REPORTS OF CASES

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STATE OF NEVADA

Volume 139

IN THE MATTER OF B.J.W.-A., DATE OF BIRTH: 10/21/2002, A MINOR 18 YEARS OF AGE.

B.J.W.-A., APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 83621

IN THE MATTER OF B.J.W.-A., DATE OF BIRTH: 10/21/2002, A MINOR 19 YEARS OF AGE.

B.J.W.-A., APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 84276

January 12, 2023 522 P.3d 814

Consolidated appeals from juvenile court orders certifying appellant to stand trial as an adult. Eighth Judicial District Court, Family Division, Clark County; David S. Gibson, Jr., Judge.

Affirmed.

PICKERING, J., dissented.

JoNell Thomas, Special Public Defender, and *Julian R. Gregory*, Chief Deputy Special Public Defender, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Jonathan E. VanBoskerck*, Chief Deputy District Attorney, and *Tanner L. Sharp*, Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Herndon, J.:

In 2015, the Legislature amended the statute criminalizing lewdness with a child, NRS 201.230, by redefining the crime based on the ages of the perpetrator and the victim. Under these amendments, if the victim is under the age of 14, the crime constitutes a category A felony, unless an exception applies. Relevant here, an exception to the category A felony designation exists for perpetrators under the age of 18 and recognizes the act as delinquent, rather than criminal, in those circumstances. Contrary to appellant's argument that, based on this exception, any defendant under the age of 18 charged with lewdness with a child must necessarily be tried as a juvenile, we now clarify that nothing in the amendment to NRS 201.230 limited the juvenile court's authority to certify a juvenile defendant charged with violating NRS 201.230 to be tried as an adult. Thus, we conclude that the juvenile court did not abuse its discretion in certifying appellant to stand trial as an adult.

FACTS AND PROCEDURAL HISTORY

In August 2021, 14-year-old Z.W. disclosed to her parents and others that her then 18-year-old half-brother, B.J.W.-A. (B.J.), had been sexually abusing her. The abuse was alleged to have begun when B.J. was around 11 years old and Z.W. was 7 years old. Allegedly, B.J. repeatedly fondled and ejaculated onto Z.W. from the time she was 7 until she was 14, at which point B.J. would have been 18. Officers investigating the report learned that B.J. may have also sexually abused two of his other half-sisters, A.W. and C.W. Thereafter, C.W. likewise alleged that B.J. had repeatedly fondled and attempted to have sex with her. This abuse was alleged to have begun when B.J. was around 15 years old and it took place from the time C.W. was 10 until she was 13, at which point B.J. would have been 18. Evidence emerged that B.J. would hit Z.W. and C.W. when they would resist and that he once threatened to kill C.W. with a knife. Both Z.W. and C.W. stated they had refrained from reporting

[1]The Honorable Patricia Lee and the Honorable Linda Marie Bell did not participate in the decision of this matter.

the abuse because they were afraid of B.J. Lastly, five-year-old A.W. similarly reported that B.J. had once done something to her vagina using a part of his body, although she did not disclose the details because B.J. had told her to keep it a secret. Because the alleged abuse of Z.W., C.W., and A.W. was continuing and occurred over an approximately seven-year time frame, the alleged incidents appear to have occurred both definitively before, and potentially after, B.J. turned 18.

The State filed a delinquency petition in juvenile court, alleging that B.J. committed five counts of lewdness with a child under the age of 14 between March 2018 and June 2021 in connection with the incidents with C.W. and Z.W. The State then filed a certification petition asking the juvenile court to transfer the case to criminal court. The juvenile court held a hearing on the matter and found the nature and seriousness of the charged offenses were "both heinous and egregious," given their repetitive nature and the victims' ages. The juvenile court further found that because of B.J.'s age, there was insufficient time to provide him with any warranted rehabilitative services before the juvenile court lost jurisdiction, and moreover, that because B.J. was 18 when he allegedly committed one or more of the offenses, all offenses should be tried together in the same court. The court therefore certified B.J. for criminal proceedings as an adult.

B.J. appealed the decision and then filed a motion in juvenile court under the exceptional circumstances clause in NRS 62B.390(3)(b),[2] requesting that the court accept the transfer of his case back to juvenile court. He argued that pursuant to NRS 201.230(5), lewdness with a child under the age of 14 committed by a person under the age of 18 is an act of delinquency and, therefore, a juvenile alleged to have committed such an act cannot be certified for adult proceedings. Soon after B.J. filed his motion, the State amended the delinquency petition to add additional counts for other acts of lewdness against Z.W. and C.W. between March 2018 and June 2021 and moved to certify B.J. as an adult in relation to those additional charges. The juvenile court denied B.J.'s motion to accept jurisdiction and granted the State's motion to certify B.J. for criminal proceedings on the additional charges. B.J. appealed that decision as well.

DISCUSSION

B.J. argues that under NRS 201.230(5), juveniles who commit lewd acts on children under the age of 14 commit delinquent acts

[2]This provision was previously located at NRS 62B.390(5)(b). Because the portions of NRS 62B.390 at issue in this appeal were not substantively changed by the 2021 amendments, *see* 2021 Nev. Stat., ch. 515, § 4, at 3421-22, we cite the current statute in our discussion.

and are therefore excluded from felony sanctions and cannot be certified as adults for criminal prosecutions. We disagree.[3]

We review a juvenile court's decision to certify an accused to answer in adult court for an abuse of discretion. *In re Eric A.L.*, 123 Nev. 26, 33, 153 P.3d 32, 36-37 (2007). However, we review questions of statutory construction de novo. *Jackson v. State*, 128 Nev. 598, 603, 291 P.3d 1274, 1277 (2012). When the language of the statute is plain and unambiguous, this court gives that language its ordinary meaning and does not look beyond the statute. *Koller v. State*, 122 Nev. 223, 226, 130 P.3d 653, 655 (2006). Where possible, we interpret statutes within a common scheme harmoniously with each other and in accordance with those statutes' general purpose. *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001).

NRS 62B.330(1) establishes that the juvenile court has exclusive jurisdiction over a child who is alleged to have committed a delinquent act, and NRS 62B.330(2)(c) provides that a child commits a delinquent act by committing an act designated as a criminal offense pursuant to Nevada law. Nevertheless, NRS 62B.390(1)(a) allows the juvenile court to certify a child for proper criminal proceedings as an adult if the child "is charged with an offense that would have been a felony if committed by an adult and was 14 years of age or older at the time" of the offense.

NRS 201.230 provides that a person is guilty of the crime of lewdness with a child if he or she "willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body . . . of a child." Previously, NRS 201.230 only criminalized the specified conduct when it was perpetrated against a child under the age of 14. At that time, the statute also had no age designation for the perpetrator of the crime. However, in 2015, the Legislature made two significant changes to the statute that created separate categories based on the age of the perpetrator and the age of the victim. Specifically, the Legislature amended NRS 201.230(1)(a) to specify that a person is guilty of lewdness with a child when the person is 18 years old or older and the child is under the age of 16. 2015 Nev. Stat., ch. 399, § 15, at 2241. Additionally, the Legislature added subsection 1(b) to NRS 201.230 to create a separate subsection for minors by providing that a person under the age of 18 can also be guilty of lewdness with a child but only if the person commits the act on a child under the age of 14. *Id.* NRS 201.230(2) provides that the crime of lewdness with a child under the age of 14 is a category A felony, unless an exception applies. In 2015, the Legislature included a new exception to that punishment in NRS 201.230(5), which provides, "[a] person who is under the age of 18 years and who commits lewdness with a child

[3]Because we conclude NRS 201.230 does not prevent the juvenile court from certifying a juvenile as an adult, we reject B.J.'s additional argument that certifying him as an adult violated the separation of powers doctrine.

under the age of 14 years commits a delinquent act." 2015 Nev. Stat., ch. 399, § 15, at 2241.

The legislative history from these amendments demonstrates that the legislators were wary of criminalizing what they viewed as normal, albeit immature, adolescent behavior. For example, at a February 2015 committee meeting, legislators repeatedly voiced concerns over putting harsh penalties on immature school-aged children for "doing what high school students do," mentioning situations where a 17-year-old has a 15-year-old girlfriend or where 13- and 14-year-olds kiss each other. *Hearing on A.B. 49 Before the Assemb. Comm. on Judiciary*, 78th Leg., at 15-17 (Nev., Feb. 13, 2015). Proponents of the amendments explained that the juvenile court would generally handle such cases, but that in certain circumstances—such as where the perpetrator engaged in repeated sexual misconduct—the juvenile court retained discretion to certify the minor for adult proceedings to protect society, and no legislator indicated that certification should be removed as an option. *Id.* Accordingly, the inclusion of NRS 201.230(5)'s exception here was necessary to ensure that minors who commit lewdness with a child are not automatically subject to a mandatory felony prosecution in adult court.[4]

A plain reading of the 2015 amendments and NRS Chapter 62B does not demonstrate that the inclusion of NRS 201.230(5) deprived juvenile courts of the ability to certify minor defendants as adults when the circumstances warrant such certification. The 2015 amendments did not include any changes to the juvenile court's jurisdiction under NRS 62B.330. When a juvenile commits a crime under NRS 201.230(1), NRS 201.230(5) provides that the juvenile commits a delinquent act and is subject to the jurisdiction of the juvenile court. But under NRS 62B.390(1)(a), the juvenile court has the discretion to certify the juvenile as an adult if the crime, *had it been committed as an adult*, would have been a felony. Nothing in the 2015 amendments expressly barred the juvenile court from exercising its discretion under NRS 62B.390 and certifying a juvenile charged under NRS 201.230 as an adult. *Cf. Washington*, 117 Nev. at 739, 30 P.3d at 1136 (explaining we favor interpreting statutes within a scheme in harmony with one another). The Legislature certainly knew how to create a limitation on the juvenile court's discretion to certify a juvenile defendant as an adult, as it has limited the juvenile court's ability to certify juveniles under the age of 14 as adults, *see* NRS 62B.390(1)(a), but it created no such limitation

[4]The 2015 legislative amendment expressly created a unique felony criminal category for a person under the age of 18, as stated in NRS 201.230(1)(b), which necessitated the inclusion of NRS 201.230(5)'s delinquent act designation. The inclusion of such a designation in other criminal statutes, which lack NRS 201.230(1)(b)'s unique language, is unnecessary because the general rule that a child commits a delinquent act if the child commits a crime is recognized in NRS 62B.330(2)(c).

here. Instead, the Legislature merely recognized that a person under the age of 18 who commits a lewd act on a child under the age of 14 is subject to the juvenile court's jurisdiction. NRS 201.230(5). The Legislature did not limit what occurs once the person is subject to the juvenile court's jurisdiction.

Further, the Legislature did not create a mandatory rule in NRS 201.230(5) requiring that all minors charged with lewdness with a child be adjudicated only in juvenile court. The Legislature could have done so had it included any such mandatory language, such as "must always be treated as," "can only be treated as," or "shall be treated as." Yet, the Legislature did not include such language. And under the plain language that the Legislature did choose, we cannot construe that statute as limiting the juvenile court's discretion to certify a minor charged with lewdness with a child as an adult under NRS 62B.390.[5]

Here, the juvenile court has jurisdiction over B.J., as he allegedly committed lewdness with a child under NRS 201.230(1), which is a delinquent act under NRS 201.230(5). But under NRS 62B.390(1)(a), the juvenile court had discretion to certify B.J. for criminal proceedings as an adult because he was charged with offenses that would have been a felony had he been an adult, *see* NRS 201.230(1)-(2), and he was over the age of 14 at the time of the offenses.[6] Given the nature and severity of B.J.'s alleged conduct toward Z.W. and C.W.—repeatedly and habitually sexually abusing them over the course of years and physically abusing them when they tried to resist—we agree this conduct falls far outside the type of adolescent behavior the Legislature was hesitant to criminalize and is the type of situation that warrants certifying and trying the perpetrator as an adult. *Cf. In re Seven Minors*, 99 Nev. 427, 434-35, 664 P.2d 947, 952 (1983) (setting forth criteria for the juvenile court to consider in evaluating whether to transfer a juvenile to district court, including the nature and seriousness of the charged offenses), *holding modified by In re William S.*, 122 Nev. 432, 440-41, 132 P.3d 1015, 1021

[5]We conclude no reasonable doubt exists here as to NRS 201.230(5)'s interpretation, and we do not apply the rule of lenity to interpret the statute in B.J.'s favor. *See State v. Javier C.*, 128 Nev. 536, 541, 289 P.3d 1194, 1197 (2012) (explaining the rule of lenity applies to ambiguous statutes); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 299 (2012) (explaining the rule of lenity applies when, "after all the legitimate tools of interpretation have been applied, a reasonable doubt persists" (internal quotation marks omitted)).

[6]While we are sympathetic to B.J.'s argument that he needs rehabilitative treatment instead of incarceration, the juvenile court already considered his argument and concluded that, given B.J.'s age and the extent and seriousness of his alleged conduct, there was insufficient time to provide effective rehabilitative services, and we conclude this decision was not an abuse of discretion. *See* NRS 62B.410 (explaining a juvenile court only has jurisdiction over a child until the child turns 21 years old); *see also Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008) (explaining this court does not reweigh evidence on appeal).

(2006). Therefore, the juvenile court did not abuse its discretion by certifying B.J. as an adult.

CONCLUSION

Under NRS 201.230 and NRS 62B.390, juvenile courts have the discretion to certify minors who commit lewd acts for criminal proceedings as adults. Because the circumstances of this case support the court's decision to certify B.J. as an adult, we affirm.

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

Pickering, J., dissenting:

The certification of minors to adult court subjects them to significantly harsher punishments and, as the State admitted at oral argument, significantly less chance of rehabilitation. Applying common principles of statutory interpretation, NRS 201.230 can most reasonably be read to make lewdness with a child, by a child, a delinquent act not amenable to adult court certification—subsection 5 of NRS 201.230 says: "A person who is under the age of 18 years and who commits lewdness with a child under the age of 14 years commits a delinquent act." But even accepting the majority's contrary reading as also supportable, the statute is subject to two competing interpretations and thus ambiguous. And because we are statutorily mandated to liberally construe juvenile laws to protect the child's interests, I would apply the rule of lenity and resolve the ambiguity in B.J.'s favor.

As an initial matter, under NRS 62B.390, a child may be certified to adult court if the child is "charged with an offense that would have been a felony if committed by an adult and was 14 years of age or older" at the time of the offense. Under NRS 201.230(1), a person is guilty of lewdness with a child if the person is either (a) 18 years of age or older and the child is under 16 years of age or (b) under the age of 18 years and the child is under 14 years of age. It is plainly legally impossible, with or without the contested subsection 5, for an adult to violate NRS 201.230(1)(b) because an adult will never be under the age of 18 years. In my view, this should end the inquiry.

Moving to NRS 201.230(5), the majority incorrectly states that, without subsection 5, minors who commit lewdness with a child would be "automatically subject to a mandatory felony prosecution in adult court." The State explicitly rejected this contention at oral argument and conceded that, absent NRS 201.230(5), a violation of NRS 201.230(1)(b) would still be a delinquent act. This result accords with NRS 62B.330(3), enumerating four criminal categories that automatically route a child to adult court, none of which include lewdness with a child; NRS 62B.330(2)(c), specifying that a delinquent act includes "an act designated a criminal offense pursuant to the laws of Nevada"; and footnote 3 of the majority opinion,

which calls NRS 201.230(1)(b) a "criminal category." Subsection 1(b) is a crime that does not fall within the automatic routing categories enumerated in NRS 62B.330(3). Therefore, a violation of NRS 201.230(1)(b) renders B.J. a delinquent youth, with or without subsection 5. The State's argument that subsection 5 is not superfluous because it "restates" the delinquency of the act is foreign to long-held principles of statutory interpretation. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012) ("Because legal drafters should not include words that have no effect, courts avoid a reading that renders some words altogether redundant."). Because subsection 5 must mean *something*, it must restrain the juvenile court's discretion to certify. *See id.* ("If a provision is susceptible of (1) a meaning that gives it an effect already achieved by another provision . . . and (2) another meaning that leaves both provisions with some independent operation, the latter should be preferred.").

NRS 201.230(5) is not the only statute that operates this way. Pursuant to NRS 202.300(1), a child under the age of 18 years who possesses unsupervised any firearm "commits a delinquent act," and the juvenile court "may order the detention of the child in the same manner as if the child had committed an act that would have been a felony if committed by an adult." Here, the phrase "a child who violates this subsection commits a delinquent act" is a *restraint* on the juvenile court's discretion. Otherwise, the second clause, *permitting* the juvenile court to order detention *as if the child were an adult* would be unnecessary because the court could simply certify him to adult court on the State's motion. *See also* NRS 200.900(2)(b) (using the same language to address electronic bullying by a minor). If the phrase, "a child who violates this subsection commits a delinquent act," is a restraint on the juvenile court's discretion to certify in NRS 202.300(1), it should also be read as a restraint in NRS 201.230(5). *See* Scalia & Garner, *Reading Law*, *supra*, at 170 ("A word or phrase is presumed to bear the same meaning throughout a text . . . .").

Furthermore, the majority characterizes the 2015 amendments resulting in subsection 5 as evidence that the Legislature did not intend to limit the juvenile court's discretion to certify because they failed to "change[ ] . . . the juvenile court's jurisdiction under NRS 62B.330" or limit certification under NRS 62B.390(1)(a). But NRS 200.900(2)(b) and NRS 202.300(1) impact the juvenile court's discretion without amending these two lodestar statutes.

Faced with the linguistic snarls of NRS 201.230, the majority understandably resorts to its legislative history. As it notes, legislators were clearly concerned with penalizing what they characterized as innocent sexual contact between minors close in age, specifically a 17-year-old with a 15-year-old girlfriend

or 13- and 14-year-olds kissing. *See* Hearing on A.B. 49 Before the Assemb. Comm. on Judiciary, 78th Leg., at 15-17 (Nev., Feb. 13, 2015). However, neither the majority nor the State mentions that the 17-year-old could not even be *charged* under NRS 201.230(1)(b), which limits prosecution for children under 18 to those who act upon a child under the age of 14, while the 14-year-old kissing the 13-year-old *could* be charged. The 14-year-old's only hope, then, is to rely on NRS 201.230(5), which ensures their case is retained by the juvenile court. (One could argue that NRS 201.230(3) penalizes the 17-year-old for committing lewdness with a child 15 years of age, but subsection 3 requires that the person is first charged with lewdness, and the 17-year-old cannot be so charged under NRS 201.230(1)(b).) Given that the Legislature was concerned about the fate of the 14-year-old, it would make sense that NRS 201.230(5) protects children from certification rather than making them vulnerable to it, as the majority suggests.

Because the language of the statute is ambiguous and both sides can find support in the legislative history, I would, at minimum, find that the peculiar construction of NRS 201.230(5) merits application of the rule of lenity in B.J.'s favor. *See State v. Fourth Judicial Dist. Court*, 137 Nev. 37, 39, 481 P.3d 848, 850 (2021) (quoting Scalia & Garner, *Reading Law*, *supra*, at 299) ("If, 'after all the legitimate tools of interpretation have been applied, a reasonable doubt persists' . . . the rule of lenity calls the tie for the defendant."). The majority contends that the rule of lenity is inapplicable because subsection 5 is unambiguous but relies heavily on the legislative history. While it is not unprecedented to look to the legislative history to give context to an unambiguous statute, it is highly unusual, and potentially misleading, to rely on it almost exclusively when the statute's meaning is "plain." *See* Scalia & Garner, *Reading Law*, *supra*, at 376 ("The more the courts have relied on legislative history, the less reliable that legislative history has become."). If the statute is ambiguous enough to merit extensive review of its history, we should not reject the rule of lenity out of hand, particularly when we are required by statute to liberally construct juvenile laws as would best promote care, guidance, and the child's best interests. NRS 62A.360; *see Commonwealth v. Manolo M.*, 160 N.E.3d 1238, 1248 (Mass. 2021) (concluding, in light of a statute similar to NRS 62A.360, that "the rule of lenity is not only a canon of construction in the juvenile delinquency context, but also a statutory mandate").

As an important aside, I write to correct the misuse of the phrase "avoiding absurdity" as it appeared in the State's briefing and at oral argument. That phrase is a term of art, reserved for use when the suggested disposition "makes no substantive sense." Scalia & Garner, *Reading Law*, *supra*, at 235. The State deemed absurd the result that a child who both sexually assaulted and committed lewd

acts with a child under 14 could be certified under NRS 62B.390(2) (permitting, after certification of one offense, the certification of related offenses arising from the same facts), but a child who committed only lewd acts could not. That is rational in my view—sexual assault is a more severe offense. Nor would Nevada be the only state to prohibit certification to adult court for felony prosecution of a child charged with lewdness with a minor.[1] Regardless, the inability to certify minors who commit lewd acts is a policy choice, not an absurdity.

Finally, B.J. did not challenge the integrity of the juvenile court's factual statements at his certification hearing. It is therefore unnecessary for the majority to rehash the details of the charges against him, as it was unnecessary for the State, at oral argument, to posit that the chances of B.J.'s rehabilitation were "essentially zero." These superfluous statements only serve to disparage the young people whom the State and the court are charged to protect and rehabilitate under the doctrine of *parens patriae*, even when they do terrible things. Left out of these sordid details is B.J.'s own sexual abuse at the hands of his older brother prior to his assaults. In deeming B.J. beyond help at this point in his young life, we condemn him to a lifetime of further trauma. Transferred children are five times more likely to be sexually assaulted in adult prison, Edward P. Mulvey & Carol A. Schubert, *Transfer of Juveniles to Adult Court: Effect of a Broad Policy in One Court*, Juvenile Justice Bulletin, Off. of Juv. Just. & Delinquency Prevention, U.S. Dep't of Just. (Dec. 2012), at 4, and more likely to reoffend, often with more violent crimes, Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, Juvenile Justice Bulletin, Off. of Juv. Just. & Delinquency Prevention, U.S. Dep't of Just. (June 2010), at 4. This fate should only be meted out in the rarest of circumstances, and not dispensed out of deference to an ambiguous statute easily amended by the Legislature. Accordingly, I dissent.

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[1]*See, e.g.*, Ark. Code Ann. § 9-27-318(b) (permitting certification of 14- or 15-year-olds only for enumerated crimes, not including that state's equivalent to lewdness with a minor (sexual assault in the second degree under § 5-14-125)); Cal. Welf. & Inst. Code § 707(a)(2) (confining certification of 14- or 15-year-olds for lewdness with a minor, *see* § 707(b)(6), to cases where the minor was not apprehended prior to the end of juvenile court jurisdiction); La. Child. Code art. 857 (restricting certification of any minor over 14 to enumerated crimes, which do not include lewdness with a minor).

TAHICAN, LLC, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE KATHLEEN E. DELANEY, District Judge, Respondents, and MAX JOLY; PATRICIA JOLY; JEAN FRANCOIS RIGOLLET; LE MACARON, LLC; and BYDOO, LLC, Real Parties in Interest.

No. 84352

February 2, 2023, as amended February 9, 2023 523 P.3d 550

Original petition for a writ of mandamus challenging a district court order denying a motion to expunge a lis pendens.

Petition denied.

Cory Reade Dows & Shafer and *R. Christopher Reade* and *Paul R. Graff*, Las Vegas, for Petitioner Tahican, LLC, and Real Parties in Interest Le Macaron, LLC, and Bydoo, LLC.

Jennings & Fulton, Ltd., and *Jared B. Jennings*, *Adam R. Fulton*, and *Logan G. Willson*, Las Vegas, for Real Parties in Interest Max Joly and Patricia Joly.

Jean Francois Rigollet, Henderson, Pro Se.

Before the Supreme Court, Cadish and Pickering, JJ., and Gibbons, Sr. J.[1]

OPINION

By the Court, Cadish, J.:

NRS 14.010(1) permits a party to an "action . . . affecting the title or possession of real property" to record a "notice of the pendency of the action," commonly referred to as a "lis pendens." In construing this provision in *Levinson v. Eighth Judicial District Court*, we stated that a party who records a lis pendens must have some claim of entitlement to the property. 109 Nev. 747, 752, 857 P.2d 18, 21 (1993).

In this original proceeding, we consider whether a creditor's claim seeking avoidance of a fraudulent transfer of real property under Nevada's Uniform Fraudulent Transfer Act may support the recording of a lis pendens even though the creditor does not claim an interest in the property but instead seeks to transfer title back to the debtor. In doing so, we clarify the statement in *Levinson* and

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

hold that the plain language of NRS 14.010(1) does not limit a lis pendens to actions in which the plaintiff claims an ownership or possessory interest in the property. We conclude that a fraudulent transfer claim seeking avoidance of the transfer of real property is one "affecting the title or possession of real property" under NRS 14.010(1) and thus supports a lis pendens. Accordingly, we conclude that the district court did not err in denying the motion to expunge the lis pendens.

FACTS AND PROCEDURAL HISTORY

Real parties in interest Max Joly and Bydoo, LLC, formed a partnership, Le Macaron, LLC, to operate restaurants. They later entered into a purchase agreement whereby Joly agreed to transfer his shares in Le Macaron to Bydoo in exchange for $360,000. Joly assigned his shares, but Bydoo did not make the payments required under the purchase agreement. In April 2016, Joly filed a complaint against Bydoo, Jean Francois Rigollet (the owner and sole member of Bydoo), and Le Macaron, alleging, among other things, breach of contract, fraud in the inducement, and fraud. Less than a month later, Bydoo transferred real property located in Henderson, Nevada, to petitioner Tahican, LLC, by quitclaim deed. Joly subsequently recorded a notice of lis pendens against the Henderson property.

Rigollet sought to expunge the lis pendens, arguing that the Henderson property was not the subject of the lawsuit and Joly could not record a lis pendens on the property merely to secure payment for any judgment he might eventually obtain against Bydoo or Rigollet on his breach of contract and fraud claims. Joly then amended his complaint to add Tahican as a defendant and to allege additional claims of conversion and fraudulent transfer. In the amended complaint, Joly alleged that Bydoo quitclaimed multiple properties to Tahican (for which Rigollet was the registered agent and one of two managers) without adequate consideration in anticipation of and during the pending litigation, thereby fraudulently divesting Bydoo of assets. Joly also opposed Rigollet's motion to expunge, arguing that the lis pendens was proper because his fraudulent transfer claim "affect[s] the title or possession" of the Henderson property within the meaning of NRS 14.010(1).

The district court denied Rigollet's motion to expunge, finding that Joly's claim for fraudulent transfer established a valid legal basis for recording the lis pendens. The court subsequently granted summary judgment in Joly's favor on the majority of his claims, including the fraudulent transfer claim. As to that claim, the district court found that the defendants fraudulently transferred Bydoo's properties in anticipation of and during the pendency of this litigation. The court did not decide what relief Joly was entitled to at that

time because there remained a factual dispute about the applicable operating agreement.

Tahican then filed a second motion to expunge the lis pendens, arguing that none of Joly's claims sought ownership or possession of the property and Tahican was not a party to the litigation when the lis pendens was recorded. After a hearing, the district court denied the second motion to expunge, determining that the lis pendens was tied to Joly's claim of fraudulent transfer and was proper "because the outcome of the case could affect the ultimate ownership of the property." Tahican now seeks a writ of mandamus instructing the district court to expunge the lis pendens.

DISCUSSION

Tahican argues that the district court erred in finding that Joly's fraudulent transfer claim can support a lis pendens. Tahican contends that the lis pendens was improper because Joly had no direct interest in the property himself but sought only to return the property to Bydoo so that it can be used to secure any money judgment Joly obtains against Bydoo, which is an improper use of a lis pendens.

We elect to consider the petition for a writ of mandamus

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, NRS 34.160, or to control an arbitrary or capricious exercise of discretion, *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). The decision to entertain a mandamus petition is within our sole discretion, and the petitioner has the burden of demonstrating that such extraordinary relief is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). A writ of mandamus is not available when the petitioner has a plain, speedy, and adequate remedy at law. NRS 34.170. The right to appeal from an adverse final judgment is generally an adequate legal remedy that will preclude writ relief, but whether a future appeal is sufficiently speedy depends on factors such as "the underlying proceedings' status [and] the types of issues raised in the writ petition." *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 474-75, 168 P.3d 731, 736 (2007).

Tahican lacks a speedy and adequate legal remedy. An order denying a motion to expunge a lis pendens is not substantively appealable. *See* NRAP 3A(b) (listing appealable orders). And a future appeal from a final judgment in the underlying case is not an adequate remedy given that a lis pendens impedes the property's marketability and thus "may cause substantial hardship to the property owner." *Levinson*, 109 Nev. at 751, 857 P.2d at 21 (internal quotation marks omitted). In addition, this petition presents a purely legal issue concerning the availability of a lis pendens in a

fraudulent transfer action, an issue that we touched upon but never resolved in *Levinson*. We are concerned that some of the language in *Levinson*, as well as in *Weddell v. H2O, Inc.*, 128 Nev. 94, 106, 271 P.3d 743, 751 (2012), and subsequent unpublished orders relying on them, may have misled lower courts about the availability of a lis pendens in certain actions, and this petition provides us the opportunity to clarify the law in this area. Accordingly, we elect to exercise our discretion and consider the petition.

A fraudulent transfer claim seeking to avoid the transfer of real property "affect[s] the title" of the property within the meaning of NRS 14.010 so as to support a lis pendens

The sole issue in this petition is whether a claim of fraudulent transfer of real property seeking avoidance of the transfer supports the recording of a lis pendens. This issue presents a purely legal question that we review de novo. *See Int'l Game Tech.*, 124 Nev. at 198, 179 P.3d at 559 (applying de novo review to questions of law in the context of a writ petition).

A lis pendens serves as constructive notice to potential purchasers or lenders that the real property described in the lis pendens is the subject of a pending lawsuit. NRS 14.010(3). As noted, a lis pendens may be recorded by a party "[i]n an action . . . affecting the title or possession of real property." NRS 14.010(1). After a lis pendens is recorded, the property owner may move to expunge the lis pendens pursuant to NRS 14.015. To maintain the lis pendens, the party who recorded it has the burden of establishing, among other things, that the lis pendens is proper and that the party is likely to prevail in the action and as a result will be entitled "to relief affecting the title or possession of the real property." NRS 14.015(2), (3). If the party fails to meet its burden, the district court must order the lis pendens expunged. NRS 14.015(5).

The central question here is whether a claim of fraudulent transfer "affect[s] the title or possession of real property" within the meaning of NRS 14.010(1). Tahican asserts that this court has already answered that question in *Levinson*. We disagree.

In *Levinson*, this court considered the propriety of a lis pendens in an action alleging fraudulent conveyance and constructive trust. 109 Nev. at 750, 857 P.2d at 20. This court ultimately held that the action was not one "affecting the title or possession of real property" as was contemplated by NRS 14.010(1). *Id.* at 751-52, 857 P.2d at 21. In reaching this conclusion, this court did not decide that a fraudulent transfer claim can *never* be a basis for a lis pendens; rather, the court determined that the plaintiff's fraudulent transfer claim was without merit, given that the plaintiff had not "adequately demonstrated actionable fraud." *Id.* at 752, 857 P.2d at 21. The court acknowledged, however, that the plaintiff had "presented relevant

case law indicating that lis pendens may apply to actions designed to avoid conveyances or transfers in fraud of creditors." *Id.* Thus, the court left open the issue of whether a lis pendens may be proper in a fraudulent transfer action where the plaintiff demonstrates actionable fraud. We must now decide that precise issue.

A fraudulent transfer claim under Nevada's Uniform Fraudulent Transfer Act (UFTA) is a claim by a creditor that a debtor transferred property with the intent to defraud the creditor by placing the property out of the creditor's reach. NRS 112.180(1)(a); *see also Herup v. First Bos. Fin., LLC*, 123 Nev. 228, 232, 162 P.3d 870, 872 (2007). The UFTA sets forth remedies for a fraudulent transfer, one of which is the "[a]voidance of the transfer . . . to the extent necessary to satisfy the creditor's claim." NRS 112.210(1)(a). When a creditor seeks this statutory remedy of avoidance, the district court may void the transfer of title to the property and return title to the debtor. *See* 37 Am. Jur. 2d *Fraudulent Conveyances and Transfers* § 116 (2015) (providing that a fraudulent transfer "is void or voidable and will be set aside in a proper proceeding"); *see also Farris v. Advantage Capital Corp.*, 170 P.3d 250, 252 (Ariz. 2007) (stating that the avoidance remedy for a fraudulent transfer "allows a court to undo a transaction, thus, returning title to its rightful owner"). This transfer of title back to the debtor necessarily affects the title of the property. We thus conclude that a fraudulent transfer action seeking avoidance of a transfer of real property constitutes an action "affecting the title or possession of real property" within the meaning of NRS 14.010(1).

Tahican nevertheless argues that a creditor's fraudulent transfer claim cannot support a lis pendens because the creditor has no direct interest in the property and only seeks to make the property available for the collection of a judgment. As support, Tahican relies on statements in *Levinson*, 109 Nev. at 752, 857 P.2d at 21, and *Weddell*, 128 Nev. at 106, 271 P.3d at 751, requiring a party who records a lis pendens to have some entitlement to title or possession of the property.

The lis pendens statutes, however, do not impose such a requirement. Rather, NRS 14.010(1) requires only that the action "*affect*[ ] the title or possession of real property." (Emphasis added.) It does not restrict a lis pendens to an action seeking the title or possession of real property. And NRS 14.015, which sets forth the requirements to defeat a motion to expunge a lis pendens, requires the party who recorded the lis pendens to show "*entitle[ment] to relief affecting* the title or possession of the real property." (Emphasis added.) It notably does not require the party to show entitlement to the title or possession. We must give effect to the plain language of NRS 14.010 and NRS 14.015. *See Chur v. Eighth Judicial Dist. Court*, 136 Nev. 68, 72, 458 P.3d 336, 340 (2020). Thus, we disavow *Levinson* and *Weddell* to the extent they suggest that a lis pendens must

be grounded in a claim of ownership or possessory interest in the real property.[2]

Tahican also contends that allowing the use of a lis pendens in fraudulent transfer actions would invite abuse of the lis pendens statutes, a concern cited in *Levinson* as a basis for restricting the availability of a lis pendens. In *Levinson*, this court explained that the purpose of a lis pendens is "to prevent the transfer or loss" of the real property while the dispute involving the property is ongoing and that "lis pendens are not appropriate instruments for use in promoting recoveries in actions for personal or money judgments." 109 Nev. at 750, 857 P.2d at 20. The court discussed the need to restrict the use of a lis pendens to avoid abuse: "Lis pendens is one of the few remaining provisional remedies available at [the case's] inception without prior notice to the adversary," and as such, it "may cause substantial hardship to the property owner before relief can be obtained." 109 Nev. at 751, 857 P.2d at 20 (quoting *Burger v. Superior Court*, 199 Cal. Rptr. 227, 230 (Ct. App. 1984)). Recognizing the danger that a lis pendens may be improperly utilized to avoid the more onerous procedures involved in obtaining a prejudgment attachment, *Levinson* emphasized that a "lis pendens is not available to merely enforce a personal or money judgment." *Id.* at 752, 857 P.2d at 21. We today reiterate that a lis pendens may not be used in place of a writ of attachment to secure the ultimate collection of an anticipated money judgment. However, *Levinson* did not conclude that the potential for such abuse justifies ignoring the plain language of the lis pendens statutes when, as here, a party's substantive claim for relief *itself* seeks relief affecting title to real property and the other statutory requirements are met.

To the extent some may fear parties will improperly assert such fraudulent transfer claims along with routine claims for money damages to be able to record a lis pendens, the lis pendens statutes are themselves designed to prevent and discourage such abuse. NRS 14.015 provides for an expedited process to expunge an improperly recorded lis pendens and places the burden on the party who recorded the lis pendens to show that the lis pendens is proper and should not be expunged. The statute requires the recording party to demonstrate not only that the action affects the title or possession of the property, NRS 14.015(2), but also that the action has merit and that, if the recording party prevails, the party will be entitled to relief "affecting the title or possession of the real property." NRS 14.015(3). If the recording party fails to establish any of the requirements in NRS 14.015, the court must expunge the lis pendens. NRS 14.015(5). And, even if the recording party estab-

[2]This opinion has been circulated among all justices of this court, any two of whom, under IOP 13(b), may request en banc review of a case. The two votes needed to require en banc review in the first instance of the question of disavowing in part *Levinson* and *Weddell* were not cast.

lishes all of the requirements to maintain the lis pendens, the court may still order expungement if the property owner posts a bond sufficient to secure adequate relief for the recording party. NRS 14.015(6). In addition, a person who knowingly files a groundless lis pendens may be subjected to criminal charges or a civil lawsuit. NRS 205.395. In sum, we conclude that the lis pendens statutes adequately account for and protect against any potential abuses.

In contrast, adopting Tahican's position would significantly frustrate the UFTA's purpose: "to prevent a debtor from defrauding creditors by placing the subject property beyond the creditors' reach." *Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 622, 426 P.3d 593, 597 (2018). The UFTA does not allow for a transfer of property to be voided in a fraudulent transfer action if the transferee took the property in good faith for a reasonably equivalent value. NRS 112.220(1). Thus, if a lis pendens is not available to creditors in fraudulent transfer actions, the property could be transferred to a good faith transferee during the litigation, which would "cut off the creditor's rights, and the court's power, to undo the prior transfer." *Farris*, 170 P.3d at 252. "Without the creditor's lis pendens, evasive debtors may secure the benefit of their fraudulent transfers and impede collection." *Id*. An interpretation of the lis pendens statutes as applying to a fraudulent transfer claim seeking avoidance of the transfer of real property comports with and furthers the purpose of the UFTA. Such an interpretation also serves the purpose of the lis pendens statutes, as it protects a party from having their claim involving title to real property defeated by the transfer of the property to a bona fide purchaser during the course of the lawsuit. Other jurisdictions with similar lis pendens and fraudulent transfer statutes have likewise concluded that a fraudulent transfer claim may support a lis pendens where the claim seeks to void a real property transfer. *See, e.g.*, *id.*; *Kirkeby v. Superior Court*, 93 P.3d 395, 400 (Cal. 2004). We therefore conclude that this result harmonizes the applicable statutes and is faithful to their plain language.

CONCLUSION

Though we entertain this writ petition, we decline to provide the relief Tahican seeks. Because a fraudulent transfer claim seeking avoidance of the transfer of real property is an "action . . . affecting the title or possession of real property" within the meaning of NRS 14.010(1), the district court did not err in denying Tahican's motion to expunge the lis pendens. Accordingly, we deny the writ petition.

Pickering, J., and Gibbons, Sr. J., concur.

NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, A TRADE ASSOCIATION, APPELLANT, *v.* THE STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY, DIVISION OF INSURANCE; AND BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF INSURANCE, RESPONDENTS.

No. 82951

February 16, 2023 524 P.3d 470

Appeal from a district court order partially denying appellant's request for a permanent injunction and declaratory relief. Eighth Judicial District Court, Clark County; Elizabeth Gonzalez, Judge.

Affirmed.

[Rehearing denied May 16, 2023]

Pisanelli Bice PLLC and *Jordan T. Smith* and *Dustun H. Holmes*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, *Steve Shevorski*, Chief Litigation Counsel, and *Craig A. Newby*, Deputy Solicitor General, Carson City, for Respondents.

Campbell & Williams and *J. Colby Williams* and *Philip R. Erwin*, Las Vegas, for Amicus Curiae Chamber of Commerce of the United States of America.

Leonard Law, PC, and *Debbie Leonard*, Reno, for Amici Curiae Consumer Federation of America and Center for Economic Justice.

Before the Supreme Court, EN BANC.

OPINION

By the Court, PICKERING, J.:

The Nevada Insurance Code permits insurers to use consumer credit information when underwriting and rating personal property and casualty insurance, subject to restrictions designed to ensure the use of this information is fair and not discriminatory. The governor's COVID-19 declaration of emergency led to mass unemployment across Nevada and a corresponding decline in consumer credit scores. After investigation, the Nevada Division of Insurance (the Division) determined that it was unfair and actuarially unsound for insurers to use credit score declines against insureds who lost their jobs due to the pandemic, through no fault of their own. The Division therefore promulgated a regulation, R087-20, prohibiting insurers from adversely using consumer credit information changes

that occurred during the governor's COVID-19 emergency declaration, plus two years.

Appellant National Association of Mutual Insurance Companies (NAMIC) is a private, nonprofit insurance trade association whose members include insurers that use consumer credit information to underwrite and rate personal home and auto insurance in Nevada. On behalf of itself and its members, NAMIC opposed the Division's adoption of R087-20 and sued to invalidate the regulation after it passed. The district court enjoined the regulation to the extent it required insurers to give retroactive premium refunds but otherwise rejected NAMIC's suit.

The questions presented by this case are whether NAMIC has standing to sue based on harm R087-20 caused or threatened to cause some of its members and, if so, whether the Division had the statutory and constitutional authority to promulgate R087-20. Like the district court, we hold that the answer to both questions is "yes" and therefore affirm.

I.

A.

The insurance industry maintains that there is a correlation between consumer credit scores and the risk of insurance loss in personal home and auto insurance policies. Nevada permits insurers to use consumer credit information in underwriting and rating personal insurance policies, subject to the statutory requirements of NRS 686A.600 through 686A.730 and the Division's regulations. *See* NRS 679B.130(1)(a) (authorizing the Division to promulgate "reasonable regulations" to administer the Nevada Insurance Code). But this permission is limited by NRS 686A.680(1)(a), which prohibits insurers from using a consumer credit report to score an insured if the score is calculated using protected class-based information "or would otherwise lead to unfair or invidious discrimination." More generally, no property or casualty insurer "may make or permit any unfair discrimination between insured or property having like insuring or risk characteristics, in the premium or rates charged for insurance." NRS 686A.130(5); *see also* NRS 686B.050(4) ("One rate is unfairly discriminatory in relation to another in the same class if it clearly fails to reflect equitably the differences in expected losses and expenses.").

On March 12, 2020, hundreds of thousands of Nevadans became involuntarily unemployed due to the governor's COVID-19 declaration of emergency. In Las Vegas, where the governor's declaration effectively closed the city's robust travel and leisure industry, unemployment soared by the highest over-the-year percentage in the country, and in the months that followed, temporary unemployment became permanent and consumer credit scores declined. These declines cast doubt on the propriety of using credit scores

to predict insurance risk, since the declines were due to the pandemic, not individual behavior in managing risk. In response, after investigation and proper notice-and-comment procedures, the Division promulgated R087-20, which prohibits insurers from adversely underwriting and rating insurance policies using changes in consumer credit occurring from March 1, 2020, to May 20, 2024 (two years following the May 20, 2022, end date of the emergency declaration). The Division found that R087-20 was necessary to protect Nevadans from unfairly discriminatory insurance practices during the pandemic. It further found that "[a]llowing two years of recovery to occur in the aftermath of the Declaration of Emergency being lifted [was] reasonable to accommodate affected workers and give them time to regain employment and financial stability."

Section 2 of R087-20 states the regulation's core prohibition against insurers making adverse use of consumer credit changes during the governor's emergency declaration, plus two years:

> 1. An insurer that uses information from a consumer credit report shall not increase a policyholder's premium or make an adverse underwriting decision as a result of any change in the policyholder's consumer credit report or insurance score which occurred on or after March 1, 2020, and on or before the date which is 2 years after the termination date of the Declaration of Emergency for COVID-19 issued by the Governor on March 12, 2020.
>
> 2. Every such change in the policyholder's consumer credit report or insurance score which occurred during the period of time described in subsection 1 shall be deemed by the Commissioner to be:
>
> (a) Caused by the COVID-19 emergency, which is the subject of the Declaration of Emergency mentioned in subsection 1;
>
> (b) Independent of the choice or the financial management decisions of any applicable individual; and
>
> (c) Unrelated to expected losses and expenses for all lines of insurance.
>
> 3. Any increase in a premium or adverse underwriting decision which violates the prohibition in subsection 1 shall be deemed by the Commissioner to be unfairly discriminatory.

Section 3 permits insurers to use credit score changes that benefit insureds, regardless of when the change occurred, and to continue to make adverse use of credit score deteriorations if they occurred before March 1, 2020, or after May 20, 2024. Section 4 requires insurers to revise insurance premiums that increased due to credit or insurance score deteriorations from March 1, 2020, to December 29, 2020 (the effective date of R087-20), and to refund policyholders the increased amount.

B.

NAMIC participated in the Division's rulemaking proceedings on R087-20, presenting policy objections and challenging the regulation's validity. After the Division adopted R087-20, NAMIC filed suit, seeking a declaratory judgment that (1) the Division exceeded its statutory authority by enacting R087-20; (2) if the Division's enabling statutes granted the Division authority to pass R087-20, the enabling statutes are an unconstitutional delegation of power; and (3) R087-20 is unconstitutional under the United States and Nevada Constitutions' Contract Clauses. NAMIC moved for a preliminary injunction, which the district court granted as to Section 4 (the retroactive provision) and denied as to Sections 2 and 3 (the prospective provisions).

The Division and NAMIC stipulated that the dispute involved questions of law, not fact, so the district court could resolve the case on cross-motions for summary judgment. In its motion, the Division argued that the court should not hear the matter because NAMIC lacked standing. After briefing and argument, the district court rejected the Division's challenge to NAMIC's standing. On the merits, it held that, while the agency did not have statutory authority to enact R087-20 Section 4's refund provisions, the Division did have statutory authority to enact Sections 2 and 3. The district court also held that the Division's enabling statutes are not unconstitutional delegations of power and that R087-20 does not violate the contract clauses of either the United States or the Nevada Constitutions. Accordingly, the district court granted the Division's motion for summary judgment on Sections 2 and 3 and NAMIC's motion for summary judgment on Section 4 and denied the corresponding cross-motions. This appeal followed, with NAMIC challenging the district court's conclusions regarding Sections 2 and 3. On NAMIC's motion, this court enjoined R087-20 pending the outcome of this appeal. The Division does not cross-appeal the district court's conclusion regarding Section 4.

II.

We first consider NAMIC's standing. The Division argues that NAMIC has not shown the injury-in-fact to itself or its members from R087-20 needed to establish standing. NAMIC maintains that it has both statutory standing under NRS 30.040 and NRS 233B.110 and representational standing under the constitutional test established in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). Although we reject NAMIC's argument that it has statutory standing merely because it objected to R087-20 during the rulemaking process, we adopt *Hunt* and hold that NAMIC has representational standing under the test *Hunt* establishes.

A.

Standing presents a question of law. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011). The Nevada Constitution does not include the "case or controversy" requirement stated in Article III of the United States Constitution, so we are not strictly bound to federal constitutional standing requirements. *See Heller v. Leg. of Nev.*, 120 Nev. 456, 461 n.3, 93 P.3d 746, 749 n.3 (2004). But the Nevada Constitution includes a robust separation of powers clause that the United States Constitution does not. Nev. Const. art. 3, § 1(1). Both as a prudential matter, *see In re AMERCO Derivative Litig.*, 127 Nev. 196, 213, 252 P.3d 681, 694 (2011), and because of the justiciability requirements the separation-of-powers doctrine imposes on the Nevada judiciary, *see Nev. Policy Research Inst., Inc. v. Cannizzaro*, 138 Nev. 259, 263-64, 507 P.3d 1203, 1208 (2022), our caselaw generally requires the same showing of injury-in-fact, redressability, and causation that federal cases require for Article III standing. *See Stockmeier v. Nev. Dep't of Corr. Psychological Review Panel*, 122 Nev. 385, 393, 135 P.3d 220, 225 (2006), *abrogated on other grounds by Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008); *Elley v. Stephens*, 104 Nev. 413, 416, 760 P.2d 768, 770 (1988); *see also Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443-45 (Tex. 1993) (holding that the state separation-of-powers doctrine imposes justiciability constraints like those Article III imposes on federal courts). We have made exceptions, however, for the rare case involving a constitutional expenditure challenge or separation-of-powers dispute that will evade review if strict standing requirements are imposed. *See Cannizzaro*, 138 Nev. at 262, 507 P.3d at 1207-08; *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016). We also recognize statutory standing in cases where the Legislature has created a right and provided a statutory vehicle to vindicate that right that relaxes otherwise applicable standing requirements. *Stockmeier*, 122 Nev. at 394, 135 P.3d at 226; *see Fergason v. Las Vegas Metro. Police Dep't*, 131 Nev. 939, 952, 364 P.3d 592, 600 (2015).

NAMIC brought this suit under NRS 30.040 and NRS 233B.110. It claims statutory standing under NRS 233B.110(1), which provides:

> The validity or applicability of any regulation may be determined in a proceeding for a declaratory judgment . . . when it is alleged that the regulation, or its proposed application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. *A declaratory judgment may be rendered after the plaintiff has first requested the agency to pass upon the validity of the regulation in question*. The court shall declare the regulation invalid if it finds that it violates constitutional or statutory provisions or exceeds the statutory authority of the agency.

(emphasis added). NAMIC maintains that its challenge to R087-20 during the rulemaking process gives it statutory standing to challenge the regulation in court and excuses it from having to show that R087-20 will cause injury-in-fact to itself or its members. But NAMIC reads too much into NRS 233B.110(1)'s statement that a declaratory judgment "may" be rendered after a plaintiff opposed an agency's adoption of a proposed regulation. Under NRS 233B.061(1), "[a]ll interested persons must be" given a reasonable opportunity to argue against a proposed regulation during the rulemaking process, whether the regulation directly affects them or not. But for a court challenge, the plaintiff must show "that the regulation, or its proposed application, *interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff.*" NRS 233B.110(1) (emphasis added). Unlike the statutory standing cases, which involve statutes that both create a right and provide a procedural vehicle to vindicate that right, NRS 233B.110(1) requires actual or threatened injury to independently established "legal rights or privileges."

That NRS 233B.110(1) does not afford standing without injury-in-fact is confirmed by NRS 233B.110(3), which specifies that "[a]ctions for declaratory judgment provided for in [subsection 1] shall be in accordance with the Uniform Declaratory Judgments Act (chapter 30 of NRS)." Nevada's "Uniform Declaratory Judgments Act does not . . . grant jurisdiction to the court when it would not otherwise exist," it "merely authorizes a new form of relief, which in some cases will provide a fuller and more adequate remedy than that which existed under common law." *Builders Ass'n of N. Nev. v. City of Reno*, 105 Nev. 368, 369, 776 P.2d 1234, 1234 (1989) (citing *Jenkins v. Swan*, 675 P.2d 1145, 1148 (Utah 1983)). Declaratory relief actions under NRS 30.040 require a plaintiff to demonstrate a "legally protectible interest," *Knittle v. Progressive Cas. Ins. Co.*, 112 Nev. 8, 10, 908 P.2d 724, 726 (1996), or injury-in-fact, *Morency v. State, Dep't of Educ.*, 137 Nev. 622, 626 n.5, 496 P.3d 584, 588 n.5 (2021).

The Legislature drew NRS 30.040 and NRS 233B.110 from the Uniform Declaratory Judgment Act (UDJA) and the 1961 version of the Model Administrative Procedure Act (MAPA), respectively. Other states that also have the UDJA and MAPA hold that these statutes require a plaintiff to show direct or representational injury-in-fact from the regulation to sue for declaratory relief: "To have standing to bring [an action challenging a regulation] a plaintiff may not assert 'only a general interest he shares in common with members of the public at large,' but 'must be able to show that he has suffered some distinct and palpable injury that gives him a personal stake in the outcome of the legal dispute.'" *Utah Rest. Ass'n v. Davis Cty. Bd. of Health*, 709 P.2d 1159, 1162 (Utah 1985) (quoting *Jenkins*, 675 P.2d at 1148-49); *see Med. Ass'n of Ala. v. Shoemake*, 656 So. 2d 863, 866 (Ala. Civ. App. 1995) (requiring showing of injury to pur-

sue declaratory judgment action challenging a regulation's validity under the UDJA and MAPA); *Conn. Ass'n of Health Care Facilities, Inc. v. Worrell*, 508 A.2d 743, 747-48 (Conn. 1986) (same); *Tex. Dep't of Ins. v. Tex. Ass'n of Health Plans*, 598 S.W.3d 417, 422 (Tex. App. 2020) (same). Thus, NAMIC does not have standing merely because it objected to R087-20 during the rulemaking process. It must demonstrate injury-in-fact to itself or its members to proceed. *See* NRS 30.160 (providing that Nevada's UDJA, "NRS 30.010 to NRS 30.160, inclusive, shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of those states which enact them, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees").

B.

NAMIC is a private, nonprofit insurance trade association whose membership comprises 1400 property and casualty insurers from across the country. According to the declaration of NAMIC vice-president Erin Collins, seventy-six of NAMIC's members sell home and automobile insurance policies in Nevada, and "[m]ost" of those members use consumer credit scores to underwrite and rate these policies. R087-20 does not directly regulate NAMIC, since NAMIC is not itself an insurance company.[1] Rather, R087-20 regulates the 76 NAMIC members who issue personal property and casualty insurance policies in Nevada. NAMIC claims standing based on the harm R087-20 causes (or threatens to cause) its Nevada members.

A voluntary-membership trade association like NAMIC may establish Article III standing by showing injury to its members, even though the association itself suffered no direct injury. *Warth v. Seldin*, 422 U.S. 490, 511 (1975). In *Hunt*, the Supreme Court adopted a three-part test for representational standing, holding that an association has standing to sue on behalf of its members if it can establish that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U.S. at 343. Although we have not expressly addressed representational standing under *Hunt*, we implicitly endorsed the concept in *Nevada Attorney for*

[1]NAMIC separately argues that it has organizational standing due to the time and money it has spent challenging and educating its Nevada members about R087-20. NAMIC does not adequately develop the facts required to sustain organizational standing on its own behalf because it is unclear whether expending those resources frustrated NAMIC's organizational mission. *See, e.g.*, *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919-21 (D.C. Cir. 2015) (finding that use of resources for advocacy, "to educate its members and others," did not establish organizational standing since this did not frustrate the organization's mission) (internal quotation marks omitted).

Injured Workers v. Nevada Self-Insurers Ass'n, where we reached and resolved the merits of a declaratory judgment action in which a trade association sued to invalidate a regulation affecting its members. 126 Nev. 74, 83 n.7, 225 P.3d 1265, 1270 n.7 (2010) (holding that a declaratory judgment action under NRS 233B.110(1) was "the appropriate mechanism" for a trade association to challenge a regulation adversely affecting its members). Like other state courts, we find the *Hunt* test pragmatic and helpful and adopt it as appropriate for Nevada, even though we are not constrained by strict Article III standing requirements. *See Utah Rest. Ass'n*, 709 P.2d at 1163 (adopting *Hunt* and noting that, "[w]here, as a practical matter, the rights asserted and the remedies sought do not require direct participation by affected individuals who would have standing, there is no reason not to permit associations to press claims common to their members"); *accord Tex. Ass'n of Bus.*, 852 S.W.2d at 447 (adopting the *Hunt* test for representational standing); *see also Conn. Ass'n of Health Care Facilities*, 508 A.2d at 747-48 (applying the *Hunt* standard to determine representational standing under the state's Administrative Procedure Act); *Human Rights Party v. Mich. Corr. Comm'n*, 256 N.W.2d 439, 443 (Mich. Ct. App. 1977) (same).

NAMIC and the Division agree that an insurer subject to R087-20 *could* suffer personal injury from the prohibition on use of consumer credit information to raise insurance premiums over the applicable period. Nonetheless, relying on *Summers v. Earth Island Institute*, 555 U.S. 488, 499 (2009), the Division argues that NAMIC fails to meet the first prong in *Hunt*—requiring the association to show that one or more of its members would have standing to sue in their own right—because NAMIC did not "name" an individual member insurer harmed by R087-20. Instead, along with the Collins declaration, NAMIC provided a list copied from the Division's website, which names the 128 home or automobile insurers in Nevada that use consumer credit information in underwriting and rating insureds and the 43 such insurers that do not. The Collins declaration states that NAMIC has 76 members that write home or automobile insurance in Nevada, "[m]ost" of whom use consumer credit information in doing so. Therefore, even if all 43 home or automobile insurance companies the Division lists as not using consumer credit information are NAMIC members, at least 33 remaining NAMIC members would be subject to R087-20 per the Division's own classification of those insurers.

Federal courts disagree whether *Summers* requires an organization to identify by name the member(s) who suffered the injury needed to meet *Hunt*'s first element. *See Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 2 F.4th 1002, 1011 (7th Cir. 2021) (noting that it is unclear whether its prior rule that an organization need not "name" an individual member to assert representational standing survives *Summers*). *Compare Draper v. Healey*, 827 F.3d

1, 3 (1st Cir. 2016) (no representational standing where organization failed to specifically identify member that the challenged regulation harmed), *with Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015) (stating that it was "not convinced that *Summers*" stood "for the proposition that an injured member of an organization must always be specifically identified in order to establish . . . standing for the organization"). For those circuits concluding that a specifically identified member is not required, the first element of *Hunt* is met when the party alleges nonspeculative member injury:

> Where it is relatively clear, rather than merely speculative, that one or more members have been or will be adversely affected by a defendant's action, and where the defendant need not know the identity of a particular member to understand and respond to an organization's claim of injury, [an organization need not] identify by name the member or members injured.

La Raza, 800 F.3d at 1041. We conclude that, in providing a list that includes 76 of NAMIC's member insurers that are or reasonably could be affected by R087-20, NAMIC sufficiently "named" individual members under either interpretation of *Summers*.

The Division also argues that the members' purported injuries are too speculative, claiming that NAMIC provided "no evidence that any of [its] members . . . even plan to use credit information in rate-making in the wake of the COVID-19 pandemic." But this is not accurate. Collins attested to the fact that several of NAMIC's 76 member insurers subject to R087-20 already had issued new policies. Collins' declaration also avers that members will not be able to recover premiums that R087-20 prevents them from charging and will need to reconfigure rating systems to adapt to this change, increasing costs. Collins further attests that its members asked NAMIC to intervene and advocate for their right to continue using consumer credit information in the wake of R087-20. *See* 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3531.9.5 (3d ed. 2008) (explaining that members' ask of an organization to represent their interests is evidence of member injury). The Collins declaration provides uncontroverted evidence of nonspeculative injury to NAMIC's members and allows the Division to sufficiently understand and respond to NAMIC's declaratory relief action. Therefore, we find that NAMIC sufficiently demonstrated injury to its members to satisfy the first element of the *Hunt* test.

Hunt's second element—requiring that the interests the trade association seeks to protect be germane to its purpose—is designed to assure that the association has a sufficient stake in the resolution of the dispute to provide vigorous advocacy. *See United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517

U.S. 544, 555-56 (1996); *Schwartz*, 132 Nev. at 743, 382 P.3d at 894 (stating that standing assures that "the party seeking relief has a sufficient interest in the litigation" to "vigorously and effectively present his or her case against an adverse party"). The Collins declaration attests that NAMIC exists to advocate for and advance the interests of the casualty and property insurers who are its members; that R087-20 adversely impacts most of its members who issue home and auto policies in Nevada; and that NAMIC has spent time and money advocating against and educating its members about R087-20.[2] As the Division effectively concedes, these averments satisfy *Hunt*'s second element.

The Division also asserts that NAMIC does not meet the third element of the *Hunt* standard because its claim that R087-20 violates the United States and Nevada Constitutions' Contract Clauses requires individualized proof of how R087-20 impacts its members' contracts. While a party must demonstrate standing for each individual claim, a court's standing analysis should not reach the merits of a case. *See Tex. Dep't of State Health Servs. v. Balquinta*, 429 S.W.3d 726, 742 n.71 (Tex. App. 2014). Additionally, individual participation is ordinarily less significant where an association seeks declaratory relief for its members, rather than monetary damages, because declaratory relief is "properly resolved in a group context." *Hunt*, 432 U.S. at 343-44; *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 10 n.4 (1988); *see also Utah Rest. Ass'n*, 709 P.2d at 1163 (granting representational standing to seek declaratory relief but declining to grant standing to seek refunds for its members unless plaintiff seeks refunds on behalf of an established class).[3] Declaratory relief actions therefore do not require tailored proof of how a regulation will impact each member. *See United Food*, 517 U.S. at 553-54. Accordingly, we find that NAMIC satisfied the elements of the *Hunt* standard to challenge R087-20 on behalf of its members and grant NAMIC representational standing.

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[2]Although the Division concedes that NAMIC meets the second *Hunt* element, it quarrels with NAMIC's reliance on the Collins declaration in opposing summary judgment. The declaration adequately establishes Collins' personal knowledge of the facts to which she attests. *See* NRCP 56(c)(4) (on a motion for summary judgment, declarations must set out facts "that would be admissible in evidence").

[3]*Hunt*'s third element is prudential, not constitutionally driven; it concerns much the same "matters of administrative convenience and efficiency" as are implicated in class actions and suits by trustees representing creditors in bankruptcy. *United Food*, 517 U.S. at 555-57. Representational standing to seek damages on behalf of third parties is allowed when provided by statute or court rule. *See High Noon at Arlington Ranch Homeowners Ass'n v. Eighth Judicial Dist. Court*, 133 Nev. 500, 507, 402 P.3d 639, 645-46 (2017) (allowing an HOA to sue for damages on behalf of its members, per statutory authority); *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 125 Nev. 449, 457-58, 215 P.3d 697, 703 (2009) (similar); *see also* NRCP 23 (class actions).

III.

Having established NAMIC's standing to challenge R087-20, we reach NAMIC's challenges to the regulation's validity. NAMIC argues that the Division exceeded its statutory authority in passing R087-20, it conflicts with existing statutory provisions, and the regulation otherwise violates the United States and Nevada Constitutions. Courts may "declare a regulation invalid when the regulation violates the constitution, conflicts with existing statutory provisions or exceeds the statutory authority of the agency." *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000). NAMIC does not challenge the weight of the evidence before the Division and asks us to decide this case based on the regulation itself and the Division's enabling statutes.

A.

To determine whether the Division exceeded its authority in promulgating R087-20, we begin with the plain meaning of the statutory text. *See, e.g.*, *Pub. Agency Comp. Tr. (PACT) v. Blake*, 127 Nev. 863, 866, 265 P.3d 694, 696 (2011); *see also Martinez Guzman v. Second Judicial Dist. Court*, 136 Nev. 103, 106, 460 P.3d 443, 447 (2020) (finding that unambiguous language defeats competing interpretations). NAMIC argues that the unambiguous text of the Division's enabling statutes does not grant it authority to pass R087-20. We disagree.

The Division relies on NRS 679B.130(1)(a), NRS 679B.150(1)(b), and NRS 686A.680(1)(a) as authority to promulgate R087-20. NRS 679B.130(1)(a) grants the Division general authority to promulgate "reasonable regulations" to administer the Nevada Insurance Code. NRS 679B.150(1)(b), covering standards for insurance policies regulated under the Nevada Insurance Code, provides:

> The Commissioner may: . . . Develop, promulgate and revise as the Commissioner deems appropriate, standards in each of the several areas of insurance appropriate to be applied to policies sold in the State of Nevada. The standards must seek to ensure that policies are not unjust, unfair, inequitable, unfairly discriminatory, misleading, deceptive, obscure or encourage misrepresentation or misunderstanding of the contract.

NRS 686A.680(1)(a) creates restrictions on the use of consumer credit information by insurers in Nevada:

> An insurer that uses information from a consumer credit report shall not . . . [u]se an insurance score that is calculated using income, gender, sexual orientation, gender identity or expression, address, zip code, ethnic group, religion, marital status or nationality of the consumer as a factor, or would otherwise lead to unfair or invidious discrimination.

NAMIC argues that the Division exceeded its statutory authority because R087-20 "does not relate to any insurance practice that is 'discriminatory' or 'would otherwise lead to unfair or invidious discrimination' within the commonly understood meaning" of NRS 679B.150(1)(b) and NRS 686A.680(1)(a). NAMIC presents the commonly understood meaning of "discrimination" as "the differential treatment of similarly situated groups." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 614 (1999) (Kennedy, J., concurring); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (affirming Justice Kennedy's *Olmstead* concurrence); *see also Salaiscooper v. Eighth Judicial Dist. Court*, 117 Nev. 892, 903, 34 P.3d 509, 517 (2001) (recognizing that "[a] discriminatory effect is proven where a defendant shows that other persons similarly situated" are treated differently). NAMIC also points to other uses of "discrimination" throughout the Nevada Insurance Code, clarifying that "similarly situated groups" may be understood as individuals "of the same class and of essentially the same hazard," NRS 686A.100(2), or individuals "having like insuring or risk characteristics," NRS 686A.130(5). Further, rates are "unfairly discriminatory" among similarly situated individuals if the rates "fail[ ] to reflect equitably the differences in excepted losses and expenses." NRS 686B.050(4). The Division offers no competing definition for "discrimination," arguing that it promulgated R087-20 to address differential treatment between similarly situated groups resulting from the unique conditions of the pandemic and restrictions enacted by the governor's emergency declaration, which caused use of credit information to be an invalid statistical or actuarial basis for calculating risk.

NAMIC argues that, even "if the COVID-19 virus can somehow create two classes [of individuals]," insureds with recent negative credit events are not similarly situated to other insureds whose credit remained stagnant or improved since the governor's emergency declaration. *See City of North Las Vegas v. State Local Gov't Emp.-Mgmt. Relations Bd.*, 127 Nev. 631, 643, 261 P.3d 1071, 1079 (2011) (finding "[t]here must be a reasonably close resemblance of the facts and circumstances" between individuals to find them similarly situated). But the Division found, based on the evidence it considered, that the pandemic disrupted the correlation between credit and risk. For example, the Division found that individuals whose work was affected by the governor's emergency declaration and those whose work was not so affected, despite being otherwise similarly situated and exhibiting the same risk characteristics, would experience unjustified differential treatment from credit-based insurance models. *See* Legislative Review of Adopted Regulations Informational Statement, LCB File No. R087-20, at 6-10 (referencing data from the Division's Fact Sheet: A Sample of Supporting Data for Regulation R087-20 and the United States Bureau of Labor Statistics Metropolitan Area Employment and Unemployment Summary (December

2020)). As NAMIC itself notes, in the context of R087-20, "unfairly discriminatory means that the rate fails to equitably reflect the difference in expected losses and expenses in relation to another in the same class." The regulation therefore falls under the Nevada Insurance Code's unambiguous language prohibiting unfair discrimination between similarly situated individuals.

NAMIC contends that the general prohibition against "unfair discrimination" in the Nevada Insurance Code is limited to protected class-based discrimination—that is, to prohibited discrimination based on race, sex, religion, or other protected class. *See* NRS 686A.680(1)(a) (providing that insurer shall not use credit information "that is calculated using income, gender, sexual orientation, gender identity or expression, address, zip code, ethnic group, religion, marital status or nationality"). But the limitation NAMIC would have us read into the Nevada Insurance Code contradicts the plain language of both NRS 686A.680(1)(a) and NRS 679B.150(1)(b). First, while the Division promulgated R087-20 pursuant to NRS 686A.680(1)(a), which includes prohibitions on protected class-based discrimination and creates restrictions on discriminatory uses of consumer credit information specifically, the Division also promulgated the regulation under its authority in NRS 679B.150, which makes no mention of protected class-based discrimination and grants the Division authority to regulate "unfair discrimination" throughout the Nevada Insurance Code generally. *See* NRS 679B.150(1)(b) (the Division's regulations "must seek to ensure that [insurance] policies are not . . . unfairly discriminatory"). Courts generally assume equivalent words have equivalent meaning when repeated in a statute. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170-79 (2012). However, the Nevada Insurance Code's recognition of protected class-based discrimination in NRS 686A.680(1)(a) cannot be understood to erase the general prohibition against "unfair discrimination" that existed in the code more than three decades before the Legislature passed NRS 686A.680(1)(a). *See* NRS 679B.150(1)(b), 1971 Nev. Stat., ch. 661, § 5, at 1933; NRS 686A.680(1)(a), 2003 Nev. Stat., ch. 455, § 10, at 2802.

Second, within the context of NRS 686A.680(1)(a), we disagree with NAMIC's argument that the term "invidious," read in tandem with "unfair," limits discrimination regulated by NRS 686A.680(1)(a) to protected class-based discrimination. While associated words in a statute may bear on another's meaning, courts seek to give all terms meaning. *See* Scalia & Garner, *supra*, at 195 (describing associated-words canon *noscitur a sociis*). Read in context of the entire statute, as well as the general meaning of "unfair discrimination" throughout the Nevada Insurance Code, "invidious" and other protected class-based discrimination proscribed by NRS 686A.680(1)(a) is additive, not subtractive. *Compare Ojo v.*

Farmers Grp., Inc., 356 S.W.3d 421, 425, 434-35 (Tex. 2011) (holding that Texas Insurance Code's language limited to "unfair discrimination" does not reach protected class-based discrimination), *with Lumpkin v. Farmers Grp., Inc.*, No. 05-2568 Ma/V, 2007 WL 6996777, at *6-7 (W.D. Tenn. July 6, 2007) (holding that Tennessee Insurance Code does not distinguish between disparate-impact and intentional discrimination and that mandate against unfair discrimination reaches disparate-impact claims). Nevada's insurance code contemplates prohibitions on various forms of discrimination, including both protected class-based discrimination *and* actuarial discrimination—the differential treatment of individuals without consideration of individual risk characteristics—as "unfair discrimination." This is clear from NRS 686A.130(5), which prohibits property and casualty insurers from "*any* unfair discrimination between insured or property *having like insuring or risk characteristics*, in the premium or rates charged for insurance." (emphases added). We therefore conclude that the Division's enabling statutes grant it authority to regulate the type of unfair actuarial discrimination that R087-20 seeks to address.

NAMIC next argues that the Division may only regulate intentional discrimination. But NRS 686A.680 does not incorporate an intent requirement, and this court will not imply one. *See Sheriff v. Witzenburg*, 122 Nev. 1056, 1061, 145 P.3d 1002, 1005 (2006) (affirming that "if the statute is clear," the court does "not look beyond the statute's plain language"). Although NRS 686A.680(1)(a) directs restrictions on the use of consumer credit information to insurers ("[a]n *insurer* that uses information from a consumer credit report *shall not*") (emphases added), the Division has general authority to promulgate "reasonable regulations" and standards to enforce compliance with statutory restrictions throughout the Nevada Insurance Code. NRS 679B.130(1)(a). Additionally, NRS 679B.150(1)(b) directs the Commissioner of the Division to develop standards "in each of the several areas of insurance appropriate to be applied to [insurance] policies," which applies to restrictions on the use of consumer credit information in NRS 686A.680(1)(a). Further, NAMIC's argument that "discrimination requires intent" is taken out of its context in a line of disparate-impact cases under Title VI of the federal Civil Rights Act of 1964 that apply to private challenges to alleged state discrimination. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001). This does not apply to the Division's authority to regulate private insurance practices that result in unfair class-based or actuarial discrimination, intended or not.

B.

We also conclude that R087-20 does not nullify or conflict with Nevada's statutory scheme allowing insurers to use consumer credit

information in rating and underwriting insurance premiums. *See* NRS 686A.600-.730. An administrative regulation like R087-20 cannot contradict, conflict with, or otherwise nullify the statutes that it is designed to enforce. *Jerry's Nugget v. Keith*, 111 Nev. 49, 54, 888 P.2d 921, 924 (1995).

NAMIC argues that R087-20 conflicts with the statutory scheme at NRS 686A.600-.730 because the regulation entirely prohibits the use of consumer credit information NRS Chapter 686A generally allows. NAMIC directs this court to the Michigan Supreme Court's decision to invalidate a regulation promulgated by the Michigan Division of Insurance banning the use of consumer credit information. *See Ins. Inst. of Mich. v. Comm'r, Fin. & Ins. Servs., Dep't of Labor & Econ. Growth*, 785 N.W.2d 67, 77-83 (Mich. 2010). There, the court found that the regulation conflicted with the statutory scheme permitting use of consumer credit information "by enacting a *total ban* on a practice that the Insurance Code permits." *Id.* at 87 (emphasis added). But R087-20 does not impose a total ban on the use of consumer credit information: it is tailored to address unfairly discriminatory use of consumer credit information based on findings that NAMIC does not dispute. For example, the regulation does not apply to uses that lower premiums, R087-20 §§ 2.1, 3.4, and the regulation allows insurers to continue using credit information generated *before* March 1, 2020, to increase premiums or make adverse underwriting decisions, *id.* § 3.4. It also allows insurers to resume using changes in consumer credit occurring after March 1, 2020, upon the expiration of the regulation on May 20, 2024. *Id.* § 3.1. Neither does the regulation redefine a term in the statute to prohibit a practice the statute otherwise allows. *Cf. Pub. Agency Comp. Tr.*, 127 Nev. at 869, 265 P.3d at 698 (declaring regulation invalid because it permitted recalculation of disability injury percentages by *different means* than those *required* under the statute); *Clark Cty. Soc. Serv. Dep't v. Newkirk*, 106 Nev. 177, 179, 789 P.2d 227, 228 (1990) (striking regulation as in conflict with statute requiring county to provide financial aid "to the poor" where county limited eligibility to "employable" persons). Instead, based on the plain language of the statute and pursuant to its findings, the Division restricted the certain limited uses of consumer credit information it found unfairly discriminatory.

NAMIC also argues that R087-20 nullifies the major life-event exception in NRS 686A.685 because the exception already "provides a mechanism for insureds with credit-based policies to seek relief if their credit information has been harmed by an event outside their control," including the declaration of a federal or state emergency. *See* NRS 686A.685(1)(a) (providing that insurer using credit information shall provide reasonable exceptions where credit information directly influenced by, among others, "[a] catastrophic event, as declared by the Federal or State Government"). NAMIC asserts

that, since the exception still allows insurers to use "credit information during a catastrophic event subject to an insured's ability to seek an exception" and subject to the "sole discretion" of an insurer to require verification from the insured, prohibiting the use of credit information due to a declared emergency without this mechanism conflicts with the statute. We disagree that R087-20 "nullifies" this exception because the regulation still allows for other "reasonable exceptions" under NRS 686A.685(1) upon an individual's request that its insurer recognize pandemic-caused deteriorations in credit as extraordinary life events. *See* R087-20 § 3.3.

To the extent that NAMIC claims R087-20 "conflicts" with the verification mechanism provided in NRS 686A.685, this court must work to harmonize this mechanism with the Division's general authority to regulate practices that lead to "unfair discrimination." *See Guinn v. Leg. of Nev.*, 119 Nev. 277, 285, 71 P.3d 1269, 1274-75 (2003) (construing various provisions in a statute to give each meaning), *overruled on other grounds by Nevadans for Nev. v. Beers*, 122 Nev. 930, 142 P.3d 339 (2006). NAMIC reaches beyond the statute's text to argue that the Legislature's decision to pass the major life-event exception instead of a proposed bill eliminating all uses of consumer credit as evidence of its intent to make NRS 686A.685 the exclusive exception to uses of consumer credit otherwise allowed by NRS 686A.600-.730. *See* A.B. 162, 76th Leg. (Nev. 2011) (proposed, but not enacted, bill eliminating use of consumer credit); 2011 Nev. Stat., ch. 506, § 30, at 3367-68 (codified at NRS 686A.685). But "[u]npassed bills, as evidences of legislative intent, have little value." *Dyna-Med, Inc. v. Fair Emp't & Hous. Comm'n*, 743 P.2d 1323, 1333 (Cal. 1987) (collecting cases). And while the Legislature's failure to act in an area may suggest that a regulation enacting that same policy is invalid, *see Boreali v. Axelrod*, 517 N.E.2d 1350, 1356 (N.Y. 1987), as discussed above, R087-20 is tailored to address discriminatory uses of consumer credit information and is not a total ban on its use. Additionally, reading NRS 686A.685 as the exclusive restriction on use of consumer credit information would absorb restrictions elsewhere in the code into an insurer's own determination of "reasonable exceptions" and vitiate the Division's authority to regulate unfairly discriminatory practices. Therefore, we hold that R087-20 does not conflict with the applicable statutes and affirm the regulation as within the Division's statutory authority.

C.

Finally, we reject NAMIC's constitutional challenges to R087-20. First, NAMIC argues that any reading of NRS 686A.680(1)(a), NRS 679B.150(1)(b), and NRS 679B.130(1)(a) that allows the Division to pass R087-20 renders the statutes an unconstitutional delega-

tion of power. It is a fundamental tenet of the Nevada and federal Constitutions that the Legislature may not delegate its lawmaking power to another branch of government. *E.g.*, *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 227, 19 P.3d 245, 248 (2001); *see also* Nev. Const. art. 3, § 1 (delineating Nevada's separation-of-powers doctrine). But this court will uphold a delegation if the Legislature establishes "suitable standards" to govern the manner and circumstances under which an executive agency can exercise its delegated authority. *Sheriff v. Luqman*, 101 Nev. 149, 153, 697 P.2d 107, 110 (1985); 2 Am. Jur. 2d *Administrative Law* § 59 (2d ed. 2014). Where possible, this court will avoid interpreting a statute to render it an impermissible delegation of legislative authority. *See McNeill v. State*, 132 Nev. 551, 556, 375 P.3d 1022, 1025 (2016) ("Because we presume that the Legislature is aware that it may not delegate the power to legislate pursuant to the separation of powers, we presume that it acted in accordance.").

We conclude that the Legislature established suitable standards in NRS 686A.680(1)(a), NRS 679B.150(1)(b), and NRS 679B.130(1)(a) and that the statutes are not unconstitutional delegations of power. Statutes empowering an agency to enforce an insurance code frequently are upheld as constitutional delegations of administrative and ministerial duties. *See, e.g.*, *Med. Society of New York v. Serio*, 800 N.E.2d 728, 736-37 (2003); *see also* 1 Steven Plitt *et al.*, *Couch on Insurance* § 2:8 & n.21 (3d rev. ed. 2009 & Supp. 2022) (listing cases upholding agency rulemaking authority under states' insurance codes). Here, the Legislature established standards in 686A.680(1) to guide the Division in enforcing the statutes governing the use of consumer credit in rating insurance by indicating that it should limit such use if insurers impermissibly "[u]se an insurance score that is calculated using income, gender, sexual orientation, gender identity or expression, address, zip code, ethnic group, religion, marital status or nationality of the consumer as a factor, or would otherwise lead to unfair or invidious discrimination." NRS 686A.680(1)(a). Regarding unfair actuarial discrimination, the Legislature provided various standards to define differential treatment. *See, e.g.*, NRS 686A.130(5) ("having like insuring or risk characteristics"). Therefore, we conclude that the Legislature properly delegated authority to the Division to engage in fact-finding and enact regulations based on these standards.

Second, NAMIC argues that if this court concludes that the Division had properly delegated statutory authority to enact R087-20, then the regulation unconstitutionally interferes with its members' contracts in violation of the United States and Nevada Constitutions' Contracts Clauses. Under the United States and Nevada Constitutions, the state may not pass a law that impairs the obligations of existing contracts. U.S. Const. art. 1, § 10 ("No State shall . . . pass

any . . . Law Impairing the Obligations of Contracts . . . ."); Nev. Const. art. 1, § 15 ("No . . . law impairing the obligation of contracts shall ever be passed."). The district court correctly rejected NAMIC's argument since NAMIC failed to provide an insurance policy or other proof that R087-20 impaired any preexisting contractual term. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978) (holding that the first step of a Contracts Clause challenge is to determine whether the challenged state law "operate[s] as a substantial impairment" to an existing contractual relationship). Without providing an actual policy or language from an existing policy, NAMIC failed to make the threshold "substantial impairment" showing to demonstrate how, and to what extent, R087-20 impaired that contract. Additionally, NAMIC's declaration of incidental harm to prospective contracts is not a valid state or federal Contracts Clause claim. *See Nw. Nat'l Life Ins. Co. v. Tahoe Reg'l Planning Agency*, 632 F.2d 104, 106-07 (9th Cir. 1980) (noting that the Contracts Clause does not protect against incidental effects on the subject matter of a contract); *Father & Sons & A Daughter Too v. Transp. Servs. Auth. of Nev.*, 124 Nev. 254, 263, 182 P.3d 100, 106 (2008) (holding that the Contracts Clause protects only existing, and not prospective, contracts). Without a basis to determine actual impairment and its severity, we therefore reject NAMIC's Contracts Clause claims. *See Allied Structural*, 438 U.S. at 244-45 (stating that court will end its inquiry of potential Contracts Clause violation if party challenging the statute only shows "minimal alteration of contractual obligations" rather than "substantial impairment"); *see also Hui Lian Ke v. Sandoval*, No. 17-cv-04229-EMC, 2018 WL 1763339, at *3 (N.D. Cal. Apr. 12, 2018) (dismissing a Contracts Clause claim because plaintiff's affidavit failed to allege the actual existence of impaired contract terms).

CONCLUSION

The economic shutdown that occurred in Nevada due to the emergency directive led to massive involuntary unemployment, with Las Vegas suffering the highest unemployment in the country. The Division acted within the province of its authority when it found that using consumer credit scores against insureds during the pandemic and its aftermath would result in unfair actuarial discrimination. We therefore affirm the district court and lift the injunction on R087-20 issued by this court on September 16, 2021.

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

PEGGY WHIPPLE REGGIO, AN INDIVIDUAL; AND JOHN REGGIO, AN INDIVIDUAL, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MARK R. DENTON, DISTRICT JUDGE, RESPONDENTS, AND BETSY L. WHIPPLE, INDIVIDUALLY AND AS SHAREHOLDER OF WHIPPLE CATTLE COMPANY, INC., A NEVADA CORPORATION, REAL PARTY IN INTEREST.

No. 84233

March 9, 2023 525 P.3d 350

Original petition for a writ of mandamus or prohibition challenging a district court order striking a peremptory challenge of a judge.

Petition denied.

Legal Resource Group, LLC, and *T. Augustus Claus*, Henderson, for Petitioners.

Howard & Howard Attorneys, PLLC, and *Cami M. Perkins* and *Karson D. Bright*, Las Vegas, for Real Party in Interest.

Before the Supreme Court, STIGLICH, C.J., HERNDON, J., and SILVER, Sr. J.[1]

OPINION

By the Court, STIGLICH, C.J.:

Supreme Court Rule (SCR) 48.1 governs peremptory challenges of judges. At issue in this writ petition is how SCR 48.1(1), 48.1(5), and 48.1(9) apply in the context of consolidated cases. Generally, when cases are consolidated, the second-filed case is transferred to be heard with the first-filed case. *See* EDCR 2.50(a)(1) ("Motions for consolidation of two or more cases must be heard by the judge assigned to the first case commenced . . . . If consolidation is granted, the consolidated case will be heard before the judge ordering consolidation."). Here, the defendants in the second case filed a peremptory challenge after their case was consolidated with an earlier-filed first case. Because the first-case defendants had already waived their right to a peremptory challenge under SCR 48.1(5), the district court found that the second-case defendants were barred from filing a peremptory challenge post-consolidation. The second-case defendants now challenge that ruling.

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

SCR 48.1(1) contemplates that, upon consolidation, the second case essentially becomes part of the first case. *Panko v. Eighth Judicial District Court*, 111 Nev. 1522, 908 P.2d 706 (1995), confirms this reading, and we reaffirm that holding here. And in *Gallen v. Eighth Judicial District Court*, 112 Nev. 209, 211, 213, 911 P.2d 858, 859-60 (1996), we interpreted SCR 48.1 to mean that when one party in a case waives their right to exercise a peremptory challenge, that waiver also bars another party on the same side of the case from filing a peremptory challenge. Applying SCR 48.1(1), *Panko*, and *Gallen*, we conclude that if a party waives their right to a peremptory challenge under SCR 48.1(5), that waiver also applies to any other party on the same side of a later consolidated action.

Further, parties are entitled to an additional peremptory challenge under SCR 48.1(9) if their case is reassigned. But when a second case is transferred as a result of consolidation to be heard with the first, we conclude that there is no "reassignment" at all because the second case is already considered part of the first case and the first case remains before the same judge before and after consolidation. Consequently, parties in consolidated cases are entitled to an additional peremptory challenge under SCR 48.1(9) only if the first case is reassigned, not when the second case is transferred to be heard with the first. Because the district court's order striking the second-case defendants' peremptory challenge accords with our conclusion, extraordinary relief is not warranted. Accordingly, we deny the petition.

FACTS AND PROCEDURAL HISTORY

Real party in interest Betsy Whipple sued Whipple Cattle Company (WCC), her family-owned-and-operated cattle farm, various family members, and other affiliated entities, alleging misconduct in handling the business and its assets (the first case). Eventually, the case was assigned to the Honorable Nancy Allf. She ruled on several matters, including motions for a preliminary injunction, to disqualify the defendants' lawyer, and for attorney fees.

Over a year later, Whipple filed a second lawsuit against her sister and brother-in law, petitioners Peggy and John Reggio (the second case). Whipple had not named the Reggios as defendants in the first case. In the second case, Whipple alleged that she purchased WCC shares from the Reggios but the Reggios failed to transfer the shares to her. The second case was assigned to the Honorable Mark R. Denton.

Whipple moved to consolidate the first and second cases under NRCP 42(a). The Reggios did not contest the motion, and the cases were consolidated. As a result of the consolidation, the second case was reassigned to Judge Allf. The Reggios filed a peremptory challenge against Judge Allf under SCR 48.1. As a result, the case was

transferred back to Judge Denton. Whipple then moved to strike the Reggios' peremptory challenge, arguing that SCR 48.1 barred the challenge. The Reggios opposed the motion, arguing that SCR 48.1 did not bar their peremptory challenge and that SCR 48.1(9) specifically provided them with one.

In striking the Reggios' peremptory challenge, the district court did not address SCR 48.1(9). Instead, the court found that the first-case defendants waived their right to a peremptory challenge under SCR 48.1(5) because they failed to file any challenge before Judge Allf ruled on contested motions in the first case. Because the first and second cases were consolidated, the court determined that the second case became part of the first case. Accordingly, the court found that the first-case defendants' waiver applies to the Reggios, thereby barring their peremptory challenge. The Reggios petitioned for a writ of mandamus or prohibition, seeking a writ directing the district court to accept their peremptory challenge.

DISCUSSION

We exercise our discretion to hear the merits of this petition

"A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *see also* NRS 34.160. A writ of prohibition serves to restrain a district court from acting outside of or in excess of its jurisdiction. NRS 34.320; *see also Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

Although we have complete discretion on whether to entertain the merits of a writ petition, *Smith*, 107 Nev. at 677, 818 P.2d at 851, "[e]xtraordinary relief is the appropriate remedy when the district court improperly grants or fails to grant a peremptory challenge under SCR 48.1," *Turnipseed v. Truckee-Carson Irrigation Dist.*, 116 Nev. 1024, 1029, 13 P.3d 395, 398 (2000). We may also choose to entertain a writ petition when it "raises an important legal issue in need of clarification, involving public policy, of which this court's review would promote sound judicial economy and administration." *Int'l Game Tech., Inc.*, 124 Nev. at 198, 179 P.3d at 559. Because extraordinary relief is appropriate in SCR 48.1 cases and this case presents an issue of first impression that warrants clarification, we exercise our discretion to hear the merits of this petition.

The district court properly granted Whipple's motion to strike the Reggios' peremptory challenge

In resolving this writ petition, we first determine whether the district court's interpretations of SCR 48.1(1) and SCR 48.1(5) were

correct. Second, we consider whether SCR 48.1(9) applies to allow an additional peremptory challenge after cases are consolidated.

Standard of review

Although we review a district court's decision to grant or deny a motion to strike for abuse of discretion, the issue here is the district court's interpretation of SCR 48.1. We review a district court's interpretation of a Supreme Court Rule de novo. *See Marquis & Aurbach v. Eighth Judicial Dist. Court*, 122 Nev. 1147, 1156, 146 P.3d 1130, 1136 (2006) (noting that de novo review applies to the interpretation of a statute or court rule, even in the context of writ petitions); *see also City of Henderson v. Eighth Judicial Dist. Court*, 137 Nev. 282, 284, 489 P.3d 908, 910 (2021) ("While the decision to deny the motion to strike was addressed to the district court's discretion, the ultimate question presented in this petition is one of law.").

"The Supreme Court may make rules not inconsistent with the Constitution and laws of the State for . . . the government of the district courts." NRS 2.120(1). In these rules, this court regulates "judicial proceedings in all courts of the State." NRS 2.120(2). The rules of statutory interpretation apply to the Supreme Court Rules. *See Morrow v. Eighth Judicial Dist. Court*, 129 Nev. 110, 113, 294 P.3d 411, 414 (2013). Thus, we first consider the plain meaning of the rule. *Id.* In determining the "plain meaning of the 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 (1998); *see also Orion Portfolio Servs. 2, LLC v. County of Clark ex rel. Univ. Med. Ctr. of S. Nev.*, 126 Nev. 397, 403, 245 P.3d 527, 531 (2010) ("This court has a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized."). Further, in reading a statute "a word . . . is presumed to bear the same meaning throughout a text." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012). And "[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory." *Id.* at 180.

The district court correctly determined that the first and second cases, post-consolidation, merged into a single action under SCR 48.1 and that the first-case defendants' waiver bars the Reggios from using a peremptory challenge

The first-case defendants waived their peremptory challenge under SCR 48.1(5), which governs waiver of peremptory challenges. *See Smith*, 107 Nev. at 678, 818 P.2d at 852 ("Failure to file within the time strictures of the rule results in waiver of the right to make

a peremptory challenge."). Under SCR 48.1(5), a party must file a peremptory challenge against a judge before that judge rules on any contested matter in the case. Here, the parties do not dispute that the first-case defendants waived their right to a peremptory challenge by failing to file such a challenge before Judge Allf ruled on contested motions. However, the parties disagree on the effect of that waiver.[2]

The Reggios argue that when cases are consolidated, they do not merge into a single case, but rather both the first and second cases retain their separate character. As a result, they argue, the first-case defendants' waiver has no bearing on their ability, as the second-case defendants, to file a peremptory challenge.

Whipple counters that when one case is consolidated with another, the two cases become a single case—Whipple is on one side of the litigation, while the first- and second-case defendants are collectively on the other side. Because the first-case defendants waived their right to a peremptory challenge in the first case, Whipple argues, that waiver applies to the Reggios because the Reggios and the first-case defendants are on the same side of the consolidated case.

Under SCR 48.1(1), "each side" of a civil case pending in district court "is entitled, as a matter of right, to one change of judge by peremptory challenge." Significantly, the rule provides that "[e]ach action or proceeding, whether single or consolidated, shall be treated as having only two sides," and "[i]f one of two or more parties on one side of an action files a peremptory challenge, no other party on that side may file a separate challenge." *Id.*

SCR 48.1(1) contemplates that, upon consolidation, the second case becomes part of the first case

SCR 48.1(1) itself dispenses of the Reggios' argument. SCR 48.1(1) contemplates that, upon consolidation, the first and second cases merge into a single action for peremptory challenge purposes because the rule expressly treats a consolidated case as having only two sides. We confirmed this reading in *Panko*. In *Panko*, the plaintiffs filed a lawsuit against a first defendant. 111 Nev. at 1523, 908 P.2d at 707. The plaintiffs used a peremptory challenge, so the case was reassigned. *Id.* The plaintiffs then filed a lawsuit against a

[2]Whipple, below and on appeal, also argues that the first-case defendants' appeal, which was pending when the Reggios filed their peremptory challenge, bars the Reggios' peremptory challenge under SCR 48.1(1). The district court did not use this reasoning. Because we agree with the district court that SCR 48.1(1) and SCR 48.1(5) bar the Reggios' peremptory challenge for other reasons, this argument, even if accepted, would not change the result here. Accordingly, we decline to address it. *See APCO Constr., Inc. v. Zitting Bros. Constr., Inc.*, 136 Nev. 569, 575 n.4, 473 P.3d 1021, 1027 n.4 (2020) (declining to reach certain arguments where the appeal was resolved on another basis).

second defendant. *Id.* The first and second defendants moved to consolidate the cases, and the plaintiffs did not oppose consolidation. *Id.* As a result of consolidation, the second case was transferred to the department where the first case was heard. *Id.* The plaintiffs then filed a second peremptory challenge. *Id.*

We held that the plaintiffs' second peremptory challenge violated SCR 48.1(1). *Id.* at 1524, 908 P.2d at 708. Pointing to the "two sides" language in SCR 48.1(1), we reasoned that "when the second action was consolidated with the first action and was scheduled to take place in front of the judge assigned to the first action, the second action essentially became part of the first action." *Id.* Accordingly, "because [the plaintiffs] had exercised their right to a peremptory challenge in the first action, they were precluded from exercising a second peremptory challenge in the consolidated case." *Id.* We reaffirm *Panko*'s interpretation of SCR 48.1(1)'s "two sides" language in the context of a consolidated case—that upon consolidation the second case becomes part of the first case—because it properly interprets the text of SCR 48.1(1).

The Reggios argue that this result flies in the face of *In re Estate of Sarge*, 134 Nev. 866, 432 P.3d 718 (2018), and *In re Wynn Resorts, Ltd.*, No. 80928, 2020 WL 3483757 (Nev. June 25, 2020) (Order Dismissing Appeal). In *Sarge*, we held that consolidation did not merge two cases into a single case for the purpose of the final judgment rule for appealability. *Sarge*, 134 Nev. at 866, 432 P.3d at 720. As a result, the appellant was not required to wait until the final judgment of both consolidated cases to appeal. *Id.* at 866-67, 432 P.3d at 720. Instead, as soon as the district court rendered a final judgment in one of the consolidated cases, that case became immediately appealable. *Id.*

Our analysis hinged on the ambiguity of former NRCP 42(a),[3] which provided, in relevant part, that "[w]hen actions involving a common question of law or fact are pending before the court . . . it may order all the actions consolidated." *Id.* at 868, 432 P.3d at 721. We concluded that the term "consolidation" was ambiguous and therefore turned to the history of the rule to interpret it, because it "can mean that 'several actions are combined into one, lose their separate identities and become a single action' or that 'several actions are tried together but each retain their separate character.'" *Id.* at 868-69, 432 P.3d at 721 (quoting *Randall v. Salvation Army*, 100 Nev. 466, 470, 686 P.2d 241, 243 (1984)).

[3]In 2019, this court amended NRCP 42. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018 (effective March 1, 2019)). The amendments did not substantively change the language discussed in *Sarge*. *See id.*

But here, the term "consolidation" is unambiguous. Unlike NRCP 42(a), SCR 48.1(1) does not use the term "consolidation" without indicating which definition of consolidation applies. By expressly stating that even a consolidated case has only two sides and allowing one peremptory challenge per side, SCR 48.1(1) clears up any ambiguity. If SCR 48.1(1) intended that upon consolidation each case retained its separate character, then a consolidated case would have a total of four sides, two sides for the first case and two sides for the second case. Because even a consolidated case has two sides, the former definition, that upon consolidation the "several actions are combined into one, lose their separate identities and become a single action" must apply. *Id.* at 868, 432 P.3d at 721.

Similarly, in *Wynn*, we dismissed an appeal because the appellant was not a party to the case she was appealing. *Wynn*, 2020 WL 3483757, at *2. There, the appellant filed a first case, which was consolidated with a second case in which the appellant was not a party and did not intervene. *Id.* at *1. The appellant sought to appeal the second case. *Id.* at *2. This court dismissed the appeal, concluding that the consolidation did not make the appellant a party to the second case. *Id.* In so holding, we applied *Sarge*. *Id.* at *1-2. For the same reason stated above, *Sarge*'s analysis is inapplicable here, so the Reggios' argument based on *Wynn* is unconvincing. *Wynn* and *Sarge* establish that a different definition of consolidation exists, but that definition does not apply here because SCR 48.1(1)'s "two sides" language clarifies that when two cases are consolidated, they lose their separate character for purposes of peremptory challenges.

If one party on one side of a case waives their right to a peremptory challenge, that waiver applies to other parties on the same side of the case

The Reggios next argue that the first case defendants' waiver of their right to a peremptory challenge does not apply against them. *Gallen* forecloses this argument. In *Gallen*, we held that a third-party defendant, who was brought into the case by the original defendant, did not have the right to file a peremptory challenge. 112 Nev. at 211, 213, 911 P.2d at 859, 860. We reasoned that the third-party defendant was on the "same side of the action" as the original plaintiff, who had already waived his right to a peremptory challenge. *Id.* at 213, 911 P.2d at 860. As a result, the third-party defendant's peremptory challenge was barred. *Id.*

Gallen stands for the principle that a party's waiver of their peremptory challenge also waives other parties' right to a peremptory challenge when those parties are on the same side of the case. *Cf. Switzer v. Superior Court*, 860 P.2d 1338, 1340 (Ariz. Ct. App. 1993) (interpreting Arizona's similar peremptory challenge provisions and holding that one party's waiver applies to all parties on

the same side of an action). This result is also compelled by the express language of SCR 48.1(1). If one party on the same side of the litigation files a peremptory challenge against a judge, no other party on the same side may file one. SCR 48.1(1). Here, the first-case defendants and the Reggios are on the same side of the consolidated case—the defendant's side—so the first-case defendants' waiver bars the Reggios' peremptory challenge.

The Reggios insist that *Gallen* is inapplicable because it does not address consolidation. We disagree. Under SCR 48.1(1), both single multiparty cases and consolidated cases are treated exactly the same: both cases have only two sides, and each side has a right to one peremptory challenge. SCR 48.1(5) also does not distinguish between a consolidated case and a single multiparty case. Instead, it simply says that "[a] notice of peremptory challenge may not be filed against any judge who has made any ruling on a contested matter . . . in the action." SCR 48.1(5). The fact that *Gallen* addressed waiver in a single multiparty case, but here we address consolidated cases, is immaterial because there is no reason to treat the cases differently. As a result, we conclude the district court did not err by determining that the first-case defendants' waiver of their peremptory challenge applied to the Reggios, the second-case defendants, to bar their peremptory challenge.

SCR 48.1(9) does not provide parties whose case is transferred, as result of consolidation, to the judge hearing the first case with an additional peremptory challenge

The Reggios next argue that SCR 48.1(9) permits an additional peremptory challenge because their case, the second case, was reassigned to Judge Allf after consolidation.[4] The Reggios request that we define "reassignment" to mean the transfer of a case from one judge to another. Whipple counters that the second case became part of the first case upon consolidation. It follows, according to Whipple, that the transfer of the second case to the judge hearing the first case is not a reassignment because the second case is now part of the first case, which was already assigned to that judge. Put differently, the first case is only truly reassigned if the first case is transferred to a different judge for some nonconsolidation-related reason, such as a judge's retirement. Accordingly, Whipple asks this court to clarify that reassignment under SCR 48.1(9) does not refer to transfer as a result of consolidation.

[4]To the extent the Reggios base this argument on *Tradewinds Building and Development, Inc. v. Eighth Judicial District Court*, No. 61796, 2013 WL 3896543 (Nev. July 23, 2013) (Order Granting Petition for Writ of Mandamus), their reliance is misplaced because that decision may not be cited. *See* NRAP 36(c)(2)-(3).

We adopted SCR 48.1 in 1979, and we amended SCR 48.1 in 2009 to add subsection (9). *In re SCR 48.1 Regarding the Procedure for Change of Judge by Peremptory Challenge*, ADKT 434 (Petition, Apr. 13, 2009). We added subsection (9) in response to "elections, retirements and the anticipated addition of new district judge departments" because "it will become necessary for the district court clerks to reassign civil division and family division cases." *Id.* It furnishes a party with an additional peremptory challenge as a matter of right, even if the party previously exercised a peremptory challenge under SCR 48.1(1), "in the event that the *action* is reassigned for any reason other than the exercise of a peremptory challenge." SCR 48.1(9) (emphasis added).

The issue here is not the definition of reassign, but whether SCR 48.1(1)'s description of an "action," which is that "[e]ach action, whether single or consolidated, shall be treated as having only two sides," applies to an "action" under SCR 48.1(9). If SCR 48.1(1)'s understanding of an action applies to SCR 48.1(9), then upon consolidation the second case becomes part of the first case. As a result, SCR 48.1(9) would not be triggered because the first case was not reassigned.

In light of our duty to interpret SCR 48.1 as a whole and each provision, to the extent possible, harmoniously, we interpret "an action" in SCR 48.1(9) to be the same as an "action" under SCR 48.1(1). *Orion*, 126 Nev. at 403, 245 P.3d at 531; *see also* Scalia & Garner, *supra*, at 170. Accordingly, SCR 48.1(9) is not triggered when the second case is transferred upon consolidation because the second case does not retain its separate character and becomes part of the first case. The same judge hears the first case before and after consolidation, so there has not been a reassignment. Thus, SCR 48.1(9) does not provide the second-case parties with an additional peremptory challenge. Although the district court did not address this issue, we conclude it reached the correct result—striking the Reggios' peremptory challenge—because SCR 48.1(9) does not provide them with an additional peremptory challenge. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

CONCLUSION

In this opinion, we clarify three aspects of SCR 48.1 as applied to consolidated cases. First, SCR 48.1(1) says that even consolidated cases have only two sides. This language necessarily means that when cases are consolidated, the second case becomes part of the first case. *Panko* confirmed this reading, and we reaffirm it here. Second, applying this understanding of consolidation and *Gallen*, if one side in consolidated cases waives their right to a peremptory

challenge, that waiver bars any subsequent peremptory challenges from the same side. Third, an "action" in the context of consolidated cases under SCR 48.1(9) means the same thing as an action in the context of consolidated cases under SCR 48.1(1). As a result, the focus is on whether the first case is reassigned to a different judge. The transfer of the second case to the judge hearing the first case as a result of consolidation does not trigger SCR 48.1(9) because the first case before and after consolidation remains before the same judge. Accordingly, we deny this petition.

Herndon, J., and Silver, Sr. J., concur.

NORTH LAS VEGAS INFRASTRUCTURE INVESTMENT AND CONSTRUCTION, LLC, A NEVADA LIMITED LIABILITY COMPANY, APPELLANT, *v.* CITY OF NORTH LAS VEGAS, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, RESPONDENT.

No. 83257

CITY OF NORTH LAS VEGAS, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, APPELLANT, *v.* NORTH LAS VEGAS INFRASTRUCTURE INVESTMENT AND CONSTRUCTION, LLC, A NEVADA LIMITED LIABILITY COMPANY, RESPONDENT.

No. 83617

March 16, 2023 525 P.3d 836

Consolidated appeals from a district court judgment and a post-judgment order denying attorney fees and awarding costs in a contract action. Eighth Judicial District Court, Clark County; Elizabeth Gonzalez and Susan Johnson, Judges.

Affirmed (Docket No. 83257); affirmed in part, reversed in part, and remanded (Docket No. 83617).

Campbell & Williams and *Philip R. Erwin* and *Samuel R. Mirkovich*, Las Vegas, for Appellant/Respondent North Las Vegas Infrastructure Investment and Construction, LLC.

Hone Law and *Jill Garcia* and *Eric D. Hone*, Henderson, for Respondent/Appellant City of North Las Vegas.

Before the Supreme Court, STIGLICH, C.J., PARRAGUIRRE, J., and GIBBONS, Sr. J.[1]

OPINION

By the Court, STIGLICH, C.J.:

In this opinion, we consider a district court's discretion to decline to award costs to a prevailing party for expenses the party incurred in its efforts to comply with a district court discovery order. This court has repeatedly emphasized that taxable "costs must be reasonable, necessary, and actually incurred." *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120, 345 P.3d 1049, 1054 (2015). Despite the district court's wide discretion to determine which costs meet these criteria, we take this opportunity to clarify that

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

court-ordered costs are necessarily incurred and, so long as they are actually incurred and reasonable, are taxable.

Below, after entering judgment in favor of the prevailing party on the underlying breach-of-contract claims, the district court issued a post-judgment order denying the prevailing party's motion for attorney fees and retaxing costs. Docket No. 83257 is an appeal from the district court's judgment, and Docket No. 83617 is an appeal from the court's post-judgment order. We consolidated the appeals for resolution and now conclude that the district court did not err in entering judgment in favor of the prevailing party on the breach-of-contract claims. Further, the district court did not abuse its discretion in denying the prevailing party's motion for attorney fees. We conclude, however, that the district court abused its discretion to the extent it denied the prevailing party's request for the costs incurred for trial technology services. Thus, while we affirm the district court's judgment in Docket No. 83257, we reverse in part the post-judgment order retaxing costs in Docket No. 83617 and remand to the district court for further proceedings.[2]

FACTS AND PROCEDURAL HISTORY

In 2016, appellant/respondent North Las Vegas Infrastructure Investment and Construction, LLC (NLVI) submitted the winning bid for respondent/appellant City of North Las Vegas' (the City) proposal seeking a financing partner to develop the Apex Industrial Park (Apex) in North Las Vegas, and the parties entered into a letter of intent (LOI). NLVI then contracted with nonparty Poggemeyer Design Group, Inc. (PDG) to begin the initial design and infrastructure work.

Section 2 of the parties' LOI provides that NLVI would "design, construct, and finance" specified infrastructure items and that, "[a]mong other things, the City will create the revenue streams necessary to pay for the [p]roject, including establishing the special improvement district and tax increment districts, [and] connection fee and service charges." Section 3(a) of the LOI addresses rights and responsibilities upon the LOI's termination, providing in relevant part that

> [w]ithin 30 days of termination of the LOI, the City will reimburse [NLVI] for all expenses paid under the [PDG] Contract, and [NLVI] will assign [its] rights, title and interest in the [PDG] Contract to [the] City.

[2]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted. While Judge Susan Johnson signed the order at issue in Docket No. 83617, we note that Judge Elizabeth Gonzalez ruled on the motions underlying that order and entered the judgment appealed in Docket No. 83257 before her retirement.

The LOI also references multiple external documents that were attached to it as exhibits, including the City's request for proposal, NLVI's winning proposal, a term sheet, and NLVI's contract with PDG. Pursuant to the terms of both the LOI and its contract with PDG, NLVI was responsible for funding PDG's work. After a short period of time, NLVI stopped making payments, and PDG ceased all work at Apex. The parties agreed to terminate the LOI, and NLVI demanded the City reimburse it for the nearly $3 million it owed or had paid to PDG. The City refused, and NLVI filed the underlying breach-of-contract action seeking reimbursement.

After a bench trial, the district court entered judgment for the City, concluding that although Section 3(a) of the LOI suggests that the City agreed to reimburse NLVI for its PDG-related expenses, the LOI and its appendices as a whole made clear that the City only agreed to *facilitate* reimbursement through various means. The court later denied the City's motion for attorney fees and granted, in part, NLVI's motion to retax the City's costs. As relevant here, the district court declined to award costs incurred by the City for videotaping three depositions, for utilizing an electronic discovery database, and for electronic trial preparation services. NLVI appeals from the district court's judgment in Docket No. 83257, and the City appeals from the district court's attorney fees and costs order in Docket No. 83617.

DISCUSSION

We first address NLVI's argument that the district court erred in finding that the LOI did not require the City to reimburse it for its PDG costs. We then address the City's argument that the district court abused its discretion in its attorney fees and costs award.

The district court correctly found that the LOI did not require the City to reimburse NLVI for its design costs

In Docket No. 83257, NLVI argues that the district court erred in its ambiguity analysis concerning Section 3(a) of the LOI. It contends that the plain language of Section 3(a) requires the City to repay it for all amounts it paid or owed PDG for the work at Apex. The City responds that it never agreed to repay NLVI for its PDG-related expenses; it only agreed to *facilitate* repayment by imposing taxes and related charges on Apex landowners and passing that revenue on to NLVI.

Whether a contract is ambiguous is a question of law this court reviews de novo. *Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013). "A contract is ambiguous if its terms may reasonably be interpreted in more than one way, but ambiguity does not arise simply because the parties disagree on how to interpret their contract." *Id.* (internal citations omitted). Indeed,

"[c]ontracts must be read as a whole without negating any term." *Fed. Nat'l Mortg. Ass'n v. Westland Liberty Vill., LLC*, 138 Nev. 614, 619, 515 P.3d 329, 334 (2022). Thus, even if a contract contains an ambiguous term, extrinsic evidence is not considered if the meaning of the ambiguous term or portion of the contract can be ascertained by reviewing the contract in its entirety. *See Halling v. Yovanovich*, 391 P.3d 611, 618 (Wyo. 2017) (looking to the contract as a whole to interpret a provision before considering parol evidence); *cf. MMAWC, LLC v. Zion Wood Obi Wan Tr.*, 135 Nev. 275, 279, 448 P.3d 568, 572 (2019) (providing that the court's goal in contract interpretation is to identify the intent of the parties, which is generally "discerned from [the contract's] four corners" (quoting *MHR Capital Partners LP v. Presstek, Inc.*, 912 N.E.2d 43, 47 (N.Y. 2009))). This would include reviewing any documents incorporated by reference or appended to the contract at issue.[3] *See Lincoln Welding Works, Inc. v. Ramirez*, 98 Nev. 342, 345, 647 P.2d 381, 383 (1982) (holding that where a separate writing is "made a part of the contract by annexation or reference," the writing will be construed as a part of the contract (quoting *Orleans Hornsilver Mining Co. v. Le Champ d'Or French Gold Mining Co.*, 52 Nev. 92, 98-99, 284 P. 307, 309 (1930))).

Here, the district court determined that although Section 3(a) of the LOI was not ambiguous when read alone, it was ambiguous when read in the context of the entire agreement. The district court further found that when reading the entirety of the LOI, including the appendices attached thereto, the City's repayment obligation was limited to facilitating repayment rather than repaying NLVI directly. We agree. Section 2 of the LOI explains that NLVI would be responsible for designing, constructing, and financing the development of specified infrastructure at Apex, while the City would "create the revenue streams necessary to pay for" that infrastructure through various enumerated means.[4] And the LOI's appendices, namely NLVI's response to the City's request for proposal and the parties' agreed-upon term sheet, also provide that the City would "facilitate the making of payments and repayments from" tax districts and other fees to NLVI, with no language making the City responsible for the payments otherwise. In fact, Exhibit C to the LOI provides that the City will commence with repaying NLVI "upon substantial completion of the Project" and that such payments would come from assessments and other service fees. Because the LOI as a whole makes clear that the City's repayment obligation

[3]We therefore reject NLVI's argument that we should not consider the appendices to the LOI to ascertain the parties' intent—Section 2 explicitly incorporated the appendices into the LOI.

[4]Although Section 2 did not survive the LOI's cancellation according to the terms of the LOI, we may still look to the LOI as a whole to construe the provision at issue here. *See Halling*, 391 P.3d at 618.

stemmed from its eventual collection of taxes and other fees from Apex landowners, which never occurred, the City did not breach the contract by failing to repay NLVI. Thus, the district court properly entered judgment for the City on NLVI's breach-of-contract claims.[5]

Attorney fees and costs

In Docket No. 83617, the City challenges the district court's order denying its motion for attorney fees and retaxing certain costs. The City contends that the district court abused its discretion because (1) it made inadequate findings as to the four factors set forth in *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), regarding offers of judgment; and (2) the City demonstrated that each of its claimed costs were "reasonable, necessary, and actually incurred," *Cadle Co.*, 131 Nev. at 120, 345 P.3d at 1054. We review the district court's refusal to award attorney fees and its decision to retax costs for an abuse of discretion. *See Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001) (attorney fees); *Logan v. Abe*, 131 Nev. 260, 267, 350 P.3d 1139, 1144 (2015) (costs).

The district court did not abuse its discretion by denying the City's request for an award of attorney fees

"At any time more than 21 days before trial," a party may serve a written offer "to allow judgment to be taken in accordance with [specified] terms." NRCP 68(a). If a party rejects such an offer of judgment and "fails to obtain a more favorable judgment[,] . . . the offeree must pay the offeror's post-offer costs and expenses" that were "actually incurred by the offeror from the time of the offer." NRCP 68(f)(1)(B). When considering whether to grant a prevailing party's request for attorney fees pursuant to NRCP 68(f)(1)(B), the district court must consider four factors:

> (1) whether the plaintiff's claim was brought in good faith; (2) whether the . . . offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the . . . decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

Beattie, 99 Nev. at 588-89, 668 P.2d at 274. As this court has recognized, "the district court is vested with discretion to consider the adequacy of [an NRCP 68] offer and the propriety of granting attorney fees." *Certified Fire Prot., Inc. v. Precision Constr., Inc.*, 128 Nev. 371, 383, 283 P.3d 250, 258 (2012). "Although explicit findings with respect to [the *Beattie*] factors are preferred, the district

[5]Given our conclusion, we need not reach NLVI's remaining arguments regarding the district court's refusal to make a pretrial determination as to whether Section 3(a) of the LOI was ambiguous and its admission of parol evidence.

court's failure to make explicit findings is not a per se abuse of discretion." *Wynn*, 117 Nev. at 13, 16 P.3d at 428; *see also Certified Fire Prot.*, 128 Nev. at 383, 283 P.3d at 258 (same). So long as "the record clearly reflects that the district court properly considered the *Beattie* factors, we will defer to its discretion." *Wynn*, 117 Nev. at 13, 16 P.3d at 428-29.

The City focuses on the district court's minute order, which only mentioned one of the four *Beattie* factors, to argue that the court abused its discretion by failing to consider all of the relevant factors. We decline to limit our review of the district court's analysis to the minute order, however, given that a "minute order [is] ineffective for any purpose." *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987). In its written order, the district court addressed each of the three *Beattie* "good-faith" factors, finding that NLVI did not bring its claims in bad faith, the City's offer was not unreasonable given its position regarding the LOI's plain language, and NLVI's decision to reject the offer and proceed to trial was not unreasonable or made in bad faith.[6] Because "the record clearly reflects that the district court properly considered the *Beattie* factors," *Wynn*, 117 Nev. at 13, 16 P.3d at 428-29, we defer to its discretion concerning "the propriety of granting attorney fees," *Certified Fire Prot.*, 128 Nev. at 383, 283 P.3d at 258. We therefore affirm the district court's post-judgment order insofar as it declines to award attorney fees.

The district court abused its discretion in denying costs for electronic trial preparation services

NRS 18.020(3) provides for an award of costs to the prevailing party "[i]n an action for the recovery of money or damages, where the plaintiff seeks to recover more than $2,500." Taxable costs must be provided for by statute; otherwise, the district court retains sound, but not unlimited, discretion to determine which expenses are allowable as costs. *See Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 431, 132 P.3d 1022, 1036 (2006); *see also Cadle Co.*, 131 Nev. at 120, 345 P.3d at 1054 (noting that the court's discretion in this regard has some boundaries); 20 Am. Jur. 2d *Costs* § 1 (2022) (explaining that "costs are not synonymous with expenses . . . 'costs' are limited to necessary expenses" and "expenses" are "those expenditures made by a litigant in connection with an action that are normally not recoverable from the opponent . . . absent a special statute or

[6]The district court also explained that because the three *Beattie* "good-faith factors" ultimately weighed against an award of fees, it did not need to conduct a thorough analysis of the fourth *Beattie* factor concerning the reasonableness of the amount of fees requested. *See Frazier v. Drake*, 131 Nev. 632, 644, 357 P.3d 365, 373 (Ct. App. 2015) (holding that where the three good-faith factors weigh against awarding attorney fees, the reasonableness of the amount of fees requested "becomes irrelevant").

the exercise of judicial discretion"). NRS 18.005 lists the categories of taxable costs, which includes costs for "[a]ny . . . reasonable and necessary expense incurred in connection with the action." NRS 18.005(17); *see also Cadle Co.*, 131 Nev. at 120, 345 P.3d at 1054 (recognizing that any cost awarded "must be reasonable, necessary, and actually incurred").

The City argues that the district court abused its discretion by retaxing its costs for deposition videography services, electronic discovery, and electronic trial preparation services. The parties do not dispute that these costs were reasonable and actually incurred, only whether they were necessarily incurred.[7]

Deposition videography services

The first item of costs the City challenges is for videotaping three depositions. Under NRS 18.005(2), a prevailing party may recover its taxable costs for court reporter fees for taking depositions. The statute is silent, however, as to whether the district court may properly tax costs for videotaped depositions. "[T]he costs of videotaping depositions . . . are not allowed when no statute or any uniform course of procedure authorizes the taxation of such costs." 20 Am. Jur. 2d *Costs* § 43 (2022); *see also Armstrong v. Onufrock*, 75 Nev. 342, 349, 341 P.2d 105, 108-09 (1959) (reasoning that a party who chooses to take a deposition must bear the expense of the copies they order, "without the right of reimbursement from the losing party").

We conclude that the district court did not abuse its discretion in denying costs for the videotaped depositions. As the district court correctly observed, the City failed to demonstrate that its costs for videotaping certain depositions were necessarily incurred. Not only did the City not use those video depositions at trial, it also did not explain why obtaining videos of those depositions was *necessary*, particularly where the district court did not order the parties to record their depositions on video.

Electronic discovery database

The City next challenges the district court's decision to retax its costs for electronic discovery, arguing that it necessarily incurred those costs to access and exchange discovery. Although the parties agreed to use a central electronic discovery database to disclose, exchange, and store discovery, this was an elective charge likely chosen for the parties' convenience. Because the City did not demonstrate that this cost was necessary, we conclude that the district court did not abuse its discretion by denying the City's costs for electronic discovery.

[7]Indeed, it appears that the parties jointly selected many, if not all, of the third-party service providers and agreed to split the costs associated with their services.

Electronic trial preparation services

Lastly, the City challenges the denial of all the costs it incurred for using a trial technology services provider, as the district court awarded only the costs incurred during the trial and awarded no costs incurred pretrial. The district court reasoned that the retaxed costs were for "trial preparation services" that were not a taxable cost under NRS 18.005(17). We agree with the City that the district court abused its discretion in this respect.

"Costs for trial preparation may be considered necessary and are awardable." 20 Am. Jur. 2d *Costs* § 37 (2022); *see also Hesterberg v. United States*, 75 F. Supp. 3d 1220, 1227 (N.D. Cal. 2014) (authorizing the recovery of costs for preparing court-ordered trial exhibits). Below, the district court ordered the parties to present all evidence at trial electronically and wholly disallowed the use of paper exhibits. Because of this edict, the parties jointly selected and retained a trial technology services provider to assist them and split the provider's costs. As the district court ordered the parties to present all of their trial exhibits electronically, the parties necessarily had to incur costs for their trial technology services provider to upload and prepare those exhibits before the trial began. Therefore, we conclude that the City demonstrated that the costs for trial preparation were necessarily incurred and the district court abused its discretion in finding otherwise. *See Logan*, 131 Nev. at 267, 350 P.3d at 1144. Accordingly, we reverse the district court's decision to retax the City $1000 for trial preparation services.

CONCLUSION

Because the parties' LOI did not obligate the City to repay NLVI for its costs, the district court properly entered judgment for the City on NLVI's breach-of-contract claims. We also conclude that the district court's written post-judgment order sufficiently discussed the requisite factors when considering the City's request for attorney fees. Finally, the district court properly exercised its discretion to retax the City for those costs it incurred voluntarily, rather than necessarily. However, the City demonstrated that it necessarily incurred its costs for electronic trial preparation services because the district court ordered it to incur such costs. The district court therefore abused its discretion by concluding that the City had not necessarily incurred those costs and retaxing them from the City's costs award. Accordingly, we affirm the judgment in Docket No. 83257, and we affirm in part and reverse in part the district court's order in Docket No. 83617 and remand for further proceedings consistent with this decision.

Parraguirre, J., and Gibbons, Sr. J., concur.