se unduly prejudicial, *see, e.g.*, *United States v. Bufalino*, 683 F.2d 639, 647 (2d Cir. 1982) (concluding that a tape recording of an extortion threat that contained several obscenities was not highly prejudicial); *Foster v. Schares*, No. 08-0771, 2009 WL 606232, at *5 (Iowa Ct. App. Mar. 11, 2009) (explaining how "the profanity in question has become commonplace throughout all segments of society," and concluding that the district court therefore did not abuse its discretion by admitting evidence that the plaintiff told the defendant he "better have F'ing insurance"), and we perceive no abuse of discretion in the district court's finding that the jury would likely not be surprised at the profanity, given the context and circumstances in which Parra-Meza used it.

Second, the district court did not abuse its discretion when it gave the comparative-negligence jury instructions. *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. 235, 237-38, 416 P.3d 249, 253 (2018) (reviewing a decision to give a jury instruction for an abuse of discretion). Both Evans-Waiau and Parra-Meza testified that Parra-Meza installed aftermarket taillight covers that "smoked out" the rear taillights to the vehicle. Parra-Meza agreed with the "interpretation" that regular taillights are more visible than smoked-out taillights and acknowledged that the vehicle had been rear-ended twice after he installed the smoked-out taillight covers. That testimony, coupled with Tate's testimony that she did not see "any turn signal" or brake lights and "would have seen a turn signal" had Evans-Waiau used one, supports the district court's decision to give the challenged instructions regarding required safety equipment and taillight visibility requirements. *See Banks v. Sunrise Hosp.*, 120 Nev. 822, 832, 102 P.3d 52, 59 (2004) ("[A] party is entitled to jury instructions on every theory of her case that is supported by the evidence." (alteration in original) (internal quotation marks omitted)).

Third, we are not persuaded that the district court abused its discretion by allowing Dr. Schifini's testimony. *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014) (reviewing a decision to allow expert testimony for an abuse of discretion). His testimony assumed that appellants were injured in the crash and suffered the symptoms they reported, and based on those assumptions, he concluded that several aspects of the medical care appellants received were not reasonable. Because his testimony "include[d] the plaintiff's causation theory in his analysis," the district court properly allowed it as rebuttal expert testimony.[7] *FGA, Inc. v. Giglio*, 128 Nev. 271, 284, 278 P.3d 490, 498 (2012) ("[F]or defense expert testimony to constitute a contradiction of the party opponent's expert testimony, the defense expert must include the plaintiff's causation theory in his analysis."); *Williams*, 127 Nev. at 530-31, 262 P.3d at 368 (same).

CONCLUSION

Consistent with *Rives*, an appellant need not move for a new trial to raise claims of improper attorney arguments on appeal if they preserved the issue with an objection. As to the merits, on this record, we conclude that the alleged improper ability-to-pay argument and golden-rule argument do not warrant reversal, either because they fall within a permissible range of argument or because appellants did not timely object and are unable to show plain error. As to the other alleged trial errors, we perceive no abuse of discretion in the district court's decision to (1) admit the audio/video recording of Parra-Meza, as the recordings met relevancy criteria; (2) give comparative-negligence jury instructions in light of undisputed testimony regarding alteration of the taillight covers and conflicting testimony about turn signal use; and (3) allow Dr. Schifini to testify, because his testimony met the requirements for expert witness testimony on causation. Accordingly, we affirm the district court's judgment on the jury verdict.

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

Stiglich, J., with whom Silver and Herndon, JJ., agree, dissenting:

I respectfully dissent because, in my view, Tate's counsel's comments during closing amounted to an impermissible ability-to-pay argument. These comments infected the sanctity of the trial and

[7]We decline to consider appellants' other argument that an expert can testify to the reasonableness of a party's medical treatment only if that expert also asserts a medical causation theory that contradicts the party opponent's medical causation theory because appellants did not provide any authority supporting that argument. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court will not consider claims unsupported by cogent argument and relevant authority).

potentially the jury's verdict. Therefore, I would reverse the judgment and remand for a new trial.[1]

Tate's comments during closing argument impermissibly commented on Tate's ability to pay

During closing arguments, Tate argued that it would take hundreds of years for an "average family" to save the $3 million in damages that appellants sought in this case. Tate maintained that these comments were only meant to remind the jurors of "the value of the dollar." The majority concludes that Tate did not make an ability-to-pay argument here because Tate "did not ask the jury to reject appellants' claims based on Tate's inability to pay a judgment and did not even discuss Tate's financial circumstances."

I disagree. This line of argument was introduced to demonstrate the severity of Tate's potential liability with the clear inference being that she would not be able to pay. *Cf. Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977) (observing that "the ability of a defendant to pay the necessary damages injects into the damage determination a foreign, diverting, and distracting issue which may effectuate a prejudicial result"). True, Tate did not explicitly ask the jury to consider Tate's ability to pay or Tate's financial circumstances. But Tate's emphasis that it would take an "average family" over 600 years to pay off the damages that appellants sought strongly—and impermissibly—implied that Tate could never pay back such a judgment. Tate did not mention the "value of the dollar" in the abstract. Rather, Tate contended concretely that "[a] lot of people aren't able to [pay $5,000 a year]." This is a quintessential ability-to-pay argument that all but explicitly references Tate specifically.

This improper argument prejudiced the jury's verdict and warrants a new trial

In my view, Tate's ability-to-pay argument during closing warrants reversal because I believe that the jury may have found that Tate was negligent had Tate's comments been disallowed. These comments urged the jurors to consider the value of the dollar and implied that such an onerous financial burden would be impossible

[1]I also believe that these comments violated the prohibition against invoking the "golden rule" because they may have "infect[ed] the jury's objectivity" by asking them to consider if they could save up the $5,000 per year required to pay off the potential judgment. *See Lioce v. Cohen*, 124 Nev. 1, 22, 174 P.3d 970, 984 (2008) (explaining that a golden rule argument "is an argument asking jurors to place themselves in the position of one of the parties"). However, reviewing for plain error because appellants did not preserve this claim, I agree with the majority that reversal is not warranted on this issue because "other reasonable explanation[s] for the verdict exists." *Id.* at 19, 174 P.3d at 982 (quoting *Ringle v. Bruton*, 120 Nev. 82, 96, 86 P.3d 1032, 1041 (2004)).

for the "average family" to pay off. This line of argument focused not on whether Tate was negligent as a matter of law but rather on whether Tate could pay the judgment as a matter of fact. *Cf. Taylor v. State*, 132 Nev. 309, 323, 371 P.3d 1036, 1045 (2016) (observing that "[t]he purpose of closing arguments is to 'enlighten the jury, and to assist . . . in analyzing, evaluating, and applying the evidence, so that the jury may reach a just and reasonable conclusion'" (quoting 23A C.J.S. *Criminal Law* § 1708 (2006))). I believe that excluding these improper comments may have reasonably led to a different verdict below, and I would reverse on this issue. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (concluding that prejudicial error occurs when "the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached").

I believe that the court has erred in resolving this appeal. I respectfully dissent.

DIAMOND NATURAL RESOURCES PROTECTION & CONSERVATION ASSOCIATION; J&T FARMS, LLC; GALLAGHER FARMS LLC; JEFF LOMMORI; M&C HAY; CONLEY LAND & LIVESTOCK, LLC; JAMES ETCHEVERRY; NICK ETCHEVERRY; TIM HALPIN; SANDI HALPIN; DIAMOND VALLEY HAY COMPANY, INC.; MARK MOYLE FARMS LLC; D.F. & E.M. PALMORE FAMILY TRUST; WILLIAM H. NORTON; PATRICIA NORTON; SESTANOVICH HAY & CATTLE, LLC; JERRY ANDERSON; BILL BAUMAN; DARLA BAUMAN; ADAM SULLIVAN, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES; AND EUREKA COUNTY, APPELLANTS, *v.* DIAMOND VALLEY RANCH, LLC; AMERICAN FIRST FEDERAL, INC.; BERG PROPERTIES CALIFORNIA, LLC; BLANCO RANCH, LLC; BETH MILLS, TRUSTEE OF THE MARSHALL FAMILY TRUST; TIMOTHY LEE BAILEY; CONSTANCE MARIE BAILEY; FRED BAILEY; CAROLYN BAILEY; SADLER RANCH, LLC; IRA R. RENNER; AND MONTIRA RENNER, RESPONDENTS.

No. 81224

June 16, 2022 511 P.3d 1003

Appeal from a district court order granting petitions for judicial review in a water law matter. Seventh Judicial District Court, Eureka County; Gary Fairman, Judge.

Reversed.

[Rehearing denied September 12, 2022]

PARRAGUIRRE, C.J., with whom SILVER, J., agreed, and PICKERING, J., with whom SILVER, J., agreed, dissented.

Leonard Law, PC, and *Debbie Leonard*, Reno, for Appellants Jerry Anderson; Bill Bauman; Darla Bauman; Conley Land & Livestock, LLC; D.F. & E.M. Palmore Family Trust; Diamond Natural Resources Protection & Conservation Association; Diamond Valley Hay Company, Inc.; James Etcheverry; Nick Etcheverry; Gallagher Farms LLC; Tim Halpin; Sandi Halpin; J&T Farms, LLC; Jeff Lommori; M&C Hay; Mark Moyle Farms LLC; William H. Norton; Patricia Norton; and Sestanovich Hay & Cattle, LLC.

Allison MacKenzie, Ltd., and *Karen A. Peterson*, Carson City; *Theodore Beutel*, District Attorney, Eureka County, for Appellant Eureka County.

Aaron D. Ford, Attorney General, and *James N. Bolotin*, Senior Deputy Attorney General, Carson City, for Appellant Adam Sullivan, P.E., Nevada State Engineer, Division of Water Resources, Department of Conservation and Natural Resources.

Kemp Jones, LLP, and *Christopher W. Mixson* and *Don Springmeyer*, Las Vegas, for Respondents Timothy Lee Bailey, Constance Marie Bailey, Fred Bailey, and Carolyn Bailey.

Taggart & Taggart, Ltd., and *David H. Rigdon* and *Paul G. Taggart*, Carson City, for Respondents Ira R. Renner, Montira Renner, and Sadler Ranch, LLC.

Marvel & Marvel, Ltd., and *John E. Marvel*, Elko, for Respondents American First Federal, Inc.; Berg Properties California, LLC; Blanco Ranch, LLC; and Diamond Valley Ranch, LLC.

Beth Mills, Eureka, in *Pro Se.*

Blanchard, Krasner & French and *Steven M. Silva*, Reno; *Pacific Legal Foundation* and *Daniel M. Ortner*, Sacramento, California, for Amicus Curiae Pacific Legal Foundation.

Before the Supreme Court, En Banc.

OPINION

By the Court, Hardesty, J.:

Diamond Valley is a groundwater-dependent farming region located in Eureka County, Nevada. The Diamond Valley Hydrologic Basin is over-appropriated and over-pumped, such that groundwater withdrawals from the Basin exceed its perennial yield (i.e., more groundwater is withdrawn from the aquifer than what can be naturally replenished). To address the scarcity of groundwater in Nevada's over-appropriated basins, the Legislature enacted NRS 534.037 and NRS 534.110(7) in 2011.[1] Under NRS 534.110(7), the State Engineer may designate an over-appropriated basin a Critical Management Area (CMA). Once designated a CMA, NRS 534.037 allows water permit and certificate holders (rights holders) to petition the State Engineer to approve a Groundwater Management Plan (GMP) that sets forth the necessary steps for removal of the basin's designation as a CMA. In determining whether to approve the GMP, the State Engineer is required to weigh the factors under NRS 534.037(2).

[1]*See* 2011 Nev. Stat., ch. 265, §§ 1 & 3, at 1383-84 & 1387.

Here, Diamond Valley was designated a CMA, and its rights holders submitted a GMP to the State Engineer for approval. Although the GMP deviated somewhat from the guiding principle underlying Nevada's water law statutes—the doctrine of prior appropriation, which dictates that priority is assigned based on first in time, first in right to put the water to beneficial use—the State Engineer approved the Diamond Valley GMP. The crux of this case, then, concerns whether NRS 534.037 and NRS 534.110(7) allow the State Engineer to approve a GMP that deviates from the doctrine of prior appropriation. We hold that the Legislature unambiguously gave the State Engineer discretion to approve a GMP that departs from the doctrine of prior appropriation and other statutes in Nevada's statutory water scheme. Thus, we conclude that the State Engineer's decision to approve the GMP was not erroneous. As we further conclude that the State Engineer's factual findings in support of his decision were supported by substantial evidence, we reverse the district court's order granting respondents' consolidated petitions for judicial review and reinstate the State Engineer's decision.

FACTS AND PROCEDURAL HISTORY

We have previously recognized that groundwater "in Diamond Valley, Nevada, is over-appropriated and has been pumped at a rate exceeding its perennial yield for over four decades." *Eureka County v. Seventh Judicial Dist. Court (Sadler Ranch)*, 134 Nev. 275, 276, 417 P.3d 1121, 1122 (2018). Each year, roughly 76,000 acre-feet of groundwater is withdrawn from the Basin's aquifer, yet its perennial yield is only 30,000 acre-feet. Even more concerning, up to 126,000 acre-feet of water rights have been permitted in the Basin. If the State Engineer limited pumping in the Basin to its perennial yield, any appropriations made after roughly May 1960 would have junior priority and be subject to curtailment. Similarly, any water rights appropriated before that date would have seniority and would not be subject to curtailment.

As noted, in 2011, the Legislature enacted NRS 534.037 and amended NRS 534.110 to allow the State Engineer to approve a GMP that helps resolve groundwater shortages in over-appropriated basins like Diamond Valley, which was designated a CMA in 2015. In 2018, a majority of rights holders in Diamond Valley petitioned the State Engineer to approve their proposed GMP for the Basin. After holding a public hearing and allowing written comments, the State Engineer approved the GMP. State Engineer Order No. 1302 (Jan. 11, 2019). The GMP created a 35-year plan to reduce the amount of pumping from the Basin at 5-year intervals. The GMP reduced the amount of water that rights holders can use based on the priority of the holders' rights. However, the GMP deviated from the

doctrine of prior appropriation by requiring *all* water rights holders to reduce their withdrawals from the Basin—not just junior rights holders.

Respondents, who are senior rights holders in the Basin, filed petitions for judicial review, which the district court consolidated. Respondents sought to invalidate the GMP on the ground that its deviance from water-law principles, such as the doctrine of prior appropriation, and from Nevada's statutory water scheme made the plan legally erroneous. The district court concluded that the GMP violated (1) the doctrine of prior appropriation by forcing senior appropriators to reduce their water use; (2) the beneficial use statute, NRS 533.035, by allowing unused groundwater to be banked or transferred; and (3) two permitting statutes, NRS 533.325 and NRS 533.345, by allowing appropriators to change the point or manner of diversion without filing an application with the State Engineer. The district court concluded that NRS 534.037 and NRS 534.110(7) do not give the State Engineer discretion to approve a GMP that deviates from the foregoing principle and statutes. Because the district court decided that the State Engineer's legal conclusions were erroneous, it concluded that Order No. 1302 was arbitrary and capricious. Thus, the district court granted respondents' consolidated petitions for judicial review and invalidated Order No. 1302. Nonetheless, the district court found that the State Engineer's analysis of the factors under NRS 534.037(2) was supported by substantial evidence.

The State Engineer and several rights holders in the Basin (collectively, appellants) now appeal. They argue that the Legislature unambiguously gave the State Engineer discretion to approve a GMP that deviates from the doctrine of prior appropriation and other provisions in Nevada's statutory water scheme, so long as the State Engineer considers the factors enumerated in NRS 534.037(2) and determines that the GMP will remove the basin's designation as a CMA. Respondents contend the district court's order should be affirmed because the GMP reduces their water rights based on an erroneous interpretation of the law.

At oral argument, we asked respondents if they presented *any* evidence to the State Engineer during the GMP approval process showing whether—and to what extent—their water rights were affected by the GMP. Respondents answered, "[N]o, it was not quantified." We then inquired whether respondents requested the State Engineer make those calculations before approving the GMP. Respondents conceded that "[t]hey did not raise it as an issue in their written comments." Finally, we asked respondents whether they presented any calculus to the district court showing that *any* of their water rights were affected by the GMP. Respondents answered, "I don't think it was raised as a specific issue."

DISCUSSION

Standard of review

"The decision of the State Engineer is prima facie correct, and the burden of proof is upon the party attacking the same." NRS 533.450(10). We perform the same review as the district court; thus, when we review a district court's order reversing the State Engineer's decision, "we determine whether the [State Engineer]'s decision was arbitrary or capricious." *King v. St. Clair*, 134 Nev. 137, 139, 414 P.3d 314, 316 (2018). A "capricious exercise of discretion is one . . . 'contrary to the evidence or established rules of law.' " *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (citation omitted) (quoting *Capricious*, *Black's Law Dictionary* (9th ed. 2009)). "[W]e review purely legal questions [de novo,] without deference to the State Engineer's ruling." *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010). However, "[w]e review the State Engineer's factual findings for an abuse of discretion and will only overturn those findings if they are not supported by substantial evidence." *Sierra Pac. Indus. v. Wilson*, 135 Nev. 105, 108, 440 P.3d 37, 40 (2019). "Substantial evidence is that which a reasonable mind could find adequate to support a conclusion." *Kolnik v. State, Emp't Sec. Dep't*, 112 Nev. 11, 16, 908 P.2d 726, 729 (1996).

NRS 534.037 and NRS 534.110(7) plainly and unambiguously allow the State Engineer to approve a GMP that departs from the doctrine of prior appropriation and other statutes in Nevada's water scheme

Appellants argue that NRS 534.110(7) unambiguously allows the State Engineer to approve a GMP that departs from the doctrine of prior appropriation. They also argue that a GMP may depart from other portions of Nevada's statutory water scheme so long as the State Engineer weighs the factors under NRS 534.037(2) and determines that the GMP will remove the basin's designation as a CMA. Respondents assert that NRS 534.110(7) unambiguously provides that the State Engineer shall order priority-based curtailment if a GMP has not been approved for the basin, but any GMP must comply with the doctrine of prior appropriation. Respondents alternatively argue that, if the statute is ambiguous, the presumption against implied repeal and legislative history show that the Legislature did not intend to repeal the doctrine of prior appropriation.

The State Engineer concluded that NRS 534.037 and NRS 534.110(7) allow the approval of a GMP that departs from the doctrine of prior appropriation and other parts of Nevada's statutory water scheme. Because the State Engineer's conclusion invokes a question of law, we review it de novo. *Pyramid Lake Paiute Tribe*, 126 Nev. at 525, 245 P.3d at 1148. "Where a statute is clear and

unambiguous, this court gives effect to the ordinary meaning of the plain language of the text without turning to other rules of construction." *Chandra v. Schulte*, 135 Nev. 499, 501, 454 P.3d 740, 743 (2019). We look beyond a statute's plain text only "if it is ambiguous or silent on the issue in question." *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009). "[W]hen a statute is susceptible to more than one reasonable interpretation, it is ambiguous . . . ." *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014). Where a legal question invokes multiple statutes, we "construe [them] as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized." *Cromer v. Wilson*, 126 Nev. 106, 110, 225 P.3d 788, 790 (2010).

Because we have not yet interpreted NRS 534.037 and NRS 534.110(7), we must now ascertain the meaning of these statutes. Under NRS 534.110(7)(a), the State Engineer "[m]ay designate as a critical management area [(CMA)] any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin." Once the basin receives CMA designation, a majority of the rights holders in the basin may petition the State Engineer for "approval of a groundwater management plan [(GMP)] for the basin." NRS 534.037(1). The GMP "must set forth the necessary steps for removal of the basin's designation as a [CMA]." *Id.* Then, the State Engineer "shall consider" seven factors to determine whether to approve the GMP:

> (a) The hydrology of the basin;
>
> (b) The physical characteristics of the basin;
>
> (c) The geographic spacing and location of the withdrawals of groundwater in the basin;
>
> (d) The quality of the water in the basin;
>
> (e) The wells located in the basin, including, without limitation, domestic wells;
>
> (f) Whether a groundwater management plan already exists for the basin; and
>
> (g) Any other factor deemed relevant by the State Engineer.

NRS 534.037(2). If a basin has been designated as a CMA for 10 consecutive years, then NRS 534.110(7) dictates that "the State Engineer *shall* order that withdrawals . . . be restricted in that basin to conform to priority rights, *unless* a groundwater management plan has been approved for the basin pursuant to NRS 534.037." (Emphases added.)

Construing NRS 534.037 and NRS 534.110(7) together, we conclude that these statutes plainly and unambiguously allow the State Engineer to approve a GMP so long as the State Engineer concludes that the GMP (1) "set[s] forth the necessary steps for removal of the basin's designation as a [CMA]," *see* NRS 534.037(1), and (2) is

warranted under the seven factors enumerated in NRS 534.037(2).[2] Moreover, NRS 534.110(7) plainly states that the State Engineer shall order curtailment by priority *unless* a GMP has been approved for the basin—indicating that a GMP could, but does not necessarily have to, comply with the doctrine of prior appropriation. Thus, NRS 534.110(7) permits regulation in a manner inconsistent with the doctrine of prior appropriation if a GMP has been approved for the basin. Because these statutes plainly allow the State Engineer to approve a GMP based on the preceding criteria,[3] and because they are silent as to other aspects of Nevada's statutory water scheme, we reject respondents' position that a GMP must strictly comply with the doctrine of prior appropriation. Moreover, because NRS 534.037 and NRS 534.110(7) are clear, there is no need to consult extratextual sources—such as legislative history or the statutory canons—to disambiguate these statutes. *See generally Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (explaining that legislative history should not be used to "cloud a statutory text that is clear").[4] Thus, we conclude that the State Engineer's legal conclusions were not erroneous: NRS 534.037 and NRS 534.110(7) allow the State Engineer to approve a GMP that departs from the doctrine

[2]Insofar as respondents assert that our plain meaning interpretation is inconsistent with the presumption against implied repeal, we disagree. Under the implied-repeal canon, we presume that the Legislature does not intend to overturn existing law unless it does so expressly in the statutory text. *See Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 307, 448 P.3d 1106, 1111 (2019). However, the presumption against implied repeal does not apply where "the later act covers the whole subject of the earlier one and is clearly intended as a substitute." *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936). When a basin is designated as a CMA and a petition by a majority of rights holders is made to have a GMP approved, it is clear NRS 534.037 and NRS 534.110(7) are intended to exempt a GMP that meets the statutory requirements from other provisions in Nevada's statutory water scheme. Thus, the presumption against implied repeal does not apply to this analysis.

[3]Before approving a GMP, the State Engineer must also comply with the public hearing and notice provisions of NRS 534.037(3). As the district court found, the record indicates that the State Engineer complied with these provisions before approving Order No. 1302. Insofar as respondents argue that the State Engineer did not comply with NRS 534.037(3), we reject this argument because respondents did not cite relevant portions of the record to support their assertions. *See* NRAP 28(a)(10)(A); *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 997, 860 P.2d 720, 725 (1993) (stating that we need not consider arguments unsupported by citations to the record).

[4]Even if NRS 534.110(7) were ambiguous, the rule of the last antecedent supports our interpretation. *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (explaining that the rule of the last antecedent means that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows"). NRS 534.110(7)'s limiting clause—"unless a groundwater management plan has been approved"—immediately follows the text's mandate that withdrawals be restricted to conform to priority rights. Thus, it follows that the approval of a GMP allows the State Engineer to regulate a basin on a basis other than priority.

of prior appropriation, so long as the State Engineer complies with the foregoing statutory criteria.

Our conclusion is supported by Nevada law providing that statutory law *may* impair nonvested water rights. *Cf.* NRS 533.085(1); *Andersen Family Assocs. v. Ricci*, 124 Nev. 182, 188, 179 P.3d 1201, 1204-05 (2008) (explaining that statutory law *may not* impair vested water rights (i.e., rights appropriated before 1913)). Extrapolating on this law, the Legislature has authority to modify the statutory scheme regulating nonvested water rights. We recently explained that the doctrine of prior appropriation is a fundamental principle in various statutory provisions. *See Mineral County v. Lyon County*, 136 Nev. 503, 513, 473 P.3d 418, 426 (2020). Thus, it follows that the Legislature may create a regulatory scheme that modifies the use of water appropriated after 1913 in a manner inconsistent with the doctrine of prior appropriation. Accordingly, we reject respondents' argument that the State Engineer's legal conclusions in Order No. 1302 were erroneous[5] and therefore arbitrary and capricious.[6]

This leads to a needed discussion of the dissenting opinions. We begin by reiterating that NRS 534.037 and NRS 534.110(7), based on the foregoing analysis, are unambiguous. Insofar as the dissenting opinions cite the canon of constitutional avoidance and legislative history to interpret NRS 534.110(7), both interpretive tools cannot be consulted when, as here, the statutory text is plain and unam-

[5]Respondents argue that Order No. 1302 is erroneous because it does not assess whether the GMP affected vested water rights (i.e., rights appropriated before 1913), and the interference with their vested surface water rights invokes constitutional concerns. Order No. 1302 explained that before the GMP was approved, several parties in the Basin received mitigation rights for the loss of their senior surface water rights. Respondents' appellate briefs, however, do not cite portions of the administrative record to show that they presented the State Engineer with evidence to show that the GMP would affect their specific surface water rights or that they had not received adequate mitigation rights. *See Allianz*, 109 Nev. at 997, 860 P.2d at 725 (stating that we need not consider arguments unsupported by citations to the record); *see also Dubray v. Coeur Rochester, Inc.*, 112 Nev. 332, 337 n.2, 913 P.2d 1289, 1292 n.2 (1996) (stating that an argument is waived on appeal if it was not raised before the hearing officer). From this record, we are unable to conclude that the State Engineer acted capriciously because it is unclear the extent to which the GMP affected respondents' vested water rights. Although we decline to address respondents' arguments, our holding does not preclude respondents from asserting a future constitutional claim if the GMP actually affected their vested rights. We reiterate that our holding is limited to nonvested water rights because statutory law may not impair vested water rights. NRS 533.085(1).

[6]Because our interpretation of NRS 534.037 and NRS 534.110(7) concludes that a GMP is valid so long as the State Engineer makes appropriate findings under NRS 534.037(2) and determines that the GMP will remove the basin's designation as a CMA, we conclude that respondents' remaining arguments—including those pertaining to beneficial use and permitting requirements—are meritless. The State Engineer did precisely what the foregoing statutory provisions require before approving this GMP.

biguous.[7] *See generally Ratzlaf*, 510 U.S. at 147-48 (explaining that legislative history should not be used when the text is clear); *see also Warger v. Shauers*, 574 U.S. 40, 50 (2014) (stating that the avoidance canon cannot be used if statutory text is unambiguous). Because these statutes are unambiguous, we decline to resort to legislative history or the avoidance canon.

We reiterate that our holding, consistent with the plain meaning of NRS 534.110(7), applies only to priority rights and does not impair vested water rights. Thus, although our dissenting colleagues contend that we have abrogated existing water law, our holding *qualifies*—rather than abrogates—the prior appropriation and beneficial use doctrines *only* in the context of priority rights existing in an over-appropriated basin that has been designated a CMA. Moreover, the GMP here ratably reduces water usage such that senior appropriators are still allowed more water than junior appropriators, and in that regard, still honors priority rights and therefore does not abrogate them.

We must separately address Justice Pickering's dissent for three reasons. First, it interprets NRS 534.037 and NRS 534.110(7) in a manner that would render these statutes nugatory. Her dissent explains that we erred by not considering these statutes "in the larger context of NRS 534.110 and NRS Chapters 533 and 534 as a whole." Dissenting op., *post.* at 460 (Pickering, J., dissenting). It specifies that, "[a]llowing the State Engineer to approve a GMP that deviates from the prior appropriation and beneficial use doctrines puts NRS 534.037 and NRS 534.110(7) into direct conflict with the rest of NRS Chapters 533 and 534." *Id*. at 461. We disagree. To the contrary, if a GMP were required to comply with every statute in NRS Chapters 533 and 534, there would have been no need for the Legislature to enact NRS 534.037 and NRS 534.110(7).[8]

Indeed, it is dubious that the Legislature would have enacted these statutes if it believed that existing statutory provisions allowed the State Engineer to regulate an over-appropriated basin. If we were to adopt Justice Pickering's construction, NRS 534.037 and

[7]We are unable to determine whether Justice Pickering concludes that NRS 534.110(7) is ambiguous. *Compare* Dissenting op., *post.* at 456-57 (Pickering, J., dissenting) ("To the extent that the majority's reading is reasonable, then, this legal text is at best ambiguous, which opens the door to legislative history."), *with id.* at 463 ("For these reasons, and the additional reasons stated in Chief Justice Parraguirre's dissent, *which I join except as to its finding of ambiguity*, I respectfully dissent." (emphasis added)). In any event, Justice Pickering's dissent consults grammatical canons to interpret NRS 534.110(7), *see id.* at 458, but the parties' briefs do not cite these canons. Thus, we are unpersuaded that our plain meaning interpretation of NRS 534.037 and NRS 534.110(7) is incorrect.

[8]Justice Pickering's dissent also avers that NRS 534.110(7)'s text should be read "fairly" and that "a reasonable reader" would reject the majority's interpretation. *See* Dissenting op., *post.* at 457 (Pickering, J., dissenting). We are unpersuaded that our interpretation of NRS 534.110(7) is untenable such that we should apply this novel interpretive method.

NRS 534.110(7) would be meaningless because the State Engineer would have no power—beyond what is already conferred by NRS Chapters 533 and 534—to regulate over-appropriated basins. Thus, these statutes would be rendered nugatory. *See Clark County v. S. Nev. Health Dist.*, 128 Nev. 651, 656, 289 P.3d 212, 215 (2012) ("Statutes should be read as a whole, so as not to render superfluous words or phrases or make provisions nugatory."). Because this would lead to an *absurd* result, we disagree with Justice Pickering's interpretation of NRS 534.037 and NRS 534.110(7).

Second, our dissenting colleague seemingly relies on unpassed legislation to interpret NRS 534.110(7). Dissenting op., *post.* at 463 (Pickering, J., dissenting). Justice Pickering suggests that the State Engineer proposed legislation in 2016 to amend NRS 534.110(7) to expressly allow a GMP to deviate from priority regulation because NRS 534.110(7) does not allow this deviation. *Id*. Unpassed legislation, however, has little value when interpreting a statute. *See Pension Benefit Guar. Corp. v. The LTV Corp.*, 496 U.S. 633, 650 (1990) (explaining that unpassed legislation is "a particularly dangerous ground on which to rest an interpretation of a prior statute"); *see also Grupe Dev. Co. v. Superior Court*, 844 P.2d 545, 552 (Cal. 1993) (holding the same). This is because proposed legislation that was not adopted leads to conflicting inferences. As Justice Pickering concludes, the State Engineer may have believed that NRS 534.110(7) did not allow a GMP to depart from priority regulation. Dissenting op., *post.* at 463 (Pickering, J., dissenting). However, it can just as easily be inferred that the Legislature rejected this bill because it felt that the existing statutory text already allowed the State Engineer to depart from priority regulation. Due to these conflicting inferences, we conclude that the best approach here is to enforce the law as written. *See generally Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 119 (2007) (Scalia, J., dissenting) (explaining that "legislated text" should prevail over "legislators' intentions"). For these reasons, we conclude that the unpassed legislation cited in Justice Pickering's dissent is unpersuasive.

Third, we decline to reach constitutional questions, such as the Takings Clause analysis identified by Justice Pickering, that are not essential to this decision.[9] *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (explaining that constitutional questions should not be decided if there is another ground on which to rest the disposition of the case). As noted, a plain meaning interpretation of NRS 534.037 and NRS 534.110(7) leads to the

[9]We note that Chief Justice Parraguirre's dissent addresses the Takings Clause issue only as a matter of statutory interpretation, given his finding of ambiguity in NRS 534.110(7). Justice Pickering's dissent goes further and seemingly concludes the GMP here effectuates a taking such that the State Engineer "is constitutionally required to provide just compensation and process." Dissenting op., *post.* at 462 (Pickering, J., dissenting) (internal quotation marks omitted).

inescapable conclusion that the State Engineer may approve a GMP that deviates from priority regulation. Thus, we need not reach the Takings Clause to resolve this appeal.

Further, concluding otherwise would result in an advisory opinion because respondents failed to show that a controversy exists. *See Capanna v. Orth*, 134 Nev. 888, 897, 432 P.3d 726, 735 (2018) (explaining that we lack the power to render advisory opinions); *see also Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 887, 141 P.3d 1224, 1231 (2006) ("Alleged harm that is speculative or hypothetical is insufficient: an existing controversy must be present."). As noted, during oral argument, respondents conceded that they never presented any evidence to the State Engineer or the district court to show that the GMP here affected their vested water rights. In fact, they conceded that any Takings Clause claim "would certainly come later." Respondents' briefs, other than a vague reference to the Takings Clause, likewise fail to identify whether they lost *any* water rights under this GMP, let alone whether any rights that may have been lost were vested water rights. Given that respondents failed to preserve or assert any constitutional claim for our review, they have not shown that an actual controversy exists. We therefore decline to address any constitutional issue herein because doing so would lead to an advisory opinion. As previously emphasized, however, our holding does not preclude respondents from seeking future relief if their vested water rights were impaired by the GMP.

Given our conclusion that the GMP was not arbitrary or capricious, we now examine whether the State Engineer's factual findings for Order No. 1302 were supported by substantial evidence.

The factual findings for Order No. 1302 are supported by substantial evidence, and therefore, the State Engineer did not abuse his discretion

Appellants argue that the State Engineer's decision to approve Order No. 1302 was supported by substantial evidence and point to the extensive findings supporting the GMP. Respondents assert that the State Engineer's decision to approve the GMP was unsupported by substantial evidence because the administrative record is devoid of scientific or technical evidence to show that the GMP would balance the Basin's withdrawals with its perennial yield. We disagree.

We will uphold the State Engineer's factual findings for Order No. 1302 if they are supported by substantial evidence. *Sierra Pac. Indus. v. Wilson*, 135 Nev. 105, 108, 440 P.3d 37, 40 (2019). As a threshold issue, the record indicates that the majority of the Basin's permit and certificate holders petitioned the State Engineer to approve the GMP. *See* NRS 534.037(1). Thus, the State Engineer was required to weigh the factors under NRS 534.037(2) to determine whether the GMP was valid.

Before approving the GMP as Order No. 1302, the State Engineer made extensive findings under NRS 534.037(2). The State Engineer examined the Basin's (1) hydrology, (2) physical characteristics, (3) geographic spacing of withdrawals, (4) water quality, and (5) well locations. After weighing these factors, the State Engineer concluded that the proposed GMP would ultimately reduce withdrawals in the Basin to conform to its perennial yield. Given that the State Engineer, as set forth in his appendix, methodically considered the NRS 534.037 factors and concluded that the GMP would reduce withdrawals to the Basin's perennial yield—which would remove the Basin's designation as a CMA—substantial evidence supports the decision to approve the GMP. To that end, the district court concluded that the State Engineer properly weighed the NRS 534.037(2) factors to conclude that the GMP would balance the Basin back to its perennial yield.

Thus, we reject respondents' argument that the State Engineer's factual findings were unsupported by substantial evidence. Despite respondents' suggestion that the record is devoid of scientific or technical evidence to support Order No. 1302, this contention is meritless because of the foregoing explanation describing the State Engineer's extensive scientific findings. The district court likewise found that the State Engineer's findings supporting Order No. 1302 were supported by substantial evidence. Moreover, we are not in a position to reject the State Engineer's factual findings regarding scientifically complex matters. *See Wilson v. Pahrump Fair Water, LLC*, 137 Nev. 10, 16, 481 P.3d 853, 858 (2021) (explaining that our deference to the State Engineer's judgment "is especially warranted" when "technical and scientifically complex" issues are involved). Because the record shows that the State Engineer's factual findings were supported by substantial evidence, the decision to approve Order No. 1302 does not constitute an abuse of discretion. Accordingly, the State Engineer's decision to approve Order No. 1302 is entitled to deference.[10]

CONCLUSION

We have recognized generally that water in this state "is a precious and increasingly scarce resource," *Bacher v. Office of the State Eng'r*, 122 Nev. 1110, 1116, 146 P.3d 793, 797 (2006), and specifically that Diamond Valley has been an over-appropriated basin for more than four decades, *Eureka County v. Seventh Judicial Dist. Court (Sadler Ranch)*, 134 Nev. 275, 276, 417 P.3d 1121, 1122 (2018). The Legislature enacted NRS 534.037 and NRS 534.110(7) to address the critical water shortages in Nevada's over-appropriated basins.

[10]Insofar as appellants raise issues not addressed herein, including the district court's alleged reliance on evidence outside of the record, we conclude that we need not reach them given the disposition of this appeal.

These statutes plainly give the State Engineer discretion to approve a GMP that does not strictly comply with Nevada's statutory water scheme or strictly adhere to the doctrine of prior appropriation. The State Engineer is only required to weigh the factors under NRS 534.037(2) and determine that the GMP sets forth the necessary steps for the removal of the basin's designation as a CMA. Here, the State Engineer did precisely what NRS 534.037 and NRS 534.110(7) require before approving Order No. 1302.

We recognize that our opinion will significantly affect water management in Nevada. We are of the belief, however, that—given the arid nature of this State—it is particularly important that we effectuate the plain meaning of a statute that encourages the sustainable use of water. *See generally Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 311, 448 P.3d 1106, 1114 (2019) (explaining the importance of using water sustainably). The GMP here is a community-based solution to the long-term water shortages that befall Diamond Valley. Because the GMP complies with NRS 534.037 and NRS 534.110(7), it is valid. Thus, we reverse the district court order granting respondents' petitions for judicial review and reinstate Order No. 1302.

Stiglich, Cadish, and Herndon, JJ., concur.

Parraguirre, C.J., with whom Silver, J., agrees, dissenting:

I respectfully dissent from my colleagues for two reasons. First, I disagree that NRS 534.037 and NRS 534.110(7) plainly and unambiguously allow the State Engineer to approve a Groundwater Management Plan (GMP) that departs from the doctrine of prior appropriation. Rather, NRS 534.037 is silent on the issue and NRS 534.110(7) is ambiguous because it is subject to two equally plausible interpretations. Thus, this court must look beyond the text of these statutes to the canons of statutory construction, as well as to legislative history, both of which show that the Legislature did not intend to abrogate 155 years of water law when enacting NRS 534.037 and NRS 534.110(7). Moreover, the majority's interpretation of these statutes could raise constitutional doubts. Second, Order 1302 erroneously abdicates the beneficial use requirement and fails to consider whether curtailment will impair vested surface water rights. For these reasons, I would hold that Order 1302 is capricious, and thus, I respectfully dissent.

FACTS

As explained by the majority, this GMP seeks to reduce groundwater withdrawals in the Diamond Valley Basin. In doing so, the GMP requires senior appropriators to use less water than they are entitled to under the doctrine of prior appropriation. For instance, if a senior appropriator was entitled to 100 acre-feet of water per year, the GMP allows that appropriator to use only 67 acre-feet per

year during the first 5 years of the plan. Meanwhile, a junior appropriator, who is not entitled to any water under the doctrine of prior appropriation, would be allowed to use 54 acre-feet of water per year during the first 5 years of the plan. By year 35 of the GMP, the same senior appropriator would be allowed only 30 acre-feet of water per year, whereas the same junior appropriator would be allowed 24 acre-feet of water. Further, the GMP creates a novel water-banking system that allows appropriators to buy, sell, or lease their water rights to other appropriators, even if the water rights have not been put to beneficial use.

DISCUSSION

Standard of review

On a petition for judicial review, "we determine whether the [State Engineer]'s decision was arbitrary or capricious." *King v. St. Clair*, 134 Nev. 137, 139, 414 P.3d 314, 316 (2018). A decision that is contrary to established law is capricious. *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (citation omitted).

The doctrine of prior appropriation

Before turning to NRS 534.037 and NRS 534.110(7), a discussion of the prior appropriation doctrine is necessary to show why the Legislature did not intend to abrogate long-standing law. Nevada's water law is founded on a fundamental principle—*prior appropriation*. However, the majority considers the doctrine of prior appropriation a mere "guiding principle." *See* Majority op., *ante* at 438. This description of the doctrine understates the importance it has played in the development of the Western United States, and even more importantly, in the development of Nevada's water-law jurisprudence.

This court adopted the doctrine of prior appropriation 155 years ago by explaining that the first appropriator of water has a *right* to use that water to the extent of the original appropriation. *See Lobdell v. Simpson*, 2 Nev. 274, 277-78 (1866). Our adherence to the doctrine of prior appropriation has been unwavering. As we restated recently, "Nevada's water statutes embrace prior appropriation as a *fundamental* principle." *Mineral County v. Lyon County*, 136 Nev. 503, 513, 473 P.3d 418, 426 (2020) (emphasis added) (explaining that water rights are given subject to existing rights based on the date of priority). Thus, we held that adjudicated water rights cannot be reallocated unless the reallocation comports with the doctrine of prior appropriation. *Id.* at 520, 473 P.3d at 431. The United States Supreme Court likewise acknowledges that Nevada follows the prior appropriation doctrine. *See Cappaert v. United States*, 426 U.S. 128, 139 n.5 (1976) ("Under Nevada law water rights can be

created only by appropriation for beneficial use."). Moreover, the Legislature expressly provided that the doctrine applies to groundwater. *See* NRS 534.020.

In sum, the doctrine of prior appropriation is more than just a "guiding principle." The prior appropriation doctrine—*for over a century*—has been fundamental to water law in Nevada.

NRS 534.110(7) does not allow the State Engineer to approve a GMP that departs from the doctrine of prior appropriation

The majority concludes that NRS 534.037 and NRS 534.110(7) unambiguously allow the State Engineer to approve a GMP that departs from the prior appropriation doctrine. I disagree because NRS 534.037 does not speak to the doctrine of prior appropriation, much less authorize the State Engineer to disregard the doctrine. Further, as explained below, the canon against implied repeal, legislative history, and the canon of constitutional avoidance show that the Legislature did not intend for NRS 534.110(7) to authorize such an action by the State Engineer.

NRS 534.110(7) is ambiguous

We look beyond a statute's text only "if it is ambiguous." *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009). "Where a statute's language is ambiguous . . . the court must look to legislative history and rules of statutory interpretation to determine its meaning." *Orion Portfolio Servs. 2, LLC v. County of Clark*, 126 Nev. 397, 402, 245 P.3d 527, 531 (2010). "A statute's language is ambiguous when it is capable of more than one reasonable interpretation." *Id.*

NRS 534.110(7) is ambiguous because, as the parties' arguments show, it is susceptible to more than one reasonable interpretation. Specifically, NRS 534.110(7)'s relevant language—"[i]f a basin has been designated as a critical management area for at least 10 consecutive years . . . the State Engineer *shall* order that withdrawals . . . be restricted in that basin to conform to priority rights, *unless a groundwater management plan has been approved for the basin*" (emphases added)—yields two reasonable interpretations. First, as appellants argue, this language could be interpreted to mean that *if* the State Engineer approves a GMP, the GMP may order withdrawals that do not "conform to priority rights," i.e., deviate from the prior appropriation doctrine. Alternatively, as respondents argue, this language could be interpreted just as reasonably to mean that the statute mandates that the State Engineer *shall* begin to restrict withdrawals *by priority* if a basin has been designated as a critical management area for the 10-year statutory period and no GMP has been approved. But if a GMP *has been* approved for the basin, respondents contend that the language simply provides that the State

Engineer may choose not to order curtailment. Both interpretations are reasonable, thereby rendering NRS 534.110(7) ambiguous.

Having concluded that NRS 534.110(7) is ambiguous, we must consult the rules of statutory interpretation and legislative history.

Implied repeal

Under the canon against implied repeal, "[t]he Legislature is presumed not to intend to overturn long-established principles of law when enacting a statute." *Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 307, 448 P.3d 1106, 1111 (2019) (internal quotation marks omitted); *see also Ramsey v. City of North Las Vegas*, 133 Nev. 96, 112, 392 P.3d 614, 626 (2017) ("[R]epeals by implication are disfavored—*very much disfavored*." (emphasis added)). "The presumption is always against the intention to repeal where express terms [of repeal] are not used." *Presson v. Presson*, 38 Nev. 203, 208-09, 147 P. 1081, 1082 (1915) (internal quotation marks omitted). Indeed, there is a presumption that legislatures "do[ ] not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—[they] do[ ] not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

I agree with respondents' proposed interpretation of NRS 534.110(7) because appellants' interpretation would abrogate the prior appropriation doctrine without an express declaration in the statutory text. Indeed, the majority's interpretation hides elephants in mouseholes because NRS 534.110(7) does not expressly permit the State Engineer to approve a GMP that departs from the doctrine of prior appropriation, which has underpinned this State's water laws as a fundamental principle. As both the United States Supreme Court and this court have recognized, Nevada follows the prior appropriation doctrine. Here, however, Order 1302—by the State Engineer's own admission—does not comport with the prior appropriation doctrine. We cannot assume that the Legislature intended a *fundamental* and *significant* departure from 155 years of water law without express statutory text supporting this result. Thus, the canon against implied repeal supports respondents' interpretation.

Legislative history

Legislative history supports the conclusion that NRS 534.110(7) was not intended to allow the State Engineer to adopt a GMP inconsistent with the doctrine of prior appropriation. In 2011, Assemblyperson Pete Goicoechea, the sponsor of Assembly Bill 419 (seeking enactment of NRS 534.110), discussed how GMPs would treat priority rights. He first stated, "Water rights in Nevada are first in time[,] first in right. The older the water right, the higher the priority. We would address the newest permits and work backwards

to get basins back into balance." Hearing on A.B. 419 Before the Senate Gov't Affairs Comm., 76th Leg., at 13 (Nev., May 23, 2011). Assemblyperson Goicoechea then stated, "This bill allows people in over[-]appropriated basins ten years to implement a water management plan to get basins in balance. *People with junior rights will try to figure out how to conserve enough water under these plans*." *Id.* at 16 (emphasis added). This legislative history makes clear that junior—not senior—appropriators have the burden of reducing water usage under a GMP, which means that senior water rights have priority. Thus, legislative history supports respondents' interpretation of NRS 534.110(7).

Constitutional avoidance

An interpretation of NRS 534.037 and NRS 534.110(7) that departs from priority regulation could raise constitutional doubt under the Takings Clause. Consequently, I address the canon of constitutional avoidance, Nevada's long-standing treatment of water rights as property rights, and how the GMP could constitute an unconstitutional physical taking. Based on this analysis, I conclude that respondents' proposed interpretation of NRS 534.037 and NRS 534.110(7) should be adopted because it avoids constitutional doubts under the Takings Clause.

This court has explained that it "may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Degraw v. Eighth Judicial Dist. Court*, 134 Nev. 330, 333, 419 P.3d 136, 139 (2018) (internal quotation marks omitted).

"The Takings Clause of the Fifth Amendment provides that private property shall not 'be taken for public use, without just compensation.'" *Murr v. Wisconsin*, 582 U.S. 383, 392 (2017) (quoting U.S. Const. amend. V); *see also* Nev. Const. art. 1, § 8(3) ("Private property shall not be taken for public use without just compensation having been *first* made . . . ." (emphasis added)). "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner," and this duty applies "regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002).

We have explained that "[f]or a taking to occur, a claimant must have a stick in the bundle of property rights." *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 647, 173 P.3d 734, 740 (2007) (internal quotation marks omitted). "The bundle of property rights includes all rights inherent in ownership, including the inalienable right to possess, use, and enjoy the property." *Id.* (internal quotation marks omitted).

We have concluded that water rights are alienable, *Adaven Mgmt., Inc. v. Mountain Falls Acquisition Corp.*, 124 Nev. 770, 781, 191 P.3d 1189, 1196 (2008), allow the rights holder to enjoy the water, *Lobdell*, 2 Nev. at 277-78, and allow the rights holder to beneficially use the water, *Bacher v. Office of State Eng'r*, 122 Nev. 1110, 1116, 146 P.3d 793, 797 (2006). Of course, a prior appropriator also has the right to exclude others from using their water. *See Application of Filippini*, 66 Nev. 17, 21-22, 202 P.2d 535, 537 (1949) (explaining that priority rights are protected to the extent of the original appropriation). Thus, Nevada's water law gives senior appropriators at least three sticks in the bundle of property rights: the right to transfer, the right of use and enjoyment, and the right to exclude. Priority rights, therefore, are subject to the Takings Clause.

Based on three United States Supreme Court cases, I posit that requiring senior appropriators to pump less groundwater—and possibly reallocate that water to a nonbeneficial use—before junior appropriators are forced to cease pumping that same groundwater could be a compensable physical taking under the Fifth Amendment. *See Dugan v. Rank*, 372 U.S. 609, 625 (1963) (holding that the government's confiscation of surface water rights without compensation was a physical taking); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 755 (1950) (holding the same); *Int'l Paper Co. v. United States*, 282 U.S. 399, 405-07 (1931) (holding the same); *see also Washoe County, Nev. v. United States*, 319 F.3d 1320, 1326 (Fed. Cir. 2003) ("In the context of water rights, courts have recognized a physical taking where the government has . . . decreased the amount of water accessible by the owner of the water rights.").

Further, it is *crucial* to explain that priority rights are property subject to constitutional protection regardless of whether they are pre-statutory rights. Our recent jurisprudence generally uses the term "vested" water rights to describe appropriative rights "that existed under Nevada's common law before the provisions currently codified in NRS Chapter 533 were enacted in 1913." *Andersen Family Assocs. v. Ricci*, 124 Nev. 182, 188, 179 P.3d 1201, 1204 (2008) (explaining that pre-statutory rights cannot be impaired by statutory law). However, we have rejected the notion that post-statutory water rights—i.e., those appropriated *after* 1913—are not protected as real property. *See Filippini*, 66 Nev. at 21-22, 202 P.2d at 537 (explaining that priority rights are regarded and protected as real property regardless of whether the right existed prior to the enactment of Nevada's statutory water law). Thus, water rights appropriated after 1913 are still entitled to constitutional protection as property rights.

Accordingly, an interpretation of NRS 534.037 and NRS 534.110(7) that allows the State Engineer to depart from priority regulation and possibly reallocate senior water rights—without

compensation following an eminent domain proceeding—could be an unconstitutional physical taking under the Nevada and United States Constitutions. The respondents have presented a plausible statutory interpretation that avoids these doubts, and therefore, their interpretation should prevail.[1]

Conclusion

To summarize, all tools of statutory interpretation point to a simple result: NRS 534.037 and NRS 534.110(7) are intended to allow all rights holders in an over-appropriated basin to create a collaborative GMP to reduce withdrawals from the basin, with the onus being on the junior appropriators to reduce water use. If the rights holders approve the GMP, the State Engineer need not order curtailment by priority. If, however, the rights holders do not approve the GMP, then the State Engineer must order curtailment by priority. Thus, these statutes were intended to inspire junior appropriators to collaboratively reduce water use or risk curtailment. Senior appropriators should not have to, and were not intended to, bear this burden.

Order 1302 departs from other laws

In addition to the concerns above, Order 1302 violates the beneficial use statute and does not account for vested surface water rights.

The GMP does not comply with the beneficial use statute

Order 1302 provides that "[u]nused allocations [of water] may be banked, traded, leased or sold; thus, the GMP employs a market-based approach." It also states, "Section 13.9 of the GMP allows unused allocations to be carried over and banked for use in a subsequent year to increase the amount of water the rights holder can use in the next year."

The cornerstone of allocation—beneficial use—is "the basis, the measure and the limit of the right to use of water," NRS 533.035, and this requirement defines the extent of water rights. Thus, for every application to appropriate water, a "fundamental requirement . . . is that water only be appropriated for beneficial use." *Bacher*, 122 Nev. at 1116, 146 P.3d at 797 (internal quotation marks omitted). "When the necessity for the use of water does not exist, the right to divert it ceases . . . ." NRS 533.045. "Accordingly, beneficial use underpins Nevada's water statutes, and the Legislature has continued to delineate and expand on which uses are considered public uses in Nevada." *Mineral County*, 136 Nev. at 514, 473 P.3d at 427.

[1]I express no view on whether a taking occurred in this case. Although the GMP plainly decreases the amount of water that senior appropriators in Diamond Valley can utilize, the record in this case is insufficient to determine whether, and to what extent, the respondents' water rights were affected by the GMP.

The GMP departs from Nevada's beneficial use statute because it allows *unused* water to be banked, sold, traded, or leased rather than allocating water based on beneficial use. *Cf.* NRS 533.045 (providing that the right to use water ceases if not put to beneficial use). Appellants provide no citation to any law allowing water banking in Nevada. They also cite no persuasive authority that suggests that water banking is a public use that qualifies as beneficial use. Simply put, there appears to be no binding or persuasive authority that classifies water banking as a beneficial use in a prior appropriation jurisdiction. Because the GMP contravenes laws delineating beneficial use (i.e., it allows unused water rights to be retained), it is contrary to established law. Thus, I would hold that the State Engineer's decision to approve Order 1302 was capricious.[2]

The GMP does not account for vested surface water rights

In Order 1302, the State Engineer concluded that, under NRS 534.037, a GMP need not reduce groundwater pumping to preserve surface water rights, and thus, the GMP proponents need not consider its effect on surface water rights.

Vested water rights "may not be impaired by statutory law and may be used as granted in the original decree until modified by a later permit." *Andersen Family Assocs.*, 124 Nev. at 188, 179 P.3d at 1204-05. As noted, our recent jurisprudence generally uses the term "vested" water rights to describe appropriative rights "that existed under Nevada's common law before the provisions currently codified in NRS Chapter 533 were enacted in 1913." *Id.* at 188, 179 P.3d at 1204.

Here, the Diamond Valley GMP does not account for its effect on vested surface water rights. For that reason, whether the GMP actually impairs vested surface water rights is unclear. Because statutory law may not impair vested rights, a GMP approved under NRS 534.037 must account for its effect on vested surface water rights under NRS 534.037(2)(g). Accordingly, the State Engineer's contrary conclusion—that a GMP need not account for vested surface water rights—was capricious because established law requires the preservation of vested rights.

CONCLUSION

I recognize that the groundwater shortages that befall Diamond Valley and Nevada are of great concern to the public. However, I

[2]The GMP also departs from NRS 533.325 and NRS 533.345, which require an appropriator of water to file an application with the State Engineer whenever changing "the place of diversion, manner of use or place of use of water already appropriated." The GMP here deviates from this law because it allows appropriators (so long as the amount of water they use does not increase) to change the place of diversion, manner of use, or place of use of the water without filing an application with the State Engineer. For this additional reason, the GMP is capricious.

do not believe that these concerns allow this court to interpret NRS 534.037 and NRS 534.110(7) contrary to Nevada's historical water law. The constitution controls over any legislative act, and therefore, this court should adopt an interpretation of NRS 534.037 and NRS 534.110(7) that avoids constitutional violence. Respondents' interpretation of NRS 534.110(7) is compelling and well supported by the canons of statutory construction and legislative history. I would affirm the district court's decision to grant respondents' petition for judicial review because it is my firm belief that Order 1302 is capricious. Therefore, I respectfully dissent.

PICKERING, J., with whom SILVER, J., agrees, dissenting:

State Engineer Order 1302 approves a groundwater management plan (GMP) that effectively reallocates a percentage of senior water rights to junior water right holders, then ratably reduces water use across the board for a period of 35 years. The GMP does not compensate—or provide a mechanism for compensating—the senior water right holders. And in making its calculations, the GMP presumes but does not require beneficial use of the water rights it counts. These features place the GMP in direct conflict with the two fundamental principles underlying Nevada's water law statutes: the prior appropriation doctrine, which holds "first in time is first in right," such that, in times of shortage, "[t]he early appropriator of water prevails over a later appropriator," Ross E. deLipkau & Earl M. Hill, *The Nevada Law of Water Rights* 3-17 (2010); and the beneficial use doctrine, which holds that "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water" in Nevada, NRS 533.035. *See Mineral County v. Lyon County*, 136 Nev. 503, 513, 473 P.3d 418, 426 (2020) ("Nevada's water statutes embrace prior appropriation as a fundamental principle"; "[t]he other fundamental principle that [Nevada's] water statutes embrace is beneficial use.").

The majority opines that, on a "plain text" reading, NRS 534.110(7) and NRS 534.037 "plainly and unambiguously allow the State Engineer to approve a GMP that departs from the doctrine of prior appropriation and other statutes in Nevada's water scheme." Majority op. at 440. Nothing in the text of either statute expressly exempts GMPs from the prior appropriation and beneficial use doctrines. Instead, the majority infers the exemptions it declares from the fact that NRS 534.110(7) mandates the State Engineer to order curtailment in certain instances, then provides a mechanism for avoiding the mandate; and from NRS 534.037's silence on prior appropriation and beneficial use. But as Chief Justice Parraguirre develops in his separate dissent, the text of NRS 534.110(7) and NRS 534.037 can as easily—and more grammatically—be read to say GMPs are fully subject to the prior appropriation and beneficial use doctrines. To the extent that the majority's reading is

reasonable, then, this legal text is at best ambiguous, which opens the door to legislative history. *See Coleman v. State*, 134 Nev. 218, 219, 416 P.3d 238, 240 (2018). And here, the legislative history supports Chief Justice Parraguirre's reading, not the majority's. *See* Dissenting op. at 451-52 (Parraguirre, C.J.).

I write separately from Chief Justice Parraguirre because of another, more basic problem with the majority's approach: "In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (Kennedy, J.). A court does not determine a statute's meaning by reading its words out of context, in isolation from the body of statutes it inhabits. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012) ("Statutes *in pari materia* are to be interpreted together, as though they were one law."). The two statutes on which the majority relies, NRS 534.110(7) and NRS 534.037, are part of NRS Chapters 533 and 534. Since NRS Chapters 533 and 534 incorporate the prior appropriation and beneficial use doctrines, so do NRS 534.110(7) and NRS 534.037. Unless and until the Legislature expressly exempts GMPs from these doctrines, all GMPs, including Diamond Valley's, remain subject to them. With no express exemption in either NRS 534.110(7) or NRS 534.037, the only reasonable reading they can bear is that the GMPs they authorize are subject to, not impliedly exempt from, the prior appropriation and beneficial use doctrines that undergird Nevada's water statutes.

I.

A.

The closest the majority comes to finding textual support for exempting GMPs from the prior appropriation and beneficial use doctrines is the fourth sentence of NRS 534.110(7), which states:

> If a basin has been designated as a critical management area for at least 10 consecutive years . . . , the State Engineer *shall* order that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted in that basin to conform to priority rights, *unless* a groundwater management plan has been approved for the basin pursuant to NRS 534.037.

See Majority op. at 440-42 (discussing this provision with emphases shown). Ignore technical grammatical rules for the moment and just read the sentence fairly. It is long and clause-filled, to be sure. But a reasonable reader can still understand that the sentence describes circumstances where the State Engineer *must* order curtailment according to priority—where a basin has been designated a critical management area (CMA) for at least 10 consecutive years, and

there is no GMP in place. It does not state that the State Engineer can disregard the prior appropriation and beneficial use doctrines in any circumstances, including where a GMP is in place.

The majority reads the clause "unless a [GMP] has been approved" (the unless clause) to modify the clause, "that withdrawals . . . be restricted . . . to conform to priority rights" (the priority-rights clause). That is, the majority says that withdrawals need conform to priority rights in a CMA only if a GMP has not been approved for the basin. This reading disregards conventional rules of grammar and syntax. *See* Scalia & Garner, *supra*, at 140 (in interpreting a legal text, "[w]ords are to be given the meaning that proper grammar and usage would assign them"). "Unless" is a subordinating conjunction that "introduces a clause that is dependent on the independent clause." *The Chicago Manual of Style* § 5.200 (17th ed. 2017); *see id.* § 5.201(3). And the priority-rights clause is not an independent clause because it has no object. *See id.* § 5.225. The unless clause therefore necessarily refers back to the closest (and only) independent clause in the sentence—"the State Engineer shall order that withdrawals . . . be restricted in that basin to conform to priority rights . . . ." *See id.* at §§ 5.225, 5.228; *see also Castleman v. Internet Money Ltd.*, 546 S.W.3d 684, 690 (Tex. 2018) (noting that "properly placed commas" usually signal that a conditional clause applies to the entire series that precedes it). Thus, even closely parsed, the fourth sentence in NRS 534.110(7) says only that the State Engineer must order curtailment when, after a decade has passed, a basin designated as a CMA has no GMP in place. It does not (and grammatically cannot be read to) condition the application of the prior appropriation doctrine—let alone the beneficial use doctrine—on the absence of a GMP.

NRS 534.110(7) was added to NRS Chapter 534 in 2011. *See* 2011 Nev. Stat., ch. 265, § 3, at 1387. Its fourth sentence contains a specific mandate to the State Engineer to order curtailment by priority when an over-appropriated basin has been a CMA for 10 years without a GMP. Because a GMP allows the State Engineer to avoid this specific mandate does not abrogate the prior appropriation doctrine or take it or the beneficial use doctrine out of play. As the district court found, even when the mandate in NRS 534.110(7) to the State Engineer to order curtailment is avoided, conservation measures to enforce the prior appropriation and beneficial use doctrines remain, including: the State Engineer exercising his or her discretion to order curtailment by priority, *see* NRS 534.110(6) (empowering the State Engineer to order curtailment in all or any part of an overpumped basin); the creation of a funded land and water rights purchase program, *cf. New Mexico Office of State Eng'r v. Lewis*, 150 P.3d 375, 385 (N.M. Ct. App. 2006) (holding that a strict priority call is not the "first or exclusive response" to a water shortage under a prior appropriation scheme, where "resolution through land

and water rights purchases using public funding . . . and perhaps other actions" are provided for); instituting a rotating water-use schedule, *cf.* NRS 533.075; financially incentivizing best farming practices; canceling unused water rights; and curtailing peak season junior pumping.

The majority makes much ado over NRS 534.037(2). In its view, NRS 534.037's silence as to the prior appropriation and beneficial use doctrines signifies that GMPs are impliedly exempt from them. In whole, NRS 534.037(2) reads as follows:

> In determining whether to approve a groundwater management plan submitted pursuant to subsection 1, the State Engineer shall consider, without limitation:
>
> (a) The hydrology of the basin;
>
> (b) The physical characteristics of the basin;
>
> (c) The geographic spacing and location of the withdrawals of groundwater in the basin;
>
> (d) The quality of the water in the basin;
>
> (e) The wells located in the basin, including, without limitation, domestic wells;
>
> (f) Whether a groundwater management plan already exists for the basin; and
>
> (g) Any other factor deemed relevant by the State Engineer.

Again, nothing in this statute expressly allows the State Engineer to approve a GMP that restores hydrological balance by usurping senior rights. The use of the phrase "without limitation" to introduce the list of factors in NRS 534.037(2) and the reference to "[a]ny other factor" as the last item in the list makes the list non-exhaustive. The statute's silence as to the prior appropriation and beneficial use doctrines thus does not support reading it to say that neither doctrine applies. *Cf.* Scalia & Garner, *supra*, at 132-33 (noting that the negative-implication canon does not apply to expressly non-exhaustive lists). The opposite is true: These doctrines apply to GMPs because the statute does not expressly state they do not.

NRS 534.037(2) directs the State Engineer to consider certain technical environmental factors in evaluating a GMP (as well as other relevant factors "without limitation"). The prior appropriation and beneficial use doctrines—bedrock principles founding the entirety of Nevada water law, *see Mineral County*, 136 Nev. at 513, 473 P.3d at 426—do not fit in the category of enumerated environmental considerations that NRS 534.037(2) lists. Nor would a reasonable reader expect them to be listed. Thus, the enumeration of factors the State Engineer may consider in approving a GMP does not excuse the State Engineer from adhering to the prior appropriation and beneficial use doctrines in addressing over-pumped basin shortages. In short, NRS 534.110(7) and NRS 534.037 neither expressly nor impliedly authorize the State Engineer to abdicate

responsibility for enforcing the prior appropriation and beneficial use doctrines by approving a GMP that violates these doctrines.

B.

The majority compounds its error by looking at NRS 534.037 and the fourth sentence in NRS 534.110(7) and deciding their meaning without considering their text in the larger context of NRS 534.110 and NRS Chapters 533 and 534 as a whole. But "[c]ontext is a primary determinant of meaning." Scalia & Garner, *supra*, at 167. "[T]he meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view." *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting).

NRS 534.110(7) was added to NRS 534.110 in 2011, along with NRS 534.037. *See* 2011 Nev. Stat., ch. 265, §§ 1, 3, at 1383-87. They introduce the concept of critical management areas to NRS Chapter 534, with NRS 534.110(7) spelling out when the State Engineer may, and when he or she must, designate a basin as a CMA. As discussed in part I.A., *supra*, NRS 534.110(7) further specifies when, in a CMA-designated basin, the State Engineer *must* order curtailment by priority. The preceding subsection, NRS 534.110(6), predates the 2011 amendments. It grants the State Engineer the general power to curtail pumping by priority:

> Except as otherwise provided in subsection 7, the State Engineer shall conduct investigations in any basin or portion thereof *where it appears that the average annual replenishment to the groundwater supply may not be adequate for the needs of all permittees and all vested-right claimants*, and if the findings of the State Engineer so indicate, except as otherwise provided in subsection 9, *the State Engineer may order that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted to conform to priority rights*.

(emphases added); *see also* NRS 534.110(9) (recognizing the State Engineer's authority to order curtailment by priority "pursuant to subsection 6 or 7").

Subsections 6 and 7 of NRS 534.110 identically describe the State Engineer's curtailment power (to "order that withdrawals, including, without limitation, withdrawals from domestic wells, *be restricted to conform to priority rights*"). Subsection 6 explains when the State Engineer *may* invoke that power (after investigating and finding over-appropriation and over-pumping). Subsection 7 differs only in that it describes circumstances where that permissive authority becomes a mandate (following 10 consecutive years of CMA designation with no GMP in place). *See State v. Am. Bankers Ins. Co.*, 106 Nev. 880, 882, 802 P.2d 1276, 1278 (1990) (noting rule

that mandatory words impose a duty while permissive words grant discretion). There is no logical reason to read identical language describing the State Engineer's curtailment authority to achieve contradictory results (i.e., subsection 6 embracing and subsection 7 rejecting curtailment by priority when a CMA has a GMP).[1]

Allowing the State Engineer to approve a GMP that deviates from the prior appropriation and beneficial use doctrines puts NRS 534.037 and NRS 534.110(7) into direct conflict with the rest of NRS Chapters 533 and 534. As a majority of this court discussed at length just two years ago, prior appropriation and beneficial use are Nevada's water statutes' two most fundamental principles—so fundamental that even the public trust doctrine is subordinate to them. *Mineral County*, 136 Nev. at 518-19, 473 P.3d at 430; *but see id.* at 520, 529, 473 P.3d at 431, 437 (Pickering, J., dissenting in part). Priority and beneficial use matter most when shortages arise. Yet, under the majority's reading of NRS 534.037 and NRS 534.110(7), all junior water right holders otherwise facing curtailment need do is gather up a majority to petition the State Engineer to designate the basin a CMA and, again by simple majority vote, adopt a GMP that reallocates senior water rights to junior water right holders, without compensating the senior holders for the loss of their valuable rights. This is contrary to the protection Nevada's water statutes afford settled water rights, on which Nevada's "[m]unicipal, social, and economic institutions rely" and on which the "prosperity of the state" depends. *Mineral County*, 136 Nev. at 518, 473 P.3d at 429.

"A textually permissible interpretation that furthers rather than obstructs [a law's] purpose should be favored." Scalia & Garner, *supra*, at 63. And the majority's application of NRS 534.110(7) and NRS 534.037 disincentivizes conservation in over-appropriated basins. Order 1302 impairs senior water right holders' valuable property rights without compensation or process based on the majority vote of all water rights holders, including junior water right holders, who have the most to gain. *See* State Eng'r, Ruling No. 6290 21-22 (Aug. 15, 2014) (finding that many rights holders in the Diamond Valley Basin discouraged the State Engineer from taking conservation action at that time). If, however, NRS 534.110(7) is read as the backstop that its text and context support, then cooperation in conservation efforts is in the junior water right holders' interests to avoid mandated curtailment.

Some senior water right holders will cooperate altruistically, in the interests of their community. More than likely, some will not. These folks should be encouraged to do so via *compensation*, not have their valuable water rights taken from them on the vote

[1]The "[e]xcept as otherwise provided in subsection 7" language logically refers to NRS 534.110(7)'s mandate to the State Engineer to order curtailment, not the GMP exception to that mandate.

of a simple majority. That is the prior appropriation doctrine in action—defending the rights of senior water right holders during water shortages. What purpose does it serve to define and protect senior rights if juniors in a dwindling basin can simply vote to reallocate them when the rubber hits the road? *See* NRS 533.430(1);[2] NRS 533.265(2)(b); NRS 533.090(1)-(2);[3] NRS 534.020(1);[4] *cf. In re Parental Rights as to S.M.M.D.*, 128 Nev. 14, 24, 272 P.3d 126, 132 (2012) (noting that this court avoids interpretations that render statutory text meaningless).

Beyond all this, before the law takes property from persons, the government is constitutionally required to provide "just compensation" and process. *Murr v. Wisconsin*, 582 U.S. 383, 392 (2017) (quoting U.S. Const. amend. V); *see also* Nev. Const. art. 1, § 8(3) ("Private property shall not be taken for public use without just compensation having been *first* made . . . ." (emphasis added)). This implicates Chief Justice Parraguirre's point regarding the canon of constitutional avoidance—surely an interpretation that does not raise such "serious constitutional doubts" should be favored. *See* Dissenting op. at 452 (quoting *Degraw v. Eighth Judicial Dist. Court*, 134 Nev. 330, 333, 419 P.3d 136, 139 (2018)). But even further, the constitutional context militates against the majority's holding that, in enacting NRS 534.110(7) and NRS 534.037, the Legislature has, by implication and not express direction, abrogated the prior appropriation and beneficial use doctrines. This is the very area in which these doctrines are paramount—an over-appropriated and consistently over-pumped basin. Surely the Legislature would have anticipated the need for funding and processes to protect senior water right holders if it meant to exempt GMPs in CMAs from the prior appropriation and beneficial use doctrines. Other states do not allow deviation from prior appropriation without protecting senior water right holders. *See, e.g.*, *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1150-51 (Colo. 2001) (holding that water statute authorizes out-of-priority diversions of water via augmentation plans so long as senior rights are protected via replacement water that offsets the out-of-priority diversion); *Lewis*, 150 P.3d at 387-88 (offering relief to junior rights holders at the express authorization of the legislature while still honoring prior appropriation

[2]"Every permit to appropriate water, and every certificate of appropriation granted under any permit by the State Engineer . . . shall be, and the same is hereby declared to be, subject to existing rights . . . ." NRS 533.430(1).

[3]NRS 533.090 allows the State Engineer to determine priority of relative rights. NRS 533.265 requires that certificates of final determination of relative rights include their date of priority.

[4]"All underground waters within the boundaries of the State belong to the public, and, subject to all existing rights to the use thereof, are subject to appropriation for beneficial use only under the laws of this State relating to the appropriation and use of water and not otherwise." NRS 534.020(1).

via provided funds); *Arave v. Pineview W. Water Co.*, 477 P.3d 1239, 1245 (Utah 2020) (noting that a junior appropriator has the right—at their own expense—to replace a senior appropriator's water). Why would Nevada?

C.

Even the State Engineer did not think that the current statutory scheme permitted curtailment unconstrained by prior appropriation. Five years after the statutes at issue were enacted, the State Engineer proposed legislative amendments that would have filled the silence in NRS 534.037 that the majority relies on and allowed a GMP to deviate from prior appropriation. *See* S.B. 73, 79th Leg. § 2 (Nev. 2016); *see also Bailey v. Nev. State Eng'r*, Nos. CV-1902-348, CV-1902-349 & CV-1902-350, at 26 (Nev. Dist. Ct. Apr. 23, 2020) (Order Granting Petition for Judicial Review). The bill would have allowed the State Engineer to approve a GMP "limiting the quantity of water that may be withdrawn under any permit or certificate or from a domestic well *on a basis other than priority*." S.B. 73 § 2(3). The State Engineer's former understanding of the scope of the office's powers is instructive, *Nev. Attorney for Injured Workers v. Nev. Self-Insurers Ass'n*, 126 Nev. 74, 83, 225 P.3d 1265, 1271 (2010) (noting that the court may consider agency interpretations of statutes they enforce where consistent with the text): As written, NRS 534.110(7) and NRS 534.037 do not authorize a GMP that violates prior appropriation or beneficial use principles.

In sum, text, context, and the enforcing agency's original interpretation all militate against the reading the majority gives NRS 534.110(7) and NRS 534.037. For these reasons, and the additional reasons stated in Chief Justice Parraguirre's dissent, which I join except as to its finding of ambiguity, I respectfully dissent.

LARRY DECORLEON BROWN, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 81962

June 23, 2022 512 P.3d 269

Appeal from a second amended judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery, robbery with the use of a deadly weapon, and murder with the use of a deadly weapon, and pursuant to an *Alford* plea, of ownership or possession of a firearm by a prohibited person. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Affirmed.

JoNell Thomas, Special Public Defender, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Karen L. Mishler*, Chief Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, Silver, Cadish, and Pickering, JJ.

OPINION

By the Court, Silver, J.:

In this appeal from a judgment of conviction, we consider whether a jury may consider footwear impression evidence without the aid of expert testimony and conclude that such was proper here. We also consider whether the district court violated the defendant's rights under the Confrontation Clause by allowing a witness to testify via two-way video and limiting that witness's testimony to avoid disclosing trade secrets. Although the district court failed to make express findings under *Lipsitz v. State*, 135 Nev. 131, 442 P.3d 138 (2019), regarding the propriety of the two-way video, we determine reversal is not warranted here. We also conclude that the district court did not abuse its discretion by limiting the witness's testimony, and we affirm.

FACTS AND PROCEDURAL HISTORY

The State indicted appellant Larry Brown on charges of conspiracy to commit robbery, robbery with the use of a deadly weapon, murder with the use of a deadly weapon, and ownership or possession of a firearm by a prohibited person. Brown entered an *Alford*[1] plea as to the possession charge but proceeded to trial on

[1]*North Carolina v. Alford*, 400 U.S. 25 (1970).

the remaining charges. These charges arose from the 2017 death of Kwame Banks, who was shot and killed outside a Las Vegas apartment complex. Responding officers found Banks's body lying between two cars in a pool of blood. Two bullet cartridge cases were nearby, and bloody shoe prints led away from the body. A torn latex glove was near the body, and the remainder of that glove was near the apartment complex exit. A separate black glove was lying in front of some parked cars near the body. Officers also discovered three cell phones in the vicinity: one under Banks's body, one a few feet away in some landscaping rocks, and one near the exit. Banks's pockets appeared to have been searched, but Banks still had about $1,900 in cash, earrings, and a bracelet on his person.

Detectives learned that before his death Banks agreed to sell marijuana to Anthony Carter, Brown's codefendant, and to an unidentified third party. Banks drove a car to an apartment complex to do the sale. The detectives found Banks's car the next day, approximately a half mile from the crime scene, burned and missing its license plates. Detectives also learned that a patrol officer had come upon the car the night of the murder and observed a white mid-sized SUV pick up an African-American male and drive off. Detectives were able to obtain video surveillance showing the white SUV, which the State presented to the jury.

Police investigated the three cell phones and determined that two belonged to Banks and the third was registered to Brown under an Atlanta, Georgia, address and phone number. Following the murder, police executed a search warrant for Brown's home and found a white SUV and shoes that had prints which appeared to match the shoeprints at the crime scene.[2] Brown was later located in Atlanta, where he was arrested following a brief chase. Detectives thereafter linked the DNA on both the torn latex glove found near the body and the black cloth glove to Brown, but the murder weapon was never recovered.

Detectives used technology from a private company called Cellebrite to extract information from Banks's phones, but they were unable to access the contents of Brown's phone. Police then sent Brown's phone to Cellebrite, which initially was also unable to extract the data. Following a Cellebrite software update and pursuant to a second search warrant, police again sent the phone to Cellebrite, which this time successfully extracted the data. The employee who performed the successful extraction was Brian Stofik.

Notably, the extracted information contained a series of text messages between Carter and Brown in the days leading up to the murder, indicating they were planning to meet to do something involving an unidentified third person. Those messages included

[2]One of the shoes had a reddish-brown stain, but it tested negative for blood.

the address where the murder occurred and statements such as, "He have money in middle console 2 sum time mostly on him and in trunk in bags if he riding heavy he keep small pocket nife on right side," and, "If u need Nard he on stand by," as well as messages sent shortly before the murder such as, "Tonight the Night my brother," "Just seen you text okkk COOL!!!!," "How are we looking," "He suppose to be Pullen up my man that want the bags not here either . . . I told him be here at 9:30," and, "On standby."

Before trial, Brown moved to strike evidence of footwear impressions, arguing that such evidence required expert testimony. The State countered that it did not intend to present an expert because one was not needed as the photograph of the crime scene—showing the shoeprint and the photograph of the shoes found at Brown's residence later impounded into evidence—were independently admissible. The district court agreed and denied the motion. Brown also moved to preclude all cell phone information obtained from Cellebrite. Brown asserted that he should be able to cross-examine Cellebrite about its proprietary software that allows Cellebrite to duplicate the phone's data without actually reviewing the information on it, as well as Cellebrite's processes for ensuring no information is changed during the extraction and return processes. At Brown's request, the district court agreed to have a sealed hearing outside the jury's presence to allow Brown to question Cellebrite's witness prior to his testimony at trial.

Early during trial, the State learned that it would be unable to reschedule Cellebrite employee Brian Stofik's testimony as necessary to have Stofik appear in person. Noting that Stofik would be testifying to whether the copy of the phone returned to law enforcement was accurate, the State argued that good cause existed to allow Stofik to testify audiovisually because Cellebrite had an employee shortage at the time of trial, rescheduling Stofik's testimony so that he could testify in person would cost an extra $10,000 to the State, and Stofik's testimony could be taken over two-way video. Brown made a *Crawford*[3] objection, arguing that because Cellebrite worked with law enforcement, it should be willing to come to court. But Brown acknowledged that two-way video would be acceptable "if that's what's necessary." The court concluded Stofik could effectively testify over two-way video.

During trial, a detective testified to finding the cell phones and to the techniques the department used to obtain information about the cell phones and link one of them to Brown. The detective also testified that both of Banks's phones contained a contact named "POE ATL" and that the department traced that contact's number to Anthony Carter. Another detective testified to using Cellebrite software and other tools to extract and analyze information from the

[3]*Crawford v. Washington*, 541 U.S. 36 (2004).

phones. Texts on one of Banks's phones showed that on the morning of the murder, Carter set up a meeting between Banks and an unidentified third person. Phone records admitted at trial also established that Carter was in contact with both Banks and Brown in the minutes leading up to the murder. Additionally, cell tower evidence placed Brown's and Carter's phones in the vicinity of the crime scene in the hours leading up to the murder.

Before Stofik testified, the district court held a sealed hearing, during which Stofik explained Cellebrite's process for receiving and returning phones and for extracting information from those phones. As to Brown's phone, Stofik explained the phone's chain of custody and what he did to extract the data without going into specifics about Cellebrite's trade secrets. He also verified that the information provided to police mirrored what was on the phone and explained how Cellebrite used a "hashing" system to check accuracy. On cross-examination, Brown asked Stofik which of its products was used to extract the data and about the circumstances under which a particular Cellebrite device would be unable to unlock a phone. Stofik declined to answer these questions due to proprietary interests, and the district court thereafter determined the latter question was irrelevant. Although Stofik was not the employee who attempted to extract information the first time the phone was sent to Cellebrite,[4] Stofik explained Cellebrite documented that, during its first attempt, it did not examine or alter any of the applications or data on the device.

Brown then made a *Crawford* objection, arguing he had the right to confront all involved Cellebrite employees about the chain of custody. He also argued the evidence was not properly authenticated because Stofik failed to establish the process or system used to extract the data. The district court concluded that the proprietary coding and programming did not need to be presented to the jury, as those areas were technically difficult and could cause the jury undue confusion. The district court overruled the objections and allowed the parties to question Stofik regarding how Cellebrite downloaded and returned the phone information while ensuring its accuracy.

Stofik's subsequent trial testimony matched his testimony at the sealed hearing. Based on Stofik's testimony, the State moved to admit the sealed evidence bag that held the phone, documenting the phone's chain of custody. On cross, Brown primarily asked Stofik about Cellebrite's process and whether Cellebrite ever examined the data on the phone. Later, another detective testified to the messages on Brown's cell phone, which testimony the district court admitted over Brown's objection.

The State also introduced photographs of the bloodied footwear impression taken at the crime scene during its case-in-chief, but the

[4]That employee left Cellebrite's employment before Stofik arrived.

prosecution did not ask any witness at trial to compare those crime scene photographs against the shoes recovered from Brown's residence. However, during closing arguments, the State suggested that the jury should compare them during deliberations.

Brown presented evidence to counter the inference that he fled to Atlanta following the crime and to counter the State's evidence that he fled from officers once located in Atlanta. Brown also testified in his defense and denied meeting or knowing Banks. He asserted that on the day of the murder he was in contact with Carter because he wanted to buy marijuana. They agreed to meet outside a convenience store not far from where Banks was murdered, but while Brown was waiting for Carter, three masked men robbed and beat Brown, taking his money and his phone.[5] He testified that one of the assailants sounded like Carter and that there were no witnesses to the crime. Brown testified he first learned of the murder after he returned to Atlanta. During cross-examination, the State asked Brown about the text message conversations with Carter, and Brown testified that he did not know what the text message about the knife meant, explaining that he was also calling Carter during that time and that Carter, who was simultaneously texting other people, sent Brown that text by accident. When asked why he had texted "Ok" 30 seconds later, Brown explained that there was an intervening phone call and that the text was in reference to that conversation. He further testified that the text message with the address of the crime was on his phone because he may have dropped Carter off or picked him up at that location, although he also denied having ever been at that location.

The jury convicted Brown on all counts, leading to an aggregate sentence of 30 years and 4 months to life in prison. This appeal followed.

DISCUSSION

Brown raises several arguments on appeal, two of which we elect to address in this opinion: first, whether the district court improperly admitted evidence of the bloodied footwear impressions without requiring expert testimony; and second, whether the district court violated Brown's rights under the Confrontation Clause by allowing Stofik to testify via two-way video and by limiting the scope of his testimony to avoid disclosing trade secrets.[6]

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[5]Brown did not present any corroborating evidence, such as surveillance video or eyewitness testimony.

[6]Brown additionally argues the district court violated *Batson v. Kentucky*, 476 U.S. 79 (1986), during jury selection and erred by admitting certain text messages and search history from Brown's girlfriend's phone. We have considered the record in light of the relevant law and conclude these arguments are without merit.

The footwear impression evidence in this case was admissible without expert testimony

Brown argues that the district court abused its discretion in admitting footwear impression evidence without forensic expert testimony because associating footwear impressions with specific shoes is unreliable, prejudicial, and confusing, outweighing any probative value the evidence could have had.[7] Specifically, he contends that the jury needed expert testimony to properly consider the footwear impression evidence admitted at trial and that the State's suggestion during closing argument that the jury should compare the evidence was improper. We review the district court's evidentiary rulings for abuse of discretion. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

Relevant evidence is generally admissible, NRS 48.025(1), and laypersons may draw inferences that are both rationally based on the observer's perception and helpful to determine a fact in issue, NRS 50.265 (addressing lay-witness testimony). Expert testimony, however, is needed "to provide the trier of fact [with] a resource for ascertaining truth in relevant areas outside the ken of ordinary laity." *Valentine v. State*, 135 Nev. 463, 472, 454 P.3d 709, 718 (2019) (alteration in original) (internal quotation marks omitted); *see also* NRS 50.275 ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify to matters within the scope of such knowledge."). In a similar context—considering whether a witness is a lay witness or expert witness—we evaluate the substance of the testimony: "[D]oes the testimony concern information within the common knowledge of or capable of perception by the average layperson or does it require some specialized knowledge or skill beyond the realm of everyday experience?" *Burnside v. State*, 131 Nev. 371, 382-83, 352 P.3d 627, 636 (2015). To address Brown's argument, we likewise consider whether comparing footwear impressions to footwear is

[7]Brown also argues that the footwear impression evidence is inadmissible as irrelevant because it is scientifically invalid, based on the 2016 publication of the President's Council of Advisors on Science and Technology (PCAST). *See* President's Council of Advisors on Sci. & Tech., *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (Sept. 2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf. But the Department of Justice has since rejected key components of that report, and because this issue may be resolved through existing caselaw, we need not consider the PCAST report. *See* United States Dep't of Justice, *Statement on the PCAST Report: Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (Jan. 13, 2021), https://www.justice.gov/olp/page/file/1352496/download.

within an ordinary range of knowledge and capable of perception by the average person, or whether such evidence requires an expert's explanation.

We have never addressed this particular issue, and a survey of other jurisdictions reveals that other courts have come to differing conclusions. Some have upheld the use of expert testimony regarding footwear impression evidence where the circumstances of the case call for an expert's review. *See, e.g.*, *State v. Cooke*, 914 A.2d 1078, 1097-98 (Del. Super. Ct. 2007) (concluding expert testimony on a footwear impression was admissible where the expert opined that the "perimeter shaped lugs" on the impression may have come from the defendant's boots); *State v. Poole*, 688 N.E.2d 591, 600-01 (Ohio Ct. App. 1996) (determining that footwear impression evidence was beyond the jury's comprehension where the expert in that case testified to taking specific measurements from various points on the defendant's shoe and comparing those measurements to corresponding points on a plaster cast).

However, other courts have determined expert testimony is unnecessary to admit footwear impression evidence. *See, e.g.*, *McNary v. State*, 460 N.E.2d 145, 147 (Ind. 1984) (admitting lay opinion comparing a shoe to shoeprints left in snow and pointing to other law holding that "[f]or the reason that footprints are large and the points of similarity are obvious (contrasted with fingerprints or palm prints), expert testimony is not required and the comparison may properly be made a subject of non-expert testimony" (quoting *Johnson v. State*, 380 N.E.2d 566, 569 (Ind. Ct. App. 1978))); *Castellon v. State*, 302 S.W.3d 568, 572 (Tex. App. 2009) (concluding an analyst was qualified to compare shoe prints left on papers on the ground at the crime scene and in the getaway car against the defendant's shoes, and recognizing that this "field of expertise . . . is not complex" and "Texas courts have long admitted lay and expert testimony on shoe print comparison"); *State v. Yalowski*, 404 P.3d 53, 60 (Utah Ct. App. 2017) (concluding that a technician's testimony as a lay witness comparing footwear impression photographs to the pattern on a pair of shoes was admissible because the technician based his opinion on personal observations, the jurors were free to "form[ ] their own conclusions based on their observation of the photographs," and the technician "did not opine 'using terms of certainty' or about the 'degree of similarity' between the patterns"); *see also State v. Hall*, 344 S.E.2d 811, 812-13 (N.C. Ct. App. 1986) (allowing police officers to testify that shoe prints appeared to match the defendant's shoes where "the officers though not experts in identifying shoe prints were qualified to compare shoes and shoe prints and testify with respect thereto . . . *that they saw and compared both the shoe prints and shoes involved was foundation*

enough for their conclusion that the shoes and prints matched" (emphasis added)).[8]

Based on the foregoing, we conclude that a juror may make personal observations and draw general inferences regarding the similarities between footwear impressions and footwear. *Cf.* NRS 50.265 (explaining a lay witness may testify to an inference rationally based on the witness's perception where it is helpful to determining a fact in issue); NRS 52.045 (allowing jurors to make comparisons between handwriting samples without requiring the aid of an expert). We conclude, in turn, such evidence generally need not be supported by expert testimony to be admissible.[9]

Here, the photographs of the bloodied shoe prints near Banks's body and the shoes found in Brown's girlfriend's home are independently relevant circumstantial evidence.[10] *See Commonwealth v. Hawk*, 709 A.2d 373, 376 (Pa. 1998) ("Evidence that merely *advances an inference* of a material fact may be admissible, even where the inference to be drawn stems only from human experience."); *United States v. Lloyd*, 462 F.3d 510, 517 (6th Cir. 2006)

[8]*See also State v. Haarala*, 398 So. 2d 1093, 1098 (La. 1981) (concluding that a police officer could testify as a lay witness that the shoeprints he observed "were of the same pattern as would have been made by the defendant's shoes"); *State v. McInnis*, 988 A.2d 994, 995-96 (Me. 2010) (same); *State v. Walker*, 319 N.W.2d 414, 417-18 (Minn. 1982) (same).

[9]This is not to say that expert testimony regarding footwear impressions is never necessary for such evidence's admission. Depending on the circumstances surrounding either the evidence or the nature of the testimony, expert testimony may be appropriate. *See* NRS 50.275 ("If scientific, technical or other specialized knowledge *will assist the trier of fact to understand the evidence* or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education *may* testify to matters within the scope of such knowledge." (emphases added)).

[10]In response to our concurring colleague, irrespective of whether the State presented expert testimony of footwear comparison, we emphasize that the photographs of Brown's shoes were independently relevant and admissible. Here, Brown's shoes were presumptively tested by the crime scene analyst for the presence of blood. The crime scene analyst testified that Brown's shoes tested negative for the presence of blood. Thus, this evidence is relevant and independently admissible. *See* NRS 48.025(1) ("All relevant evidence is admissible[.]"); *see also* NRS 48.035(1)-(2) (establishing that relevant and admissible evidence should be excluded where "its probative value is *substantially outweighed*" by certain considerations that would warrant exclusion (emphasis added)). And we have long held that the weight to be given to admissible evidence is left to the jury's determination. *See Wheeler v. State*, 91 Nev. 119, 120, 531 P.2d 1358, 1358 (1975) ("The jury is the sole and exclusive judge of . . . the weight to be given the evidence."). Brown's arguments that the district court erred by admitting the photograph of Brown's shoes without a footwear expert are doubly unavailing because, importantly, the photographs of Brown's shoes were alternatively relevant and exculpatory to explain to the jury that Brown's shoes did not contain the victim's blood that could be seen in the photographs depicting the bloody shoe prints at the crime scene.

(determining that, despite the fact that the expert did not identify a shoe print as definitely matching defendant's shoe, the probative value of shoe print evidence was high where defendant was arrested a short distance from crime scene wearing shoes that matched a shoe print at crime scene); *see also* NRS 48.025 (relevant evidence is generally admissible). Moreover, the photograph of the footwear impression evidence was admitted for the jury's overall observation, and the State elicited no testimony during trial regarding the evidence that would require specialized testimony for the jury to understand. *Cf.* NRS 50.275 (regarding expert testimony). And while expert testimony may have further assisted the jury in forming a particular conclusion about the evidence, this, without more, does not render the photograph inadmissible or require expert testimony to be independently admissible. *Yalowski*, 404 P.3d at 60 ("Simply because a question might be capable of scientific determination, helpful lay testimony touching on the issue and based on personal observation does not become expert opinion." (quoting *State v. Ellis*, 748 P.2d 188, 191 (Utah 1987))).

Finally, the prosecutor did not improperly argue during closing that during deliberations the jury should compare the footwear impressions to the shoes found in Brown's residence. Once evidence is admitted during trial, the prosecutor is free to argue inferences from that evidence. *See Rimer v. State*, 131 Nev. 307, 330, 351 P.3d 697, 714 (2015) (noting that attorneys are free to argue inferences from the evidence admitted at trial during closing arguments). Here, the prosecutor argued to the jury regarding two admitted pieces of evidence, and in doing so, he did not, as Brown contends, improperly shift the burden to the defense where these pieces of circumstantial evidence were of independent significance and nothing in Nevada law either prohibits the prosecutor from arguing as to the evidence's meaning and inferences or requires the prosecutor to base any such argument on expert testimony. Thus, we determine that the district court did not abuse its discretion by admitting the footwear impression evidence without accompanying expert testimony.

The district court did not violate Brown's rights under the Confrontation Clause

Brown argues that the district court violated his rights under the Confrontation Clause by allowing the Cellebrite employee to testify via video conference where the district court failed to make the requisite findings under *Lipsitz v. State*, 135 Nev. 131, 442 P.3d 138 (2019). Brown also argues that the district court improperly limited his ability to cross-examine Stofik because protecting proprietary information and trade secrets is an invalid reason for limiting cross-examination and, moreover, these limitations prevented Brown from understanding Cellebrite's practices and methods and offer-

ing adequate rebuttal evidence. Brown further contends that, absent the cell phone evidence, there was no evidence to support the conspiracy charge.

"The Confrontation Clause of the Sixth Amendment guarantees that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *State v. Eighth Judicial Dist. Court (Baker)*, 134 Nev. 104, 106, 412 P.3d 18, 21 (2018) (alteration in original) (quoting U.S. Const. amend. VI). Whether a district court's decision violated a defendant's Confrontation Clause rights is a question of law that we review de novo. *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009).

Two-way video does not constitute a reversible Confrontation Clause error here

"'[T]he Confrontation Clause reflects a preference for face-to-face confrontation at trial,' but that preference 'must occasionally give way to considerations of public policy and the necessities of the case.'" *Lipsitz v. State*, 135 Nev. 131, 136, 442 P.3d 138, 143 (2019) (emphasis omitted) (quoting *Maryland v. Craig*, 497 U.S. 836, 849 (1990)); *see also* SCR Part IX-A(B) Rule 4(1) (explaining a witness may testify via two-way video if necessary to advance an important public policy and the testimony's reliability is assured). Specifically, in-person cross-examination may not be required under the Confrontation Clause if "denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Lipsitz*, 135 Nev. at 136, 442 P.3d at 143 (internal quotation marks omitted). But the district court must first find that this alternative method of testimony is necessary. *See id*. at 136-37, 442 P.3d at 143 (explaining that such "procedure [may] be used only after the trial court hears evidence and makes a case-specific finding that the procedure is necessary to further an important state interest" (internal quotation marks omitted)). However, even where a Confrontation Clause error occurs, "reversal is not required 'if the State could show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Medina v. State*, 122 Nev. 346, 355, 143 P.3d 471, 477 (2006) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)); *see also* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

Brown's argument focuses on whether the district court made the appropriate findings on *Lipsitz*'s first prong: whether the denial of in-person cross-examination was necessary to further an important public policy. The district court did not expressly make this finding. Stofik was originally scheduled to testify at trial in person, and the State indicated below that moving the testimony to

another date, as necessary to accommodate the court's calendar, would place an undue burden on Cellebrite's business and would substantially increase the prosecution's costs. The State argued that in-person testimony would not serve any purpose that could not also be served through audiovisual testimony, and Brown did not contest this point, instead arguing that he would "like to have them live obviously and testify before the jury and let us cross-examine [Stofik in person]," asserting that companies who worked with law enforcement "need[ ] to come to court, period" and that financial concerns were an inadequate reason for failing to appear in person. The district court then agreed with the State that Stofik could effectively testify via two-way video, without specifically addressing what public policy would be served, as required by *Lipsitz*.[11] And although the State raises several considerations on appeal that may, upon further information, be sufficient to establish a public policy reason supporting audiovisual testimony over in-person testimony in this case, those arguments and correlating findings were not made below. *Cf. Lipsitz*, 135 Nev. at 137-38, 442 P.3d at 144 (recognizing that protecting the defendant's right to speedy trial when a witness is unable to testify in person on the day set for trial supports the public policy prong).

However, we conclude that neither the district court's failure to make express findings nor its decision to allow Stofik to testify via two-way video contributed to the verdict, and we therefore conclude any error does not warrant reversal here.[12] The record demonstrates that Brown wanted a Cellebrite employee to testify in order to address his concerns regarding foundational issues, such as the chain of custody of the phone and that Cellebrite's extraction of the data did not alter the contents of the phone's data. The record reflects that Brown was able to cross-examine Stofik on these two points at trial and even more extensively at a sealed hearing that occurred during trial.

Further, Stofik's chain-of-custody testimony was cumulative of other evidence admitted at trial. Stofik did not conduct any analysis or observation of the phone's content. Rather, Stofik's job consisted of using Cellebrite's software to make a copy of the phone's data on a local drive and then a thumb drive, using a unique identifier to ensure accuracy of the copy on the thumb drive. Detectives who handled the phone, transmitted it to Cellebrite, and conducted the forensic analysis of the phone's data upon its return from Cellebrite testified in person at trial, and the State admitted other evidence,

[11]Neither party raised *Lipsitz* in the district court or asserted that the district court must make findings regarding the public policy served by two-way video.

[12]We nevertheless caution that district courts, in considering Confrontation Clause arguments, should make express findings on the record regarding the factors enumerated in *Lipsitz*.

such as the sealed evidence bag used to transport the phone to and from Cellebrite, establishing the phone's chain of custody. Indeed, the record shows that, through the cross-examination of Detective Michael Mangione, Brown was able to present to the jury the very same chain-of-custody defect Brown asserts Stofik was unable to properly address during his cross-examination, namely, that the cell phone was sent twice to Cellebrite for data extraction.[13] Thus, Brown had the opportunity to cross-examine multiple witnesses regarding the phone's chain of custody, as well as to cross-examine Stofik concerning the reliability of the copy. *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985) ("[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose . . . infirmities through cross-examination . . . .").

Critically, too, Brown himself testified at trial, and the prosecutor cross-examined him about the text messages. Brown acknowledged those messages were tied to his phone number, and he attempted to explain the context and meaning of several of the messages, including, notably, one sent by Carter shortly before the murder regarding items Banks may have in his car, and Brown's quick affirmative response. From Brown's own testimony, therefore, the jurors could determine that Brown sent the text messages and that he, in effect, confirmed the contents of the text messages were accurate. Thus, having determined that the use of two-way video does not require reversal under the particular facts of this case, we next consider whether the district court improperly limited Stofik's testimony.

The district court did not improperly limit witness testimony

It is well-established that a criminal defendant has the right to "explore and challenge through cross-examination the basis of an expert witness's opinion." *Blake v. State*, 121 Nev. 779, 790, 121 P.3d 567, 574 (2005). However, it is equally well-established that a defendant's right to confrontation is not unlimited and does not entitle the defense to "cross-examination that is effective in whatever way, and to whatever extent, the defendant might wish." *Pantano v. State*, 122 Nev. 782, 790, 138 P.3d 477, 482 (2006) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)); *see also Gibbs v. Covello*, 996 F.3d 596, 601 (9th Cir. 2021); *United States v. Williams*, 892 F.3d 242, 247 (7th Cir. 2018); *Boyer v. Vannoy*, 863 F.3d 428, 448-49 (5th Cir. 2017); *Davis v. Workman*, 695 F.3d 1060, 1080 (10th Cir. 2012); *Hayes v. Ayers*, 632 F.3d 500, 518 (9th Cir.

[13]Stofik was unable to explain why Cellebrite's first attempt to unlock the phone failed because he was not the Cellebrite employee who first tried the extraction. Stofik did the second extraction, which was successful, and at the time of trial, the employee who had attempted the first extraction no longer worked at Cellebrite. However, Detective Mangione explained that the phone was sent a second time to Cellebrite once police became aware of a Cellebrite software update.

2011); *United States v. Thompson*, 538 F. Supp. 3d 1122, 1130 n.40 (D. Nev. 2021); *Evans v. State*, 859 S.E.2d 593, 611 (Ga. Ct. App. 2021); *Shively v. Commonwealth*, 542 S.W.3d 255, 260 (Ky. 2018). "[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [a witness's] infirmities through cross-examination." *Pantano*, 122 Nev. at 790, 138 P.3d at 482 (internal quotation marks omitted).

Moreover, the district court retains wide latitude to impose reasonable limits on cross-examination, such as excluding interrogation that is only marginally relevant or would confuse the issues. *See* NRS 48.025(2) ("Evidence which is not relevant is not admissible."); NRS 48.035(1) ("Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury."); *Leonard v. State*, 117 Nev. 53, 72, 17 P.3d 397, 409 (2001); *see also Van Arsdall*, 475 U.S. at 679; *United States v. Fattah*, 914 F.3d 112, 180 (3d Cir. 2019) (providing examples of reasons for limiting the scope of cross-examination); *United States v. Bleckner*, 601 F.2d 382, 385 (9th Cir. 1979) (explaining the trial court's decision to limit cross-examination will not be disturbed absent a clear abuse of discretion); *Davis*, 695 F.3d at 1081 ("There is no recognized constitutional right for criminal defendants to present evidence that is not relevant and not material to his defense." (internal quotation marks omitted)); *Smith v. State*, 796 S.E.2d 666, 670 (Ga. 2017) (recognizing trial courts retain wide latitude to limit cross-examination).

In considering whether the Confrontation Clause is satisfied despite limits on cross-examination, courts should consider the jury's ability to assess the witness's credibility and specifically "whether a reasonable jury would have received a significantly different impression of the witness' credibility had counsel pursued the proposed line of cross-examination." *United States v. Mastin*, 972 F.3d 1230, 1239-40 (11th Cir. 2020) (internal quotation marks omitted). Courts should also weigh "the relevance of the excluded evidence, the weight of the interests justifying exclusion, and whether the exclusion of evidence left the jury with sufficient information to assess the credibility of the witness." *Gibbs*, 996 F.3d at 602 (internal quotation marks omitted).

We have never addressed whether a court may limit testimony in a criminal trial to protect proprietary rights in trade secrets. However, both Nevada and federal law accord special protection to trade secrets in civil litigation, *see* NRCP 26(c)(1)(G); FRCP 26(c)(1)(G), and other courts have determined trade secrets present a significant private interest that must be weighed in determining the extent to which disclosure is required. *See, e.g.*, *Level 3*

Commc'ns, LLC v. Limelight Networks, Inc., 611 F. Supp. 2d 572, 581-82 (E.D. Va. 2009) (compiling law). In considering whether to limit cross-examination regarding trade secrets, therefore, a court should consider whether, given the importance of the private interest at stake, the cross-examination is designed to harass, annoy, or humiliate the witness; whether it would cause prejudice or place the witness in danger; and whether it would confuse the issues, be repetitive of other testimony, be speculative or vague, or be only marginally relevant. *Cf. Leonard*, 117 Nev. at 72, 17 P.3d at 409.

Considering the record in this case, we conclude the district court did not clearly abuse its discretion by limiting cross-examination. It is not clear to us that the excluded evidence was so relevant as to necessitate admission, given the interests at stake. Brown cross-examined Stofik regarding the core issues of chain of custody and the reliability of the evidence, and the district court's concern that delving into technical details may unnecessarily confuse the jury is a valid one. *See* NRS 48.035. Moreover, the district court found that at least part of Brown's cross-examination was of no relevance, and we agree that the circumstances under which Cellebrite would be unable to unlock a phone is of little, if any, relevance here and limiting that line of questioning was proper. As to the general limits on cross-examining Cellebrite regarding the details of its technology, Brown did not, and on appeal Brown still has not, provided any reason why Cellebrite's extraction process is not reliable. *See People v. Cialino*, 831 N.Y.S.2d 680, 682 (N.Y. Crim. Ct. 2007) ("The defendant has not provided the court with a reasonable basis to believe that any software changes and upgrades have caused the [device] used in this case to be unreliable."). Finally, to the extent Brown was unable to cross-examine Stofik on possible deficiencies in the chain of custody, those deficiencies would go to the weight of the evidence rather than its admissibility and do not amount to a Confrontation Clause violation here, where Stofik testified to the data duplication process and its safeguards and Brown had the opportunity to cross-examine Stofik on those points.[14] *Cf. United States v. Gorman*, 312 F.3d 1159, 1163 (10th Cir. 2002) ("[D]eficiencies in the chain of custody go to the weight of the evidence, not its admissibility . . . ." (internal quotation marks omitted)); *see also Sorce v. State*, 88 Nev. 350, 352-53, 497 P.2d 902, 903 (1972) (explaining that establishing the chain of custody does not require that all possibility of tampering be eliminated or that each custodian testify to her or his involvement, so long as the evidence provides reasonable certainty that there was no tampering or substitution).

[14]To the extent Brown argues the district court should have allowed cross-examination on these points in the sealed hearing specifically, we disagree for the reasons stated here.

In sum, the record does not show that limiting the testimony left the jury with insufficient information to judge Stofik's credibility regarding the core issues or that a reasonable jury would have received a significantly different impression of Stofik's credibility had the district court not limited the scope of cross-examination. And importantly, as explained above, ultimately Brown's own testimony independently established the accuracy of those text messages. Accordingly, we determine that the district court did not violate the Confrontation Clause by limiting Stofik's testimony to avoid disclosing Cellebrite's trade secrets.[15]

CONCLUSION

We conclude that the jury could consider photographs of footwear impressions along with those of Brown's shoes without the aid of an expert witness here because both pieces of evidence were independently admissible as circumstantial evidence. We further determine reversal is not warranted for the district court's failure to make express findings under *Lipsitz v. State*, 135 Nev. 131, 442 P.3d 138 (2019), regarding the use of two-way video for a witness's testimony, and that the district court did not abuse its discretion by limiting cross-examination to avoid disclosing trade secrets. Accordingly, we affirm the judgment of conviction.[16]

Cadish, J., concurs.

Pickering, J., concurring:

I join the majority but write separately to explain the admissibility of the photographs of the tread of Brown's shoe and the shoe print found at the crime scene, despite the State not having introduced any lay or expert witness testimony establishing their relationship to each other.

To start, only relevant evidence is admissible. *See* NRS 48.025. And to be relevant, evidence must have some effect on a fact "of consequence" in the case. NRS 48.015. Here, that fact is Brown's

[15]Even had the district court erred, we conclude any error would have been harmless under the facts of this case. *See Medina v. State*, 122 Nev. 346, 355, 143 P.3d 471, 477 (2006) (setting forth considerations for determining harmless error). The record belies Brown's argument that no other evidence besides the text messages established conspiracy. Cell tower evidence placed Brown and Carter near the crime scene. Cell phone records showed that Carter was in contact simultaneously with both Brown and Banks immediately before the murder. Critically, Brown's phone and DNA were found at the crime scene. All of this evidence supports the existence of a conspiracy. *See Nunnery v. Eighth Judicial Dist. Court*, 124 Nev. 477, 480, 186 P.3d 886, 888 (2008) (defining a conspiracy as an agreement between at least two people for an unlawful purpose).

[16]Brown also argues cumulative error warrants reversal. Because we find no errors to cumulate, we reject this argument. *See Pascua v. State*, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006) (rejecting appellant's argument of cumulative error where the "errors were insignificant or nonexistent").

disputed presence at the murder scene at the time of the murder. Foundation is a special aspect of relevance because "evidence cannot have a tendency to make the existence of a disputed fact more or less likely if the evidence is not that which its proponent claims." *Rodriguez v. State*, 128 Nev. 155, 160, 273 P.3d 845, 848 (2012) (quoting *United States v. Branch*, 970 F.2d 1368, 1370 (4th Cir. 1992)). "[T]he party offering the evidence, by deciding what she offers it to prove, can control what will be required to satisfy the [foundation] requirement." 31 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 7104 (2d ed. 2021); *see also Rodriguez*, 128 Nev. at 160-61, 273 P.3d at 848-49. "But there is a significant limitation on the power of a party offering evidence to decide what she claims it to be: the party's claims must be consistent with the item's relevance." 31 Wright & Gold, *supra*, § 7104.

Understanding that, a proper foundation for the State to introduce the photograph of Brown's shoe entails more than a showing that the photograph depicts Brown's shoe. A photograph of a suspect's shoe, without more, no matter how accurately and painstakingly done, is irrelevant to a murder case. *See id.* (discussing hypothetical in which the prosecution introduces a gun as an exhibit but fails to connect it with the crime); *see also Huddleston v. United States*, 485 U.S. 681, 689 (1988) (explaining that relevancy is a matter of relations). For the photograph to be admissible under the State's theory, the State needed to lay a foundation establishing that the photograph depicts Brown's shoe *and* that Brown's shoe could have made the print at the crime scene on the night of the murder.[1] In other words, for the photographs of Brown's shoe and the crime scene shoe print to come in, the State needed to connect them. *See, e.g.*, *United States v. Lloyd*, 462 F.3d 510, 517 (6th Cir. 2006) (explaining that if the government's evidence showed only that a right shoe made a print at the crime scene and the defendant wore a right shoe, then the defendant "would be correct" that this "would have little, if any, probative value"); *State v. Sigman*, 261 N.W. 538, 539 (Iowa 1935) ("The fact that a heel mark was found upon a slip of paper lying on the floor near the safe might be a strong circumstance tending to connect the defendant with the commission of the crime . . . *if* the evidence showed that the heel mark on the exhibit had distinctive peculiarities on it similar to those on the heel of defendant's shoe . . . ." (emphasis added)). Otherwise, they were irrelevant.[2]

[1]In closing argument, the State urged the jury to look at the crime scene print, asking them, "can you look at that as reasonable men and women and say that's not Larry Brown's shoe in the middle? I'll let you make that determination."

[2]I disagree that the photographs were independently relevant circumstantial evidence. Without a connection, the photograph of Brown's shoe shows only that Brown owned shoes, and the photograph of the crime scene print shows only that the murderer wore shoes. Neither of these facts alters the probabilities of the case in any way. *See* NRS 48.015.

Boiled down, then, this is a problem of foundation, related to the concept of conditional relevancy. *See Rodriguez*, 128 Nev. at 160, 162 n.5, 273 P.3d at 848, 849 n.5 (explaining that foundation is a "special aspect of relevancy," essentially "a question of conditional relevancy") (quoting *United States v. Branch*, 970 F.2d 1368, 1370-71 (4th Cir. 1992)); David S. Schwartz, *A Foundation Theory of Evidence*, 100 Geo. L.J. 95, 110 (2011) ("While foundation is often held to be a special case of conditional relevance, the reverse is true: conditional relevance is an aspect of foundation."). By statute, the requirement of foundation "as a condition precedent to admissibility is satisfied by evidence or other showing *sufficient to support a finding* that the matter in question is what its proponent claims." NRS 52.015(1) (emphasis added). So here, the district court's task was deciding whether there was sufficient evidence for the jury to reasonably find that Brown's shoe could have made the print at the scene. *See Huddleston*, 485 U.S. at 690 ("The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact—here, that the televisions were stolen—by a preponderance of the evidence.").

This is an unusual case. The picture of the bloody shoe print is clear and depicts the tread pattern of the footwear that made it. Correspondingly, the sole of Brown's shoe has a matching "V"-patterned tread running down the middle. Given the similarities between the design of Brown's tread and the crime scene print, their obvious distinctive features, and other evidence indicating Brown's presence, the court did not abuse its discretion in finding that the jury could rely on its own knowledge and common sense to draw the conclusion that Brown's shoe could have made the print at the crime scene. *See* NRS 52.015(2) (explaining that the statutory examples of foundation are illustrative, not restrictive); *Middleton v.*

State, 114 Nev. 1089, 1105, 968 P.2d 296, 307 (1998) (acknowledging the jury's capacity "to make logical inferences" from evidence); Fed. R. Evid. 901(b)(3) (explaining that comparison by an expert witness or the trier or fact may lay a foundation for evidence); Fed. R. Evid. 901(b)(4) (stating that foundation may be shown based on distinctive characteristics). Of course, Brown was free to urge the jury to find otherwise, through evidence or argument. *See Rodriguez*, 128 Nev. at 162 n.5, 273 P.3d at 849 n.5 (explaining that even after evidence is admitted, the opponent may challenge its foundation).

This conclusion should be limited based on the unusually obvious characteristics of the evidence in question, particularly given the extensive critiques of feature-comparison methods of forensic science evidence. *See, e.g.*, Jane Campbell Moriarty, *Deceptively Simple: Framing, Intuition, and Judicial Gatekeeping of Forensic Feature-Comparison Methods Evidence*, 86 Fordham L. Rev. 1687, 1688 (2018) ("For decades, scientists and legal academics have been highly critical of claims that [feature-comparison methods of forensic science evidence have] a reliable foundation and can reliably match a known and unknown sample."). The State could not, for example, introduce a photograph of a fingerprint found at the crime scene and a photograph of the defendant's fingerprint, without other evidence (generally, expert testimony) establishing that the crime scene print was consistent with the defendant's. *See* 5 *Jones on Evidence* § 34A:36, 34A:40 (7th ed. Supp. 2022) (explaining that admitting fingerprint evidence involves an expert "comparing the latent prints lifted from the crime scene or other crime-relevant location" and the defendant's prints). Without such testimony, the photographs would lack foundation, *see* NRS 47.070(1); NRS 52.015(1), and the jury would be asked to come to a conclusion that is beyond its ability, knowledge, and common sense. *See* 31 Wright & Gold, *supra*, § 7208 ("[T]he court may refuse to permit a jury to make [a] comparison [for purposes of authentication under Federal Rule of Evidence 901(b)(3)] where the jury cannot reasonably be expected to reach a reliable conclusion because the complexity or esoteric nature of the matters to be compared requires an expert.").

Moreover, and for similar reasons, the evidence rules instruct district courts to exclude relevant evidence where its "probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1). As a result, the district court has discretion to exclude probative evidence that will cause the jury to unfairly speculate, especially where there is a danger that the jury will simply assume the evidence favors the State because the State chose to introduce it. *See, e.g.*, *Graham v. Firestone Tire & Rubber Co.*, 357 N.W.2d 666, 668 (Mich. Ct. App. 1984) (approving trial court's exclusion of evidence because of the "danger of unfair innuendo and jury speculation"); *Grant v. State*, 205 P.3d 1, 20 (Okla. Crim. App. 2009) (approving

trial court's exclusion of records because "[m]any of these reports contain information and terminology which might be confusing to someone outside the world of psychology and psychiatry"). Because prejudice "does not inhere in evidence but arises from the way in which a particular jury will respond to it," it is for the district court to proactively assess what a jury is likely to make of evidence that is offered for admission. 22A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 5215.1 (2d ed. 2014).

Thus, while I reach the same conclusion as the majority as to the admissibility of the photographs, these bedrock principles guide my analysis, and I would limit our holding to the application of those principles to these unique facts. Because I do not believe that the district court abused its discretion in finding that the photographs were authenticated, relevant, and not more unfairly prejudicial than probative, and otherwise join the majority opinion, I concur.

NATHANIEL HELTON, an Individual, Appellant, *v.* NEVADA VOTERS FIRST PAC, a Nevada Committee for Political Action; TODD L. BICE, in His Capacity as the PRESIDENT OF NEVADA VOTERS FIRST PAC; and BARBARA K. CEGAVSKE, in Her Capacity as NEVADA SECRETARY OF STATE, Respondents.

No. 84110

June 28, 2022 512 P.3d 309

Appeal from a district court order denying a challenge to a ballot measure. First Judicial District Court, Carson City; James E. Wilson, Judge.

Affirmed.

Cadish, J., with whom Hardesty and Stiglish, JJ., agreed, dissented.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *Bradley S. Schrager, John Samberg, Daniel Bravo*, and *Eric Levinrad*, Las Vegas; *Elias Law Group LLP* and *Marc E. Elias* and *Elisabeth C. Frost*, Washington, D.C.; *Elias Law Group LLP* and *Lindsay McAleer*, Seattle, Washington, for Appellant.

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

Pisanelli Bice PLLC and *Todd L. Bice, Jordan T. Smith*, and *John A. Fortin*, Las Vegas, for Respondents Nevada Voters First PAC and Todd L. Bice.

Before the Supreme Court, En Banc.

OPINION

By the Court, Herndon, J.:

The Nevada Constitution guarantees to the people the power to propose legislation and constitutional amendments by initiative petition. Initiative petitions are subject to several requirements, some set forth in statute and some set forth in Article 19 of the Nevada Constitution. In this appeal, we address three of them: the single-subject requirement, the description-of-effect requirement, and the funding requirement for a proposal that makes an appropriation or requires the expenditure of money. First, we clarify that even if an initiative petition proposes more than one change to Nevada law, it may still meet the single-subject requirement, provided that

the proposed changes are functionally related and germane to each other and a single subject. The initiative petition at issue here meets that requirement. Although it proposes two changes (open primary elections and ranked-choice general elections for specified officeholders), both changes are functionally related and germane to each other and the single subject of the framework by which specified officeholders are presented to voters and elected. Second, we conclude that the initiative petition's description of effect is straightforward, succinct, and nonargumentative. Finally, we conclude that appellant failed to demonstrate that the proposal requires the expenditure of money without providing a funding source. Thus, we affirm the district court's order rejecting appellant's complaint challenging the initiative petition.

FACTS AND PROCEDURAL HISTORY

Respondent Nevada Voters First PAC (NVF) seeks to place the Better Voting Nevada Initiative (BVN Initiative) on the ballot for the upcoming general election. If approved by voters, the BVN Initiative would add two sections to Article 15 of the Nevada Constitution. One of the proposed new sections addresses primary elections for partisan offices.[1] It would change Nevada's primary elections for partisan offices so that any voter could vote in the primary, regardless of party affiliation, and the top five candidates from the primary would proceed to the general election. On the ballot, the name of the political party with which the candidate is registered would appear next to the candidate's name, and if the candidate is not registered with a political party, the words "no political party" would appear. Further, if there is a tie for fifth place, "the candidate who proceeds to the general election for partisan office [would] be decided by lot." The other new section addresses general elections for partisan offices. It would change those elections to a ranked-choice voting format in which voters would rank the candidates by preference. If one candidate does not get more than 50% of the first-choice votes, the candidate with the lowest number of first-choice votes would be eliminated and the second-choice votes of his or her voters would be counted. This tabulation process would continue in rounds until one candidate gets more than 50% of the votes and is declared the winner.

The following description of effect appears on the signature pages for the petition:

> If enacted, this initiative changes Articles 5 and 15 of Nevada's Constitution for Congressional, Governor, Lieutenant

[1]The BVN Initiative defines partisan offices as (1) U.S. Senator, (2) U.S. Representative, (3) Governor, (4) Lieutenant Governor, (5) Attorney General, (6) Secretary of State, (7) State Treasurer, (8) State Controller, and (9) State Legislators.

> Governor, Attorney General, Secretary of State, Treasurer, Controller and State Legislator elections, eliminating partisan primaries and establishing an open top-five primary election and a rank-choice voting general election.
>
> For these offices, all candidates and voters participate in a single primary election regardless of party affiliation or non-affiliation. The top five finishers advance to the general election, and the general election winner is determined by rank-choice voting:
>
> - General election voters rank the candidates in order of preference from first to last, if they wish to rank more than their first preference.
> - As traditionally, a candidate receiving first-choice votes of more than 50% wins.
> - If no candidate is the first choice of more than 50%, the candidate with the fewest votes is eliminated. And each voter who had ranked the now-eliminated candidate as their first choice, has their single vote transferred to their next highest choice candidate.
> - This tabulation process repeats until the one candidate with more than 50% support is determined as the winner.
>
> The Legislature must adopt implementing legislation by July 1, 2025.

Appellant Nathaniel Helton filed a complaint challenging the BVN Initiative and seeking to enjoin respondent Secretary of State from placing the BVN Initiative on the 2022 general election ballot. The district court rejected Helton's challenge, concluding that (1) the BVN Initiative embraces a single subject, (2) there is nothing misleading in the description of effect, and (3) there was no evidence the BVN Initiative creates an unfunded mandate for the expenditure of money.[2] Helton now appeals.

DISCUSSION

Courts will consider challenges to an initiative petition preelection in limited circumstances, such as when those challenges are based on the petition's compliance with the single-subject requirement, the statutory requirement for the description of effect, or the preclusion against unfunded mandates. *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 883-84, 141 P.3d 1224, 1228 (2006). The party

[2]The district court required Helton to provide an alternate description of effect. Because Helton does not argue on appeal that his proposed description of effect should be used and because this court need only consider the validity of NVF's description of effect, we need not consider Helton's proposed description of effect.

challenging the initiative petition bears the burden of demonstrating the proposed initiative is clearly invalid. *See Las Vegas Taxpayer Accountability Comm. v. City Council of Las Vegas*, 125 Nev. 165, 176, 208 P.3d 429, 436 (2009) (holding that the party challenging a ballot measure "bear[s] the burden of demonstrating that the measures are clearly invalid"). Because the district court resolved the challenge to the initiative in the absence of any factual dispute, our review is de novo. *Nevadans for Nev. v. Beers*, 122 Nev. 930, 942, 142 P.3d 339, 347 (2006).

The BVN Initiative complies with the single-subject requirement

Helton argues that the BVN Initiative violates the single-subject requirement because it presents two separate policy changes that could be brought in separate initiative petitions: (1) nonpartisan open primaries and (2) general election ranked-choice voting. He contends each change is so distinct that any characterization of the petition's subject would have to be excessively general to encompass both changes. Further, he asserts that by including two separate policy changes, the petition improperly logrolls them to improve the chance that voters will approve both. We disagree and clarify that even if an initiative petition proposes more than one change, each of which could be brought in separate initiative petitions, the proper consideration is whether the changes are functionally related and germane to each other and the petition's subject.

NRS 295.009(1) provides that "[e]ach petition for initiative or referendum must . . . [e]mbrace but one subject and matters necessarily connected therewith and pertaining thereto." Subsection 2 of that statute explains that an initiative "embraces but one subject and matters necessarily connected therewith and pertaining thereto, if the parts of the proposed initiative . . . are functionally related and germane to each other in a way that provides sufficient notice of the general subject of, and of the interests likely to be affected by, the proposed initiative." NRS 295.009(2). The single-subject requirement "facilitates the initiative process by preventing petition drafters from circulating confusing petitions that address multiple subjects." *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 122 Nev. 894, 902, 141 P.3d 1235, 1240 (2006). Thus, "the single-subject requirement helps both in promoting informed decisions and in preventing the enactment of unpopular provisions by attaching them to more attractive proposals or concealing them in lengthy, complex initiatives (*i.e.*, logrolling)." *Las Vegas Taxpayer*, 125 Nev. at 176-77, 208 P.3d at 436-37.

In considering single-subject challenges, the court must first determine the initiative's purpose or subject and then determine if each provision is functionally related and germane to each other and

the initiative's purpose or subject.[3] *See Nevadans for Prop. Rights*, 122 Nev. at 907-09, 141 P.3d at 1243-45; *Las Vegas Taxpayer*, 125 Nev. at 180, 208 P.3d at 439. "To determine the initiative's purpose or subject, this court looks to its textual language and the proponents' arguments." *Las Vegas Taxpayer*, 125 Nev. at 180, 208 P.3d at 439. The court also will look at whether the description of effect articulates an overarching purpose and explains how provisions relate to a single subject. *Id.*

The BVN Initiative's single subject is the *framework* by which specified officeholders are presented to voters and elected. The purpose articulated by the description of effect and the textual language in the BVN Initiative support this characterization of the initiative's subject. This subject is distinctly different from, for instance, the *mechanics* of how voters vote, which would include early voting, absentee ballots, machine voting, and paper ballots, among other things. Thus, this subject is not excessively broad given that the initiative's proposals only apply to the framework of the election of partisan officeholders as defined in the initiative petition. Having identified the BVN Initiative's subject, we next consider whether each provision of the initiative petition functionally relates and is germane to each other and that subject.

Both changes proposed in the BVN Initiative concern the election process in Nevada and more specifically how candidates for the specifically defined partisan offices are presented to voters and elected. The fact that the two changes concern different steps in that process—the primary election and the general election—does not make them two separate subjects. Further, the changes are functionally related and germane to each other in that they work together to reform Nevada's election process and the effectiveness of one change would be limited without the other. For example, absent the open-primary change, the ranked-choice-voting change would have little practical effect because the closed primary system makes it more likely that voters would have only two candidates to choose from in the general election—the candidates selected by the two major parties in the closed primary election—such that voters would have no need to rank the general election candidates beyond their first choice. Thus, the changes are necessarily connected and pertaining to each other and to the subject of how specified officeholders are presented to voters and elected.

[3]Our dissenting colleagues express concern with how the majority has characterized the subject of the initiative petition, implying that the majority first determined the interrelation of the proposed changes and then sought to identify a subject. This concern is unwarranted. Under our de novo review process, we start anew in evaluating the initiative petition and it is our obligation to first independently identify the subject, not just adopt the argument of one party or the other. Here, our detailed review revealed the subject to clearly be as we've stated, which is the framework under which certain candidates for office are presented to voters and elected.

Additionally, although the petition proposes two changes, they do not constitute logrolling because they are interrelated. As it has been described in connection to the single-subject requirement, logrolling "occurs when two or more *completely separate provisions* are combined in a petition, one or both of which would not obtain enough votes to pass without the other." *Nevadans for Prop. Rights*, 122 Nev. at 922, 141 P.3d at 1254 (Hardesty, J., concurring and dissenting) (emphasis added). Thus, our concern with logrolling in this context cannot be separated from the single-subject requirement—the mere fact that an initiative petition proposes more than one change does not automatically mean the proponents are guilty of logrolling, provided that the changes are functionally related and germane to each other and the initiative petition's subject or purpose. To conclude otherwise would only serve to frustrate the people's initiative power. Here, as described above, the two changes are necessarily connected to each other and the initiative's subject. And Helton acknowledges that it is impossible to determine which of the two changes is the primary, and thus, the more popular, change proposed. It thus does not appear that the proponents are trying to hide an unrelated and unpopular change within the initiative petition with the hope that the electorate decides the more popular change is worth the adoption of the less popular one.

We are not the only court to have considered whether an initiative petition proposing open primaries and a ranked-choice general election complies with a single-subject requirement. In *Meyer v. Alaskans for Better Elections*, the Supreme Court of Alaska rejected a single-subject challenge to a similar initiative petition. 465 P.3d 477, 499 (Alaska 2020). The Alaska court concluded that the proposed changes "relate to the elections process and share the common thread of reforming current election laws." *Id.* In fact, the Alaska court noted that the changes establishing open primaries and ranked-voting general elections are clearly interrelated "because they together ensure that voting does not revert to a two-candidate system." *Id.* We find the Alaska court's analysis persuasive and supportive of our conclusion that the BVN Initiative's two proposed changes comply with Nevada's single-subject requirement.[4]

Thus, we conclude that even though the BVN Initiative proposes two changes, because those changes are functionally related and germane to each other and the subject of the framework of how specified officeholders are presented to voters and elected, the initiative does not violate the single-subject requirement.[5] Accordingly,

[4]While we recognize that Alaska's single-subject requirement is slightly different from our own, *Meyer*, 465 P.3d at 484, 498, we find *Meyer* to be persuasive in this instance.

[5]Our dissenting colleagues, citing to *Nevadans for Property Rights*, 122 Nev. at 902, 141 P.3d at 1241, have opined that if *changes* in an initiative petition could be brought in two separate petitions, then the single-subject requirement

we conclude the district court did not err in rejecting Helton's request for injunctive relief based on a violation of the single-subject requirement.

The description of effect complies with NRS 295.009

Next, Helton argues that the BVN Initiative's description of effect is legally insufficient because it misstates or neglects to mention many of its most significant ramifications. Specifically, Helton asserts that the description of effect (1) fails to address party affiliation and how the party listed on the ballot next to the candidate's name does not indicate support from that party; (2) minimizes the changes to the general election by inaccurately stating that currently a candidate must receive 50% of the vote to win, when Nevada has a plurality-to-win system; (3) fails to mention that if a voter does not rank all of the candidates, their vote may not count; and (4) fails to address the training and voter outreach necessary for polling officials and the public to understand the new system.

NRS 295.009(1)(b) requires that each signature page of an initiative petition include a description of the initiative's effect that is "not more than 200 words." The description of effect "facilitates the constitutional right to meaningfully engage in the initiative process by helping to prevent voter confusion and promote informed decisions." *Las Vegas Taxpayer*, 125 Nev. at 177, 208 P.3d at 437 (internal quotation marks omitted). A description of effect "must be a straightforward, succinct, and nonargumentative summary of what the initiative is designed to achieve and how it intends to reach those goals." *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 37, 293 P.3d 874, 876 (2013). Because the description of effect is limited to only 200 words, it "cannot constitutionally be required to delineate every effect that an initiative will have; to conclude otherwise could obstruct, rather than facilitate, the people's right to the initiative process." *Id.* at 37-38, 293 P.3d at 876. Further, "[i]n determining whether a ballot initiative proponent has complied with NRS 295.009, it is not the function of this court to judge the wisdom of the proposed initiative." *Id.* at 41, 293 P.3d at 878 (inter-

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demands that they be so brought. We disagree. *Nevadans for Property Rights* held only that bringing multiple *subjects* in a single initiative petition was improper, and such holding did not violate the people's initiative rights because a second subject can be addressed by creating a second petition. *Id.* A subject is decidedly different than a change. A subject is the overall thing being discussed, whereas a change is the alteration or modification of existing law. *See Subject*, *Black's Law Dictionary* (11th ed. 2019) (defining "subject" as "[t]he matter of concern over which something is created"); *Change*, *Merriam-Webster's International Dictionary of the English Language* (2d ed. 1959) (defining "change" as to alter or "to make different in some particular" way, among other definitions). Here, the initiative's proposed changes are functionally related and germane to each other and the initiative's subject and are therefore in accord with NRS 295.009 and our holding in *Nevadans for Property Rights*.

nal quotation marks omitted). The opponent of the initiative bears the burden of demonstrating that the description of effect is insufficient. *Id.* at 42, 293 P.3d at 879.

Helton did not meet his burden of demonstrating the description of effect included in the initiative petition is statutorily inadequate. Because the statute limits the description of effect to 200 words, the description necessarily will be short and will not address or thoroughly explain every provision in, or possible ramification of, the initiative. The description of effect included with the BVN Initiative petition briefly, but clearly and nonargumentatively, summarizes the initiative petition's provisions and how those provisions will achieve the initiative's goal. We address Helton's specific arguments below.

First, Helton suggests that the description of effect does not adequately explain the effect of the change to the primary election system, particularly with respect to the candidates self-identifying their political party. The description of effect provides that the BVN Initiative "eliminat[es] partisan primaries" so that all candidates and voters can participate in the primary election "regardless of party affiliation or non-affiliation." This is a succinct and nonargumentative way of explaining the elimination of partisan primaries, which puts the public on notice of the change. And contrary to Helton's suggestion, we believe the public is smart enough to understand that when a candidate self-designates a party preference, this does not mean that party has chosen or endorsed the candidate. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 454 (2008) ("There is simply no basis to presume that a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate.").

Next, Helton argues that the description of effect is misleading because it states that "traditionally, a candidate receiving first-choice votes of more than 50% wins." It is true that under Nevada's current plurality voting system, a candidate may win by receiving the most votes even if their total number of votes does not exceed 50%. But it is also true that under the plurality system, a candidate who receives more than 50% of the vote is the winner. Thus, even though there may have been a better way to explain Nevada's current plurality system and the ways in which ranked-choice voting would change that system, we are not convinced that the description here does such a poor job that it violated NRS 295.009(1)(b), particularly given the statute's 200-word limit. *See Las Vegas Taxpayer*, 125 Nev. at 183, 208 P.3d at 441 (explaining that an initiative's "summary and title need not be the best possible statement of a proposed measure's intent" (internal quotation marks omitted)). Because the description of effect is not incorrect in its statement that currently a candidate who receives 50% of the vote wins, the description of effect is not misleading in this respect.

Lastly, Helton argues that the description of effect is inadequate because it fails to mention what happens when a voter does not rank all of the candidates (their vote may not count) and does not address the training and outreach that may be necessary to educate people on the new system. Just as we believe the public is smart enough to understand what it means when a candidate self-designates his or her party affiliation, we believe the public is smart enough to understand that with ranked-choice voting, if all the candidates a voter ranked are eliminated, that voter's vote will not go toward any of the remaining candidates the voter did not rank. Additionally, while some voter education may be required if voters approve the initiative petition, that education is not what the initiative petition is designed to achieve or how the initiative petition intends to reach its goals. It therefore need not be included in the description of effect. *See Educ. Initiative*, 129 Nev. at 37, 293 P.3d at 876 (explaining that the description of effect is intended to summarize "what the initiative is designed to achieve and how it intends to reach those goals"). Given the 200-word limitation on the description of effect, the omission of these two points cannot invalidate the entire initiative. *See id.* at 38, 293 P.3d at 876 (providing that an initiative proponent "cannot constitutionally be required to delineate every effect that an initiative will have").

With so few words in which to explain the effect of an initiative petition, a challenger will always be able to find some ramification of or provision in an initiative petition that the challenger feels is not adequately addressed in the description of effect.[6] That is why the sufficiency of a description of effect depends not on whether someone else could have written it better but instead on whether, as written, it is "a straightforward, succinct, and nonargumentative summary of what the initiative is designed to achieve and how it intends to reach those goals." *Id.* at 37, 293 P.3d at 876. Helton has not demonstrated that the BVN Initiative's description of effect fell short of that standard. Accordingly, we conclude the district court

[6]Our dissenting colleagues have opined that the majority has relaxed the standard for initiative descriptions of effect. We disagree. The description of effect must be evaluated in the context of its word limit and its purpose. The word limit necessarily restricts the amount of detail that can go into the description, and judicial review must account for the inherent limitations occasioned by that. The purpose of the description of effect is to inform signatories to the initiative petition about the petition's subject. It does not serve as the full, detailed explanation, including arguments for and against, that voters receive prior to a general election. To that end, as we noted in *Education Initiative*, the description of effect does not need to address every possible effect of an initiative, especially since once enough signatures have been gathered to place the initiative on the ballot, the Secretary of State will draft a neutral summary of the initiative, which does not have a word limit, and committees will draft arguments for and against the passage of the initiative, both of which will be placed on the ballot, instead of the description of effect. *Id.* at 40, 42, 293 P.3d at 878-79.

did not err in denying Helton's request for injunctive relief based on an insufficient description of effect.

Helton failed to demonstrate the BVN Initiative proposes a change requiring an appropriation or the expenditure of money

Lastly, Helton contends that the BVN Initiative must be invalidated because the changes it proposes will require the expenditure of money and the petition includes no provisions to fund that expenditure, which violates Article 19, Section 6 of the Nevada Constitution. The district court concluded that Helton's assertion that the BVN Initiative would require an expenditure of money to implement was unsupported speculation.

As we have explained above, the burden of demonstrating the invalidity of an initiative falls on the challenger. *Las Vegas Taxpayer*, 125 Nev. at 176, 208 P.3d at 436. Below, Helton offered some references to the expected costs to implement similar changes in Alaska and New York City, but he did not provide any evidence regarding the expected costs to make the proposed changes to the Nevada election system. And although Helton recently asked this court to take judicial notice of a financial impact statement published by the Fiscal Analysis Division of the Legislative Counsel Bureau, we declined to do so because that statement was never presented to the district court and NVF disputes the facts in the statement. *See Helton v. Nev. Voters First PAC*, No. 84110 (Nev. June 6, 2022) (Order Denying Motion); *see also Carson Ready Mix v. First Nat'l Bank*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (explaining that this court's review is limited to the record made in and considered by the district court). Helton's failure to provide evidence showing that the proposals in the BVN Initiative require the expenditure of money defeats his argument in this regard. Accordingly, we conclude the district court properly denied Helton's unfunded-mandate challenge to the BVN Initiative.

CONCLUSION

The district court did not err in denying Helton's challenge to the BVN Initiative and his request for an injunction preventing the Secretary of State from placing the BVN Initiative on the ballot. An initiative petition may propose more than one change if those changes are functionally related and germane to each other and the initiative's subject. Because the BVN Initiative's proposed changes are functionally related and germane to each other and the subject of the framework of how specified officeholders are presented to voters and elected, the initiative does not violate the single-subject requirement. Further, as the BVN Initiative's description of effect is a straightforward, succinct, and nonargumentative summary of the goals the initiative is designed to achieve and how it intends

to reach those goals, it has met the statutory requirements for a description of effect. Lastly, Helton has not demonstrated the BVN Initiative proposes a change that requires the expenditure of money. Accordingly, we affirm the district court's order denying Helton's complaint for injunctive relief.

Parraguirre, C.J., and Silver and Pickering, JJ., concur.

Cadish, J., with whom Hardesty and Stiglich, JJ., agree, dissenting:

I would reverse the district court's denial of Nathaniel Helton's request for injunctive relief because the Better Voting Nevada (BVN) Initiative clearly violates the single-subject requirement for initiative petitions and has an inadequate description of effect. Thus, I respectfully dissent.

The BVN Initiative does not meet the single-subject requirement

The BVN Initiative includes more than one subject. First, it proposes changing Nevada's primary election system to an open primary. Second, it proposes changing Nevada's general election system to a ranked-choice voting process. Thus, it proposes making one type of change to primary elections and a different type of change to general elections. Because the changes are distinct and affect different aspects of the election process, the BVN Initiative goes beyond a single subject. Perhaps if the BVN Initiative was making the same type of change to each election, it could qualify as a single subject. But, because each change is different and is only applied to one of the two types of elections affected, the initiative petition violates the single-subject requirement.

Further, the single subject asserted by Nevada Voters First PAC (NVF), "how specified officeholders are elected," is excessively broad. While this subject would cover both of the changes proposed in the BVN Initiative, it could also cover a plethora of other changes. For example, under such a broad subject, an initiative proponent could also propose changes to early voting, polling places, and requirements for election officials. If an initiative petition proposed changes relating to all of these items, it would clearly be too broad to qualify as a single subject. The same is true for the BVN Initiative, which proposed one type of change to the primary election and a completely different type of change to the general election.

Thus, the BVN Initiative is like the initiative petition with an excessively general subject this court invalidated in *Las Vegas Taxpayer Accountability Committee v. City Council of Las Vegas*, where the initiative proponents asserted that the initiative's single subject was "voter approval of use of taxpayer funds to finance

large new development projects." 125 Nev. 165, 179, 208 P.3d 429, 438 (2009) (quoting the purported single subject articulated by appellants in that matter). That initiative required voter approval of certain City of Las Vegas lease-purchase agreements and also substituted in the voters as the legislative body that oversees redevelopment projects. *Id.* at 170, 208 P.3d at 432. This court concluded that because the articulated single subject was excessively general, and because there was not a clear overarching purpose connecting the initiative's two provisions, the initiative violated the single-subject requirement. *Id.* at 180-82, 208 P.3d at 439-40. The subject of the BVN Initiative (how specified officeholders are elected) is similarly excessively general, and it is impossible to determine a clear overarching purpose. No matter how many times one reads the BVN Initiative, one cannot discern which of the two changes is the initiative's primary purpose.

The majority even recognizes that NVF's proposed subject is insufficient to comply with the single-subject requirement, as the majority fashioned its own subject for the BVN Initiative: the *framework* by which specified officeholders are presented to voters and elected. In doing so, the majority had to stretch to find a broad enough subject to cover both distinct proposed changes to Nevada's election process, while also attempting to narrow the subject sufficiently to comply with the single-subject requirement. Such application of the single-subject requirement is flawed. A court should not first determine that the proposed changes are related enough that they should be permitted to proceed together and then search for an overarching subject that covers both the changes. Indeed, the court should not need to search for an appropriate subject, as the subject should be clear from the initiative petition's textual language and description of effect. *See id.* at 180, 208 P.3d at 439 (explaining that in determining an initiative's subject, a court will look to the text of the initiative petition, the proponent's arguments, and whether the description of effect articulates an overarching subject). In this case, any reader of the BVN Initiative and its description of effect would not be able to discern a clear, single subject, and any effort to describe what the initiative proposes inevitably involves describing two distinct changes—open primary elections and ranked-choice voting in the general election. It is not for the court to divine a subject for the initiative, particularly when it results in selecting a topic as broad as "the *framework* by which specified officeholders are presented to voters and elected." In my view, this is simply too broad to satisfy the purpose of NRS 295.009's single-subject rule.

Additionally, in its application of the single-subject requirement, the majority ignores the purpose behind that requirement. NRS 295.009's single-subject requirement was adopted to ensure

the electorate was not presented with confusing or misleading petitions by limiting each initiative petition to a single subject. *See Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 122 Nev. 894, 906, 141 P.3d 1235, 1243 (2006) (providing that the purpose behind the requirement was "preventing the public from being confronted with confusing or misleading petitions and preventing proposals that would not otherwise become law from being passed solely because they are attached to more popular measures"). The legislative history of NRS 295.009 clearly demonstrates that the single-subject requirement was adopted to preclude initiative petitions that present multiple distinct changes. *See* Hearing on S.B. 224 Before the Assemb. Comm. on Elections, Procedures, Ethics, and Constitutional Amendments, 73d Leg., at 4 (Nev., May 3, 2005) (statement of Senator Randolph J. Townsend) (explaining that the purpose of the single-subject requirement was to prevent what had happened in the previous election cycle when there were numerous initiative petitions that "embraced multiple issues" and made the ballot too confusing to read); Hearing on S.B. 224 Before the S. Comm. on Legis. Operations and Elections, 73d Leg., at 9 (Nev., April 12, 2005) (statement of Senator William Raggio) (commenting that requiring an initiative petition to contain only a single subject is not a "chilling of the process" and instead works to prevent confusion in the electorate).

As this court explained after the adoption of the single-subject requirement, if the changes in an initiative petition could be brought in two separate petitions, the single-subject requirement demands that they be so brought. *Nevadans for Prop. Rights*, 122 Nev. at 902, 141 P.3d at 1241. This court specifically noted that "single-subject requirements for initiative petitions do not impermissibly limit the people's ability to legislate or amend the constitution, [because] a second subject that might have been included in the first petition can be addressed by creating a second petition." *Id.* Thus, the majority's conclusion that requiring distinct changes be presented in separate initiative petitions would frustrate the people's access to the initiative process directly contradicts our precedent.

Further, the inclusion of two distinct changes in a single initiative petition is the very definition of "logrolling"—i.e., the "signing or voting for a multifaceted petition in order to effect at least one element of change." *Id.* at 918, 141 P.3d at 1251 (Maupin, J., concurring and dissenting). Logrolling is precluded because it forces the electorate to choose between two potentially competing policy goals. *Id.* at 923, 141 P.3d at 1254 (Hardesty, J., concurring and dissenting). Here, it would be easy to bring each of the two proposed changes—open primaries and ranked-choice general election voting—in separate initiatives, which would provide voters with the

opportunity to adopt only one if they were so inclined. While the majority claims that bringing the proposed changes in two separate initiatives would limit the effect of ranked-choice voting in the general election, that claim is unsupported. The current closed primary election system does not limit the general election ballot to only two candidates. NRS 293.267(1) requires that the names of minor party candidates and independent candidates appear on the general election ballot, although they do not appear on the ballot for a primary election. *See* NRS 293.1715(1); NRS 293.200(7). Thus, even if the open-primary change was not adopted, more than two candidates could be listed on the general election ballot, providing the electorate with multiple choices to rank. Additionally, the adoption of open primaries without the adoption of ranked-choice voting in the general election would not be problematic. Thus, if these changes were proposed in two separate initiative petitions, the electorate would be empowered to decide whether they liked one or both, instead of being forced to decide whether a change they like is worth tolerating the adoption of a change they do not like.

Lastly, the majority's reliance on *Meyer v. Alaskans for Better Elections*, 465 P.3d 477, 499 (Alaska 2020), is misplaced. That matter concerned an initiative that sought to "(1) replac[e] Alaska's current party-based primary system with an open, nonpartisan primary; (2) establish[ ] ranked-choice voting in general elections; and (3) adopt[ ] new disclosure and disclaimer requirements for independent expenditure groups and their donors." *Id.* at 490. The Alaska court applied Alaska's single-subject test and concluded all three provisions fell under the single subject of election reform. *Id.* at 499. However, Alaska's single-subject standard is much more relaxed than Nevada's standard. Alaska only requires the provisions to be "logically or in popular understanding" germane to one general subject. *Id.* at 484, 498 (internal quotation marks omitted). Nevada requires the provisions to be "functionally related and germane to each other in a way that provides sufficient notice of the general subject." NRS 295.009(2). The Alaska court specifically rejected narrowing its single-subject requirement to require the provisions to be functionally related. *Meyer*, 465 P.3d at 496 (declining an interpretation of the single-subject test which would require subjects to be functionally connected as opposed to "merely . . . germane") (omission in original). Even under the majority's single-subject analysis, the initiative petition considered in *Meyer* would not meet Nevada's single-subject test because its three proposed changes are not functionally related. Thus, *Meyer* is unpersuasive here, and this court is under no obligation to follow it.

Because the BVN Initiative includes more than one subject, I would reverse the district court's decision that it meets Nevada's single-subject requirement.

The description of effect was inadequate

I also disagree with the majority's conclusion that the description of effect was adequate. A description of effect "must be a straightforward, succinct, and nonargumentative summary of what the initiative is designed to achieve and how it intends to reach those goals." *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 37, 293 P.3d 874, 876 (2013). The description of effect fails to state what the initiative is designed to achieve. While it discusses the two separate changes proposed, it never states the goal those changes are designed to achieve. A signatory of any initiative petition must understand the initiative's goal before assigning his or her signature to the petition. A signatory to the BVN Initiative could read the description of effect multiple times and still not understand what goal the initiative intends to achieve. This alone renders the description of effect inadequate.

Furthermore, I find the majority's analysis of the description of effect concerning. The majority appears to be relaxing the standard for descriptions of effect because of some preconceived notion that it would be difficult to comply with that standard within the statutory 200-word limit. The brevity of the description of effect does not grant initiative proponents the right to hide the goals of the initiative petition or mislead the public on how the initiative seeks to fulfill those goals. If the majority is concerned with the word-limit for descriptions of effect, that is an issue better addressed by the Legislature. The statute requires descriptions of effect to have no more than 200 words, and many initiative proponents have capably met the standard for descriptions of effect in 200 words or less. NVF's inability to do so was likely due to the initiative petition embracing more than one subject and being too complex to be sufficiently addressed in so few words. We cannot relax the standard for what is included in a description of effect merely because an initiative proponent has presented an initiative too complex to be addressed in 200 words or less.

For the reasons stated above, I disagree with the majority's decision. The BVN Initiative fails to comply with the single-subject requirement. Additionally, its description of effect is inadequate. I would reverse and remand this matter to the district court to enter an order enjoining the Secretary of State from placing the BVN Initiative on the ballot.