

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 55429

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PERSONHOOD NEVADA, a Ballot Advocacy Group; RICHARD ZISER; OLAF
VANCURA; and KENNETH WILSON, individuals,

Appellants,

vs.

EMMILY BRISTOL; MINDY HSU, Rph., Pharm.D., WILLIAM RAMOS, M.D.,

Respondents.

Appeal from First Judicial District Court Case No. 09 OC 005061B

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Certificate of Compliance

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous nor filed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P 28, which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 26th day of March, 2010.

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INTRODUCTION

Proponents of the "Personhood Nevada Petition" seek to impose sweeping and drastic changes to the Nevada Constitution and countless provisions of state and local laws. However, their Initiative Petition utterly fails to inform voters of the breadth of these changes, much less accurately describe its intended purposes and consequences. The Initiative Petition is thus an impermissible use of the initiative process and, as the district court held, fails to meet the minimum statutory requirements for ensuring that initiative petitions promote informed decisions and the voter's right to engage meaningfully in the initiative process.

On appeal, Proponents' central, and misguided, response to the district court's decision, is that their Initiative is essentially immune from pre-enactment review and that the people of Nevada should be able to decide the "issues" it addresses. But the fundamental problem is that, no matter how much Proponents try to emotionalize this litigation, if the Initiative were to be placed on the ballot, Nevada voters would have no idea what they are actually voting on. This litigation is not about the merits of the issues or goals the Proponents seek to address through the Initiative Petition. It is about whether Personhood Nevada has complied with Nevada law regarding ballot initiatives and, more importantly, whether Nevada voters will have any notice of the consequences of a vote for the proposed constitutional amendment. The district court properly held that the vague, general Initiative Petition did not satisfy these requirements, and it could not be amended or severed to do so.

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STATEMENT OF ISSUES

Did the district court correctly declare that the Personhood Nevada Petition is an invalid initiative petition that cannot be placed on the November 2010 general election ballot based upon its findings that 1) the Initiative fails to comply with the single-subject requirements as set forth in NRS 295.009 and 2) the Description of Effect is misleading and fails to inform voters of the material consequences of enacting the proposed amendment, in violation of NRS 295.009(1)(b)?

STATEMENT OF THE CASE

This matter came before the First Judicial District Court pursuant to a complaint for declaratory and injunctive relief filed by plaintiffs Emmily Bristol, Mindy Hsu R.Ph., Pharm. D., and William Ramos, M.D. (“Plaintiffs” or “Respondents”) against the “Personhood Nevada Initiative” (“Initiative Petition”) and its proponents (“Proponents” or “Appellants”), and against defendant Ross Miller in his official capacity as Nevada Secretary of State. After briefing and a full hearing on the merits, Judge Russell issued an Order on January 21, 2010, setting forth a number of factual and legal findings, and holding that the Initiative Petition violated the single-subject rule pursuant to Nevada Revised Statute NRS 295.009(1)(a). Joint App. 180 (Order). In its Order, the court granted declaratory and injunctive relief to Plaintiffs and ordered the Secretary of State not to place the Initiative on the ballot. Joint App. 181 (Order). This appeal by Proponents followed; Defendant Secretary of State has not filed either a notice of appeal or notice to appear in this case.

1 In its Order, the district court made the following findings based on the
2 parties' briefs, factual affidavits from supporting experts, and factual and legal
3 arguments made at the hearing: (1) The Initiative Petition seeks to change, and, if
4 passed, would impact multiple unrelated provisions of Nevada's Constitution and
5 laws and have "many social implications;" (2) the Initiative Petition's primary
6 purpose cannot be determined from the text of the proposed amendment itself or the
7 Description of Effect but, to the extent it can be discerned at all, it is "excessively
8 general," and "stated in terms that are too general and vague in nature"; (3) the
9 Initiative itself does not give adequate notice to voters of the subject it addresses or
10 the interests likely to be affected, including, for example, that among the intended
11 purposes of the Initiative is to impact abortion and the rights of fertilized eggs,
12 embryos, and fetuses; and (4) the "Initiative's Description of Effect is misleading
13 and fails to inform voters of the material consequences of the Initiative" Joint App.
14 180 (Order). In addition, the district court found that severance could not save the
15 Initiative. *Id.*

17 Based on these findings, the district court held that the Initiative Petition fails
18 to comply with the requirements of NRS 295.009, and is thus "an invalid initiative
19 petition." Joint App. 181 (Order). Based on all of the above findings of fact and
20 law, the January 21, 2010, Order of the district court enjoined the Secretary of State
21 from placing the Initiative on the 2010 general election ballot. On February 11,
22 2010, Proponents filed notice of the instant appeal. Joint App. 182 (Notice of
23 Appeal).
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SUMMARY OF ARGUMENT

The district court properly held that the Initiative Petition violates each of the requirements and core principles of the NRS 295.009 in several respects. First, it fails to satisfy the minimum requirement that an initiative be limited to one primary purpose. The district court found that while the proposed amendment (or the “Initiative”) is only fourteen words on its face, it is “very complex and broad” and “impacts multiple, unrelated provisions of Nevada’s Constitution and laws.” Joint App. 180 (Order). The district court also held that it could not clearly discern a primary and unifying purpose or subject of the Initiative from the language of the Initiative, nor from its Description of Effect. Moreover, it found that to the extent Proponents have variously stated their primary purpose or subject, such statements of the primary purpose either fail to unify or encompass the multiple intended changes and impacts on Nevada law or are excessively general. *Id.* The direct result of these deficiencies is that the proposed Initiative is not functionally related to a single subject and, ultimately, “fails to adequately inform the voters of the State of Nevada of what they are voting on.” *Id.* For each of these reasons, and others explained below, the district court correctly held that the Initiative fails to meet the single subject requirement of NRS 295.009 and is thus invalid.

In addition to concluding that the substance of the Initiative itself is fatally flawed, the district court also found that the “Initiative’s Description of Effect is misleading and fails to inform voters of the material consequences of the Initiative.” Joint App. 180 (Order). Indeed, while intended consequences of the Initiative range

1 from banning abortion to prohibiting the use of certain basic forms of contraception,
2 as the district court found, nowhere is that “described in such [a] way that the
3 average voter can clearly understand” these impacts. Joint App. 172 (Tr. 59:16-23).
4 These findings are supported by substantial record evidence, including affidavits
5 submitted by both parties and Proponents’ own admissions to the district court
6 during argument. The district court also found that given the admittedly “broad
7 effect” of the Initiative, its description could not be corrected in a manner that would
8 bring the Initiative Petition within the requirements of NRS 295.009. Joint App. 174
9 (Tr. 61:5-10).
10

11 Finally, Proponents’ argument that courts are prohibited from considering
12 these statutory requirements, or that in doing so the district court reached a
13 substantive decision on the merits of the Initiative, is completely baseless. To the
14 contrary, in reaching its findings and conclusions, the district court conscientiously
15 avoided any consideration, let alone determination, of the merits of the Initiative,
16 while properly applying the requirements of NRS 295.009 and the standards set
17 forth by this Court. *See* Joint App. 171 (Tr. 58:12-20). Accordingly, this Court
18 should affirm the district court’s findings that the Initiative violates the single
19 subject requirement, that the Description of Effect is misleading and fails to advise
20 voters of material consequences of the Initiative’s passage, and that the Initiative
21 Petition cannot be remedied in a way that would cure its numerous infirmities.
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ARGUMENT

I. Standard of Review.

In a case such as this one, where the decision below rests on mixed findings of law and fact, this Court applies a two-fold standard of review. The district court's conclusions that are based on purely legal issues are reviewed *de novo*. See *Las Vegas Taxpayer Accountability Committee v. City of Las Vegas*, 125 Nev. 17, 208 P.3d 429, 433 (2009). However, the Supreme Court is more deferential to findings of fact. "This court has consistently provided that the district court's findings of fact will not be disturbed on appeal if they are supported by substantial evidence." *Id.*, 208 P.3d at 441 (internal quotation marks omitted); see also *Clark County v. Sun State Properties*, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003).

II. The District Court Correctly Held That The Initiative Violates The Single Subject Requirement.

A proposed initiative complies with the single subject requirement of NRS § 295.009 only if (1) the parts of the initiative are functionally related and germane to each other and the initiative's primary purpose or subject; and (2) the language of the initiative provides sufficient notice of the subjects it addresses and the interests likely to be affected by it. *Nevadans for the Prot. of Property Rights, Inc. v. Heller*, 122 Nev. 894, 906-08, 141 P.3d 1235, 1243-44 (2006). These statutory mandates serve the important purposes of "promoting informed decisions" by voters and "preventing the enactment of unpopular provisions by attaching them to more attractive proposals," *i.e.*, "logrolling." *Las Vegas Taxpayer*, 125 Nev. 17, 208 P.3d

1 at 437 (citing *Nevadans for the Prot. of Property Rights*, 122 Nev. at 905, 141 P.3d
2 at 1242). Moreover, this Court has held that proponents of an initiative cannot make
3 an end run around the single-subject requirement by simply phrasing the primary
4 purpose in an “excessively general fashion.” *Las Vegas Taxpayer*, 125 Nev. 17, 208
5 P.3d at 439.¹ In this case, the district court correctly found that the Initiative
6 violated each of these requirements and principles.

7
8 **A. Neither the Initiative’s Primary Purpose, Nor the Scope of Subjects It
Addresses, Can Be Discerned From the Initiative’s Text.**

9 The determination of whether an initiative’s parts are functionally related and
10 germane to each other *and* whether they are related to the initiative’s primary
11 purpose or subject requires two nearly simultaneous analyses – identifying what
12 parts, or proposed changes, are contained within the Initiative *and* identifying the
13

14 ¹ Citing no authority, Proponents contend that because this Initiative “has a more
15 fundamental purpose . . . [t]he Court . . . when looking at the initiative ‘on its face’,
16 must take into account the dramatically different perspective necessary to be used
17 when applying the NRS 295.009 tests to a Civil Rights issue verses initiatives
18 involving miniscule slices of law.” Appellants’ Opening Brief at 4:15-21.
19 Proponents appear to be requesting that this Court provide a more lenient standard
20 when reviewing the Initiative because of its “fundamental purpose” and,
21 accordingly, overlook a single-subject violation. This Court has never suggested
22 that this would be proper. See *Nevadans for the Prot. of Property Rights*, 122 Nev.
23 at 908, 141 P.3d at 1244 (finding that a provision in an initiative that “was about
24 making property rights *fundamental rights*” did not deal with the primary subject,
nor did it provide sufficient notice of the subject it addressed or the interests likely to
be affected (emphasis added)). Indeed, it would make little sense to turn the single-
subject requirement on its head – which aims to “promote informed decisions” and
prevent voter confusion, *id.* at 905, 141 P.3d at 1242 – where an initiative “of this
magnitude” presents “fundamental questions,” App. Op. Brief at 2:5-7, to the voters.
If anything, the more fundamental the rights at issue, the more important it is for
voters to have complete notice and understanding of the crucial matters involved.

1 unifying primary purpose to which those changes should relate. *Cf. Las Vegas*
2 *Taxpayer*, 125 Nev. 17, 208 P.3d at 439 (setting forth relatedness standard and
3 attempting to first determine the primary purpose).

4 In the instant case, the difficulty in attempting to discern – from the language
5 of the proposed amendment itself – how the Initiative proposes to change Nevada
6 law or the primary purpose underlying those changes reveals an overarching flaw
7 with the Initiative Petition. The Initiative merely states “In the great state of
8 Nevada, the term ‘person’ applies to every human being.” The Initiative does not
9 define the term “human being,” and the terms “person” and “human being” in their
10 commonly understood sense mean essentially the same thing. *See American*
11 *Heritage Dictionary of the English Language* (2009) (defining person as a “living
12 human being”).² Thus, voters have no notice from the Initiative itself that it
13 proposes *any* change, much less the sweeping and drastic changes it would impose.
14 Indeed, Proponents admit as much in arguing that the primary purpose of the
15 Initiative is to “extend the meaning of ‘person’ as used in Nevada’s constitution to
16 include ‘human being’ as explained in the *Description of Effect*.” Appellants’
17 Opening Brief [App. Op. Br] at 1:9-10 (emphasis added).
18

19 _____
20 ² While this Court has never directly addressed this issue, it is surely an improper
21 use of the initiative power – and certainly a waste of the State’s and voters’
22 resources – to propose a constitutional amendment that, if passed, would not
23 substantively change or affect the law. In fact, it is questionable whether such a
24 proposal could even be deemed a constitutional “amendment” – that is, an alteration
or addition – and thus a proper use of the initiative power. *See* NEV. CONST. art. 19,
§ 2 (“[T]he people reserve to themselves the power to propose, by initiative petition,
statutes and amendments to statutes and amendments to this constitution...”).

1 Reliance on the Description of Effect as *the only* way to give operative
2 meaning to the Initiative, or essentially extend or rewrite its scope and application, is
3 improper and will inevitably leave voters confused. A description of effect is meant
4 to summarize the material consequences of what the proposed amendment, if
5 enacted, will do. *Las Vegas Taxpayer*, 125 Nev. 17, 208 P.3d at 441; *see infra* Part
6 III. But it is only required to be provided to voters at the signature-gathering stage,
7 to decide whether to place the initiative on the ballot. *Nevadans for Nevada v.*
8 *Beers*, 122 Nev. 930, 940, 142 P.3d 339, 345-346 (2006); N.R.S. 295.009(b) (“The
9 description must appear on each signature page of the *petition*.”) (emphasis added).
10 Thus, placing the “definition” of the proposed constitutional amendment only in the
11 Description of Effect, a “definition” that is nowhere in the Initiative itself, will not
12 become part of the amended constitutional text, and which is not required to appear
13 on the general election ballot, will create confusion among voters trying to discern
14 how the *Initiative*, if passed, would directly change Nevada law.

16 In short, as Proponents themselves confirm, neither the content nor scope of
17 the proposed changes, nor the primary purpose underlying those proposed changes,
18 can be understood from the Initiative itself. This directly contravenes the
19 requirement of NRS 295.009 that the *Initiative itself* adequately convey the primary
20 subject and interests likely to be affected should the Initiative be enacted. Moreover,
21 if allowed, Proponents’ approach could lead to the creation of virtually blank slate
22 initiatives that necessitate post-enactment judicial interpretations of an initiative’s
23 purpose based on sponsor’s prior statements that were never adequately explained
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1 to, nor intended by, the voters.

2 **B. The District Court Correctly Held That the Initiative, If Enacted, Would**
3 **Change Multiple, Unrelated Provisions of Nevada Laws, That Are Not**
4 **Functionally Related to an Identifiable and Proper Primary Purpose.**

5 Even if Proponents could validly rely on the Description of Effect to
6 essentially rewrite, or complete, the proposed amendment (which they cannot), for
7 the reasons identified by the district court, and explained further below, the Initiative
8 would still violate the single subject rule. This is because each of the primary
9 purposes articulated by Proponents throughout the course of this litigation is either
10 excessively general – which is improper – or otherwise fails to capture and relate the
11 myriad changes proposed, and interests affected, by the Initiative. Most importantly,
12 these failures violate the fundamental principle underpinning the single subject rule:
13 that the voters must have notice of the interests affected by an initiative in order to
14 “protect[] the sanctity of Nevada’s election process.” *See Nevadans for Prot. of*
15 *Prop. Rts*, 122 Nev. at 906, 141 P.3d at 1243.

16 1. The Initiative Proposes Direct Changes to Multiple, Unrelated Provisions
17 of the Nevada Constitution and Laws.

18 As did the district court, this Court must look not just to the literal language
19 of the Initiative, but also at how the Initiative proposes to change existing law in
20 order to identify its parts and subjects, and the interests likely to be affected by it.
21 *See Nevadans for the Protection of Property Rights*, 122 Nev. at 908-09, 141 P.3d at
22 1244-45 (discussing myriad changes wrought by broad initiative).

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1 As noted above, the Initiative on its face proposes to add a new section to the
2 Nevada Constitution that states: "In the great state of Nevada, the term 'person'
3 applies to every human being." The district court found that while this proposed
4 amendment only has one explicit provision, that one provision is "very complex and
5 broad," Joint App. 180 (Order), and actually proposes direct and drastic changes to a
6 wide range of constitutional and statutory laws. This finding was correct for at least
7 three reasons.

8 First, although as explained above, "person" and "human being" are
9 commonly understood to mean the same thing, according to the Proponents the term
10 human being as used in the Initiative is meant to include "everyone possessing a
11 human genome specific for an individual member of the human species, from the
12 beginning of his or her biological development." Joint App. at 2 (Description of
13 Effect). When asked by the district court what this meant in concrete,
14 understandable, terms, Proponents agreed their phrasing is meant to newly extend
15 the meaning of the term "person" in Nevada laws to include fertilized eggs,
16 embryos, and fetuses. Joint App. 154 (Tr. 41:12-24). Second, on its face, the
17 Initiative expresses no limitation to its application and thus proposes to amend the
18 word "person" to include fertilized eggs, embryos, and fetuses throughout the
19 Nevada Constitution. This would apply to each of the many clauses and sections
20 where the words "person," "persons," "people," and presumably "men" and
21 "citizens" as well, appear.
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1 These terms appear in many sections of the Constitution, “including, but not
2 limited to, the constitutional right to life, due process, equal protection, and search
3 and seizure.” Joint App. 180 (Order). Thus, the Initiative, properly understood,
4 proposes a “change” to the meaning of a critical term in the inalienable rights clause,
5 proposes a “change” to the meaning of a critical term in the due process clause,
6 proposes a “change” to the meaning of a critical term in the right against
7 unreasonable search and seizure clause – and so forth. These are all changes
8 proposed by what is on the “face” of the Initiative.³ Third, the text of the Initiative
9 is drafted so broadly – to apply “[i]n the great state of Nevada” – that it would
10 expand the meaning of the term “person” in not only the Constitution, but also
11 countless statutes, rules, and regulations; municipal codes and ordinances; and
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13 ³ For this reason, Proponents’ reliance on *In re Title, Ballot Title and Submission*
14 *Clause, and Summary for 1999-2000 #255*, 4 P.3d 485, 496 (Colo. 2000) is
15 misplaced. See App. Op. Br. at 6-7 (citing case for support of the argument that an
16 initiative which affects multiple laws can still comply with the single-subject rule).
17 In that case, the issue was whether the initiative’s potential unenforceability was a
18 separate subject; and thus did not deal with whether an initiative, as in this case,
19 proposes direct changes to multiple and unrelated laws. *Id.* at 496.

20 Proponents similarly rely on *In re Title, Ballot Title and Submission Clause, and*
21 *Summary for 1999-2000 #227 and #228*, 3 P.3d 1, 4-5 (Colo. 2000). See App. Op.
22 Br. at 11:22-24, but that case is also factually distinguishable and unhelpful to
23 Proponents. The two initiatives at issue in that case proposed to “change the
24 different forms of marriage by adding a requirement that the marriage be between a
man and a woman.” 3 P.3d at 4. As an initial matter, that case supports
Respondents’ argument that one provision can change multiple provision of law.
However, unlike the Initiative at issue in this case, each of three provisions to be
changed by the Colorado marriage initiatives were clearly identified and
unquestionably related to the single subject of marriage. By contrast, the various
provisions of the Constitution and other areas of Nevada law that the Initiative seeks
to change relate to wide-ranging and diverse issues.

1 common law. A cursory search of Nevada's statutes alone reveals that the term
2 "person" appears thousands of times, including in areas of criminal law, tort law,
3 family law, eligibility for government benefits, and even traffic law, to name a few.

4 Thus, while the Initiative at issue in this case may be a single sentence, it is
5 not, as Proponents argue on appeal, a "narrowly tailored" initiative that only reaches
6 "but one topic," App. Op. Br. at 6:3-6, but rather, as they admitted below, one that
7 "is broad," and which is "not focusing on one pet issue . . . not focusing on one
8 item." Joint App. 170 (Tr. 57:5-14). As such, the Initiative operationally
9 incorporates more than, for example, the fourteen "parts" or sections at issue in
10 *Nevadans for the Protection of Property Rights*, 122 Nev. 894, 141 P.3d 1235
11 (2006).

12
13 Proponents do not deny that they are proposing such extensive changes, but
14 instead attempt to portray the proposed changes as "post-passage questions and
15 issues" that should not be considered "at this stage." App. Op. Br. at 7:9-11; *see also*
16 *id.* at 6:19-23 (stating that the district court "erroneously looked at the possible
17 changes or issues the proposed initiative may cause, if enacted") (emphasis in
18 original). Thus, according to Proponents, the district court "failed to confine itself to
19 the 'text of the Initiative on its face'" and wrongly "addressed the merits of the
20 initiative." *Id.* at 6:24-25, 7:11-14. These contentions are without merit. Indeed, in
21 *Nevadans for the Protection of Property Rights*, this Court did not *literally* only look
22 at the words of the initiative when analyzing whether it violated the single subject-
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1 requirement. Rather, the Court examined the language and its potential application
2 to determine the reach of that initiative, and whether all of the changes proposed
3 concerned the primary subject of eminent domain. *Id.*, 122 Nev. at 908-09, 141 P.3d
4 at 1244-45. In particular, the Court found that one provision in the Initiative was
5 “extremely broad,” and although some applications of that provision would relate to
6 eminent domain, “[i]t would also apply to myriad other government actions that do
7 not fall within the most broad definition of eminent domain.” *Id.* at 908, 141 P.3d at
8 1244-45. Similarly, in this case, it is necessary to examine “the one extremely broad
9 provision” in the Initiative and determine whether the “myriad” of changes the
10 Initiative proposes by extending the application of numerous constitutional
11 provisions and other laws to fertilized eggs, embryos, and fetuses, violates the
12 single-subject requirement.

14 Proponents’ assertion that the district court improperly “addressed the merits
15 of the Initiative,” App. Op. Br. at 7:11-14, is similarly groundless. Plaintiffs have
16 not argued in this action that the changes the Initiative proposes are substantively
17 unconstitutional and the district court did not *sua sponte* reach any such issues.⁴ In
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19 ⁴ For this reason, Proponents’ reliance on *Herbst Gaming, Inc. v. Heller*, 122 Nev.
20 877, 141 P.3d 1224 (2006) is misplaced. In *Herbst Gaming*, this Court refused to
21 consider the respondents’ *merits* arguments that, if enacted, the initiative would
22 violate substantive state and federal constitutional rights. *Id.* at 888, 141 P.3d at
23 1231. However, here, Respondents did not and have not raised any substantive
24 merits challenges to the Initiative Petition, and this aspect of *Herbst Gaming* is thus
inapposite. Moreover, *Herbst* confirms the appropriateness of review in the instant
case. In *Herbst*, the Court explicitly recognized the rule that where “the question to
be resolved is whether a proposal has satisfied all constitutional and statutory
requirements for placement on the ballot [c]ourts have routinely addressed the

1 short, Proponents' last ditch arguments regarding the district court's pre-enactment
2 review simply disregard this Court's consistent application of the single-subject test:
3 "objections to a measure's validity based on the statutory provisions governing
4 initiatives, such as the single-subject requirement, are properly considered
5 preelection." *Las Vegas Taxpayer*, 125 Nev. 17, 208 P.3d at 438 (citing *Herbst*
6 *Gaming* in support). The district court appropriately and correctly applied this
7 standard below.

8
9 2. The Primary Purpose is Not Evident from the Initiative Petition and
10 the Various Formulations Provided By Proponents Are Either
11 Excessively General, or Fail to Capture The Multiple Changes
12 Proposed and Interests to be Affected by the Initiative.

13 Looking for a primary purpose that unifies these multiple proposed changes,
14 the district court came up empty-handed. Much like in *Las Vegas Taxpayer*
15 *Accountability Committee*, where this Court found that a measure could not properly
16 be placed on the ballot, it is "difficult to discern the measure's primary purpose in
17 order to evaluate whether its provisions are 'functionally related' or 'germane' to
18 that purpose... ." 125 Nev. 17, 208 P.3d at 439.

19 To determine the Initiative's purpose or subject, the district court followed
20 this Court's instructions to look to the "textual language and the proponents'
21 arguments." *Id.*; see also *Nevadans for the Protection of Property Rights*, 122 Nev.
22 at 907, 141 P.3d at 1243-44. With respect to the text of the Initiative Petition, the
23 district court rightly concluded that "the primary purpose cannot even be determined
24 merits of such a dispute at the preelection stage. *Id.* at 883, 141 P.3d at 1228

1 from the initiative itself or the description of effect.” Joint App. 180 (Order). As
2 stated above, the text of the proposed amendment does not define the term “human
3 being” or otherwise suggest that it is expanding the existing meaning of the term
4 “person.” Only by looking at the Description of Effect can one begin to guess what
5 the content and primary purpose of the Initiative might be; but even the Description
6 of Effect falls short. While it mentions, among other statements, that the Initiative
7 “guarantee[s]” the protections of the due process clause and potentially the
8 inalienable rights clause of the Nevada Constitution to “every human being,” as
9 defined in the Description of Effect, the text of the proposed Initiative does not limit
10 its application to the due process clause or the inalienable rights clause.⁵ Rather, the
11 Initiative proposes changes to innumerable other provisions of the Nevada
12 Constitution and laws that are not encompassed by such a purpose. *See supra* Part
13 II.B.1.
14

15 Turning to Proponents’ articulations of their primary purpose or subject in
16 this litigation, like in *Nevadans for the Protection of Property Rights*, “proponents’
17 attorneys have not been entirely consistent.” 122 Nev. at 907, 141 P.3d at 1243.
18 Proponents have stated several primary purposes or subjects, both publicly and
19 throughout this litigation, all of which either run afoul of the prohibition on
20

21 (emphasis added).

22 ⁵ Indeed, Proponents have stated that the Initiative is “broad,” Joint App. 151 (Tr.
23 38:24-25); and “absolutely agree” that it has “extremely complex implications”
24 throughout Nevada’s laws, *id.* at 165 (Tr. 52:5-16), and have never made clear –
certainly not to the voters – that the Initiative is limited to any particular provisions.

1 excessively general subjects; or fail to capture the multiple and wide-ranging
2 changes that the Initiative proposes.

3 For example, at various times Proponents have formulated the Initiative's
4 primary purpose as having "only one subject, i.e., extending the meaning of 'person'
5 to include every 'human being.'" App Op. Br. at 1:9-11; *see also* Joint App. 148
6 (Tr. 35:2-4) ("the primary purpose of this initiative is exactly what it says, so that a
7 person equals a human being"). Other times, Proponents have characterized the
8 single "purpose" as "broader civil rights to protect human beings at all stages of
9 development." Joint App. 150 (Tr. 37:7-9); *see also* App. Op. Br. at 1-4 (explaining
10 this is primarily a "civil rights" initiative intended to "correct current wrongs and
11 prevent future wrongs"). The district court rejected these varying, but consistently
12 expansive, formulations of the primary purpose as "too general and vague in nature,"
13 Joint App. 180 (Order), and thus in violation of the prohibition on excessive
14 generality. This Court's decision in *Las Vegas Taxpayer Accountability Committee*
15 confirms the correctness of that conclusion.

17 In *Las Vegas Taxpayer*, this Court made clear that "an initiative proponent
18 may not circumvent the single-subject rule by phrasing the proposed law's purpose
19 in terms of 'excessive generality.'" 125 Nev. 17, 208 P.3d 429, 439. In that case,
20 this Court held that a primary purpose of "voter approval" of various aspects of city
21 redevelopment plans was an excessively general subject that could not qualify as a
22 single subject for the purposes of NRS 295.009. *Id.*, 208 P.3d at 440. If voter
23 approval of various aspects of city redevelopment is too general to satisfy the
24

1 requirements of Nevada law, surely the protection of civil rights for all human
2 beings or the redefinition of the term person for the purposes of all Nevada laws
3 including criminal law, tort law, family law, government benefits law, and traffic
4 law, as well as innumerable constitutional provisions can fare no better.

5 Nor does the different phrasing Proponents emphasize on appeal resolve the
6 problem of identifying a valid primary purpose. Without abandoning the broad
7 “definition change” and “civil rights” frameworks, Proponents additionally insist
8 that the single purpose of the Initiative is **“to extend the meaning of ‘person’ in the**
9 **Nevada Constitution to guarantee the right of life, liberty, and property to**
10 **every human being from the beginning of life.”** App. Op. Br. at 6:12-15
11 (emphasis in original). But like the Description of Effect language, which this
12 phrasing echoes, this formulation does not fully capture or express key changes the
13 Initiative proposes. As explained above, and as the district court found, Joint App.
14 180 (Order), the Initiative proposes to make changes to various constitutional
15 provisions and other laws – many of which are not functionally related or germane
16 to this newly articulated purpose.

17
18 Unable to identify one primary purpose or subject that truly encompasses all
19 the multiple, unrelated changes the Initiative proposes, while not violating the
20 prohibition on excessive generality, Proponents resort to arguing that Plaintiffs seek
21 to stifle their First Amendment rights. See App. Op. Br. at 10:24-11:10. But this
22 Court has already rejected the argument that the prohibition on addressing multiple
23 subjects in one initiative violates the First Amendment. *Nevadans for the Protection*
24

1 of *Property Rights*, 122 Nev. at 906, 141 P.3d at 1243. Proponents of an initiative
2 are free to address multiple subjects; the single-subject rule “simply requires
3 [proponents] to address separate subjects in separate petitions.” 122 Nev. at 905,
4 141 P.3d at 1243.

5 3. The Initiative Does Not Provide Voters with Any, Let Alone Sufficient,
6 Notice of The Proposed Changes Or The Interests Likely To Be Affected.

7 Regardless of how the Proponents attempt to frame the primary subject or
8 purpose of the Initiative, the Initiative fails horribly at giving voters notice of the
9 multiple and unrelated changes proposed by the Initiative, or the interests likely to
10 be affected. In *Nevadans for the Protection of Property Rights*, the Court struck
11 down a provision as violating the single-subject requirement because in addition to
12 the fact that the provision embraced multiple subjects that were not “functionally
13 related” or “germane” to the primary subject, the text of the initiative “clearly
14 fail[ed] to provide sufficient notice of the wide array of subjects addressed in [it] or
15 the interests likely to be affected by it.” 122 Nev. at 909, 141 P.3d at 1245.
16

17 The same is true here: The Initiative does not provide any – much less
18 sufficient – notice of the subjects it addresses or the interests likely to be affected by
19 it. Although Proponents like to point to the brevity of the text, here brevity is not a
20 virtue. All the Initiative states is that “In the great state of Nevada, the term ‘person’
21 applies to every human being.” It provides no explanation of what it means by the
22 term human being, a flaw that is particularly problematic given that the commonly
23 understood meaning of the two terms is essentially identical. Thus, voters have no
24

1 notice from the single-phrase Initiative that it proposes *any* change, much less the
2 sweeping and drastic changes that redefining person to include fertilized eggs,
3 embryos, and fetuses would have.

4 For example, Proponents have stated on numerous occasions that one of the
5 interests to be affected by the Initiative is the right to abortion. *See* Joint App. 150
6 (Tr. 37:12-13) (admitting that “[t]he implications on abortion are plain as the nose
7 on my face. It’s patently obvious that that’s – that is one of the stated intentions...
8 .”); App. Op. Br. at 3:10-13 (stating that the legal distinction between person and
9 human being “allows Respondents to carry out their work in the abortion industry”).
10 The Proponents also admit that the Initiative reaches far more than the prohibition of
11 abortion, including for example, contraception. *See* Joint App. 164 (Tr. 51:16-20)
12 (“I’m not going to lie to you and say that it’s not about abortion but it’s not just
13 about abortion. This is about much bigger issues, and we don’t intend to have this
14 initiative tethered to the issue of abortion.”); *see also* Joint App. at 157 (Tr. 44:18-
15 23) (acknowledging that the Initiative is intended to implicate access to “some
16 methods” of contraception). But, as the district court properly held, voters would
17 have no notice that these interests are likely, *and intended* to be affected, from
18 reading “the fourteen words of the Initiative,” or the Description of Effect, for that
19 matter. *See* Joint App. 180 (Order).
20

21 Nevada “has a number of important interests in the single-subject rule . . .
22 including preventing the public from being confronted with confusing or misleading
23 petitions and preventing proposals that would not otherwise become law from being
24

1 passed solely because they are attached to more popular measures.” *Nevadans for*
2 *the Prot. of Property Rights*, 122 Nev. at 906, 141 P.3d at 1243. Certainly,
3 preventing voter confusion and logrolling of major issues is no less important where,
4 as here, an initiative is crafted in deceptively simple language.

5 The district court properly held that the Initiative violates the single subject
6 rule and utterly fails to provide notice of the interests it is likely to affect. This
7 ruling was not only correct as a matter of law, but also vindicated the voters’
8 absolute right to meaningfully participate in the initiative process. This Court
9 should affirm the district court’s ruling that the Initiative fails the single subject
10 requirement and falls afoul of the principle of informed voter participation.
11

12 **III. The District Court Correctly Found That The Description of Effect**
13 **Violates NRS 295.009(1)(b) Because it is Misleading and Fails to**
14 **Adequately Inform Voters of the Initiative’s Material Consequences if**
15 **Enacted.**

16 This Court should affirm the district court’s findings that the Description of
17 Effect is misleading, fails to advise voters of material consequences of the
18 Initiative’s passage, and cannot be remedied in a way that would cure the underlying
19 Initiative Petition. The factual underpinnings of these findings are substantially
20 supported by the record below, and the legal analysis and conclusions are correct
21 under this Court’s clear precedent.

22 “Because under NRS 295.009(1)(b), the description of effect is a statutory
23 requirement for placement on the ballot, it is ‘virtually always ripe for preelection
24 review.’” *Las Vegas Taxpayer*, 125 Nev. 17, 208 P.3d at 440 (*quoting Herbst*

1 *Gaming*, 122 Nev. at 883, 141 P.3d at 1228). This Court has held that the
2 description of effect “facilitate[s] the people’s right to meaningfully engage in the
3 initiative process.” *Nevadans for Nev. v. Beers*, 122 Nev. 930, 940, 142 P.3d 339,
4 345 (2006).

5 Recently, in *Las Vegas Taxpayer*, this Court succinctly reiterated the standard
6 for determining whether a description of effect complies with the requirements and
7 underlying purposes of NRS 295.009(1)(b). At a minimum, a valid description of
8 effect cannot be “materially misleading” and it must be “straightforward, succinct,
9 and nonargumentative.” *Las Vegas Taxpayer*, 125 Nev. 17, 208 P.3d at 441 (citing
10 *Herbst Gaming*, 122 Nev. at 889, 141 P.3d at 1232). Importantly, a description of
11 effect that “materially fails to accurately identify the consequences of the
12 referendum’s passage” is misleading. *Id.* (holding petition to repeal an existing city
13 ordinance was “materially misleading because . . . it failed to inform the voters” of
14 the full range of consequences of such repeal); *see also Nev. Judges Ass’n v. Lau*,
15 112 Nev. 51, 59, 910 P.2d 898, 903 (1996) (holding ballot summary’s “failure to
16 explain the[] ramifications” of the proposed amendment’s impact on the judiciary
17 rendered it “potentially misleading”).⁶ Finally, under this standard, a district court’s
18 findings of fact with respect to the description of effect “will not be disturbed on
19 appeal if they are supported by substantial evidence.” *Las Vegas Taxpayer*, 208
20
21

22 ⁶ This Court’s recognition that initiative descriptions can be misleading by virtue of
23 omission is consistent with the decisions of the highest courts in other states as well.
24 *See, e.g., Askew v. Firestone*, 421 So.2d 151, 156 (Fla. 1982) (noting the problem

1 P.3d at 441 (internal quotations omitted).

2 **A. Substantial Record Evidence Establishes That the Description of Effect**
3 **Is Misleading and Does Not Advise Voters of the Initiative’s Material**
4 **Consequences.**

5 Applying the above standard, and after considering the record evidence,
6 including admissions by Proponents at extensive oral argument, the district court
7 made several key findings related to the inadequacies of the Description of Effect.
8 Specifically, the district court found that while the Initiative was admittedly intended
9 to have an impact on, *inter alia*, the legal status of abortion, fertilized eggs, and
10 embryos, the Description of Effect does not describe these consequences in “such a
11 way that the average voter can clearly understand what the impact would be.” Joint
12 App. 172-73 (Tr. 59:16 to 60:9). Additionally, the district court found that while the
13 Initiative would have an impact on “significant other areas of the law,” including
14 due process, equal protection, and criminal laws, the Description of Effect
15 misleadingly fails to accurately advise voters of the breadth and impact of such
16 expansive changes to Nevada law. Joint App. 172-74 (Tr. 59:24 to 61:21). For each
17 of these reasons, and others discussed more fully below, the district court rightly
18 found that the deficiencies inherent in the Description of Effect render it invalid and
19 incurable.

20 First, the Description of Effect does not explain, in a straightforward manner
21 that voters will readily understand, what changes are intended by specifying that a
22
23 with misleading or incomplete descriptions often “lies not with what the summary
24 says, but, rather, with what it does not say”).

1 "human being" falls within the meaning of "person." The Description of Effect
2 describes "human being" to include "everyone possessing a human genome specific
3 for an individual member of the human species, from the beginning of his or her
4 biological development," and discusses the need to protect "human beings," –
5 ranging from the unborn, to the elderly, to the infirm – from discriminatory
6 treatment. Joint App. 2 (Description of Effect). When asked at oral argument,
7 Proponents did not hesitate to confirm that the Initiative intends for a constitutional
8 person, or "human being," to be recognized from the "moment of fertilization." Joint
9 App. 150 (Tr. 37:16-20). Yet, as the district court properly found, the Description of
10 Effect fails to straightforwardly convey this to voters.
11

12 Proponents cannot overcome this plain deficiency with the argument (made
13 unsuccessfully below as well) that referencing fertilized eggs and fetuses would be
14 more confusing and likewise require an endless list specifying that "infants, toddlers,
15 children, pre-puberty, post-puberty, pre-adolescents, adolescents, teenagers, adults,
16 and seniors" are also human beings. App. Op. Br. at 15:8-10. Such rhetoric is not
17 only hyperbolic, it is disingenuous. There is no doubt that all of these groups of
18 persons – from infants to the very elderly – are already included within the
19 constitutional meaning of "person." In contrast, as Proponents point out, a
20 constitutional "person" does not include pre-natal stages of human development.
21 App. Op. Br. at 14:24-27; Joint App. 153 (Tr. 40:1-5).
22

23 Thus, the Initiative seeks to put fertilized eggs and fetuses on equal footing
24 with constitutionally protected persons, which already include children and the

1 elderly. Those are the proposed *changes* to existing law that voters are entitled to
2 know about. Furthermore it is affirmatively misleading to fail to specify that
3 “human being” is meant to encompass fertilized eggs, embryos and fetuses, while
4 instead referencing discrimination against the elderly and disabled, and other
5 persons who are already recognized as constitutionally protected persons. Indeed,
6 the Description of Effect creates a real risk that some voters concerned about the
7 rights of the elderly or disabled may be misled into supporting the Initiative because,
8 for example, they are concerned about end of life decisions, without understanding
9 that the Initiative would have no direct impact on that subject. *See* Joint App. 1
10 (Description of Effect stating the Initiative will “prohibit state intrusion in end of life
11 decisions”); *id.* at 161 (Tr. 48:4-49:14) (acknowledging the Initiative would not
12 change current law regarding the elderly or disabled, but arguing the Initiative is
13 intended to “anticipate” possible future laws that would authorize “mercy” killings
14 of infirm people).⁷

16 Second, the trial court correctly found that the Description of Effect fails to
17 advise voters of the Initiative’s intended purpose and material consequences for a
18 range of legal reproductive health services. *See* Joint App. 172 (Tr. 59:16-23), *id.* at
19

20 ⁷ Also, Proponents now claim that referring to fertilized eggs, embryos or fetuses
21 would be inaccurate and “politically charged.” App. Op. Br. at 15:4-7. But
22 Proponents’ own supporting affidavits recognize that these, and related, terms are
23 regularly used within the relevant medical community and leading professional
24 associations. *See, e.g.,* Joint App. 43, 47-48 (Irving Aff.) (quoting embryology text
referencing “fertilized egg” and “embryo” and referencing similar terminology used
by professional associations); *see also* Joint App. 3-14 (Contomitros Aff. in Support
of Plaintiffs).

1 180 (Order). Proponents attempt to dismiss this finding by nonsensically, and
2 erroneously, arguing that a description of effect cannot address post-enactment
3 consequences. But they never dispute that, if passed, the Initiative would impact
4 legally and constitutional protected reproductive health services ranging from
5 abortion to contraception to fertility treatments. Indeed, at oral argument, they
6 readily affirmed that the Initiative intends such consequences. *See, e.g.*, Joint App.
7 150 (Tr. 37:11-15) (“The description of effect says we’re trying to protect the
8 unborn. The implications on abortion are plain as the nose on my face.”); *id.* at 157
9 (Tr. 44:21-23) (stating “any sort of contraceptive device that would prevent the
10 implantation of a fertilized egg would of course be something that may be
11 implicated as a result of this initiative.”); *see also id.* at 45-47 (Irving Aff.) (arguing
12 reproductive technologies and embryonic research violate legal rights of “single-cell
13 human embryo,” which is a human being from moment of fertilization). Beyond
14 failing to directly acknowledge the intended restrictive impact on existing rights to
15 reproductive health care, the description affirmatively states that the Initiative would
16 “benefit[] all Nevadans by guaranteeing” rights of life, liberty and equality. In this
17 way, the Description of Effect misleadingly implies that the Initiative would only
18 create, not restrict, rights. A Description of Effect that will create such a
19 misperception among voters directly contravenes the purpose of NRS 295.009(1)(b).
20

21
22 Third, the Description of Effect is also misleading because it fails to give the
23 voters notice that the Initiative, if enacted, would directly amend multiple provisions
24 of the Nevada Constitution and implicate many areas of Nevada law. Once again,

1 Proponents do not dispute these material consequences, but insist the Description of
2 Effect need not address such “post-election future changes or ramifications.” App.
3 Op. Br. at 17:11-14. Thus, while Proponents readily and emphatically confirmed to
4 the district court, the “broad” and “complex implications” the Initiative would have
5 throughout the Nevada Constitution and laws, *see* Joint App. 151-52 (Tr. 38:24-
6 39:13); *id.* at 165 (Tr. 52:5-16), this is not conveyed in the Description of Effect.
7 The Description of Effect references only a subset of constitutional protections – the
8 rights to “life, liberty, and property” – that would be affected by the Initiative, and
9 makes absolutely no mention of the implications for Nevada’s statutory and
10 regulatory provisions. *See* Joint App. 2. Nevada voters are entitled to the very same
11 candor regarding the Initiative’s broad scope that was provided to the district court.
12 However, the Description of Effect completely fails to provide that.
13

14 **B. The District Court Correctly Concluded That the Description of Effect**
15 **Did Not Satisfy the Requirements of NRS 295.009 and Could Not Be**
16 **Cured So As to Save the Initiative Petition.**

17 Proponents’ primary justification for omitting all of the above material
18 consequences is that they will not be felt or fully settled until after enactment. In
19 short, Proponents argue that the description of effect standard requires no more than
20 “addressing the language of the initiative – not post enactment issues.” App. Op. Br.
21 at 13:12-15. By this logic, Proponents should give *no* explanation of effects or
22 consequences and essentially just restate the Initiative’s text and purpose. This
23 would render NRS 295.009(1)(b) meaningless, and is simply wrong as a matter of
24 law. As discussed *supra*, this Court has clearly held that the description of effect

1 *must* apprise voters of major post-enactment consequences, and a description of
2 effect that “materially fails to accurately identify the *consequences of the*
3 *referendum's passage*” is misleading. *Las Vegas Taxpayer*, 125 Nev. 17, 208 P.3d at
4 441 (emphasis added). Thus, the district court properly rejected Proponents’
5 arguments and found that the Description of Effect does not, as it must, adequately
6 inform voters of the true impact of the Initiative’s passage. Joint App. at 180
7 (Order). Indeed, as this Court has cautioned, “the importance of the description of
8 effect [must not be ignored, as]... this descriptive language is what appears directly
9 above the signature lines, as registered voters decide the threshold issue of whether
10 they even want the initiative placed on the ballot.” *Beers*, 122 Nev. at 940, 142 P.3d
11 at 346.

12
13 Ultimately, as the district court held, and Proponents agree, passage of the
14 Initiative would carry extremely broad and complex changes and consequences for
15 Nevada law. For this reason, the district court rightly held that no change or
16 addition to the Description of Effect could bring the Initiative into line with statutory
17 requirements for an initiative petition or prevent confusion among voters. *See* Joint
18 App. 174 (Tr. 61:5-10); *id.* at 180 (Order). Moreover, even if an Initiative this
19 complex in scope and application could be sustained, the district court correctly
20 concluded, from the record evidence, that fatal flaws in the Description of Effect
21 could not be adequately cured. In order to overcome all the foregoing deficiencies,
22 at the very least, a permissible description would straightforwardly explain that
23 passage of the Initiative is intended to create new constitutional protections for
24

1 fertilized eggs, embryos, and fetuses; create a conflict with the existing right to
2 access legal reproductive health services, including abortion, birth control, and
3 fertility treatments; and would have the consequences of changing numerous
4 provisions of the Nevada Constitution and laws. In addition, it could not include the
5 misleading and prejudicial claims about creating new rights for already protected
6 persons such as the elderly and infirm. However, on appeal, as below, Proponents
7 have made clear their refusal to accept such key changes to the description. *See*,
8 *e.g.*, App. Op. Br. at 17:16-18:8 (objecting to rewriting or including references to
9 “fertilized eggs, embryos, and fetuses”); Joint App. 164-65 (Tr. 51:16-52:4)
10 (objecting to referencing abortion); *id.* at 169-70 (Tr. 56:20-57:14) (arguing any
11 “200 word description other than the one we provided” could not convey its
12 purpose).

13
14 Therefore, as in *Las Vegas Taxpayer*, this Court should hold that Respondents
15 “have demonstrated that the proposed initiative violates the single-subject
16 requirement” and that the “description of effect is misleading.” 125 Nev. 17, 208
17 P.3d at 442. Thus, as in that case, the district court “properly concluded that the
18 measure[is] invalid” and should be affirmed. *Id.*


19 CONCLUSION

20
21 For all the foregoing reasons, the district court correctly determined the
22 Initiative Petition could not be cured to satisfy NRS 295.009, and thus enjoined the
23 Secretary of State from placing the Initiative on the 2010 general election ballot.
24 That decision is supported by substantial record evidence and this Court’s precedent

1 regarding the statutory requirements for a valid ballot initiative. Accordingly, this
2 Court should affirm the decision below.

3 DATED this 26th day of March, 2010.

4 KAEMPFER CROWELL RENSHAW
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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRAP 25(b), I certify that I am an employee of KAEMPFER
3 CROWELL RENSHAW GRONAUER & FIORENTINO, and that on the 26th day
4 of March, 2010, I deposited the foregoing **Respondents' Answering Brief** for first
5 class mailing, a true and correct copy of the attached document addressed as follows:

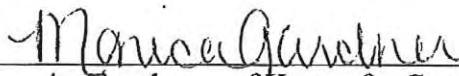
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18 I also faxed a true and correct copy on the 26th day of March, 2010, to
19 Counsel for Appellants pursuant to this Court's expedited service Order as follows:

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