

1 **PTOB**
2 CHRISTOPHER M. PETERSON, ESQ. (13932)
3 SADMIRA RAMIC, ESQ. (15984)
4 **AMERICAN CIVIL LIBERTIES**
5 **UNION OF NEVADA**
6 4362 W. Cheyenne Ave.
7 North Las Vegas, NV 89032
8 Telephone: (702) 366-1226
9 Facsimile: (702) 830-9205
10 Emails: peterson@aclunv.org
11 ramic@aclunv.org

12 *Attorneys for Petitioner*

13 *Additional counsel on next page.*

14 **EIGHTH JUDICIAL DISTRICT COURT**
15 **CLARK COUNTY, NEVADA**

16 SILVER STATE HOPE FUND, a domestic
17 nonprofit corporation,

18 Petitioner,

19 vs.

20 STATE OF NEVADA ex rel. DEPARTMENT OF
21 HEALTH AND HUMAN SERVICES, DIVISION
22 OF HEALTH CARE FINANCING AND POLICY,
23 a public entity of the State of Nevada,

24 Respondent.

Case No.: A-23-876702-W

Department: 13

**Opening Brief in Support of
Petition for Writ of Mandamus**

Hearing requested

1 REBECCA CHAN*
2 CHELSEA TEJADA*
3 ZORAIMA PELAEZ*
4 BRIGITTE AMIRI*
5 MING-QI CHU*
6 American Civil Liberties Union
7 125 Broad Street, 18th Floor
8 New York, NY 10004
9 Telephone: (212) 549-2633
10 Emails: rebeccac@aclu.org
11 ctejada@aclu.org
12 zpelaez@aclu.org
13 bamiri@aclu.org
14 mchu@aclu.org

15 *Attorneys for Petitioner*

16 *Application for *pro hac vice* forthcoming

1 Petitioner, Silver State Hope Fund, hereby submits this Opening Brief in Support of its
2 Petition for Writ of Mandamus directing the Nevada Division of Health Care Financing and Policy
3 to remove the prohibition on Medicaid coverage for abortion from the Medicaid Services Manual,
4 order that abortion care is eligible for reimbursement under the Nevada Medicaid program, and
5 award Plaintiffs reasonable costs and attorneys’ fees pursuant to NRS 34.270. This brief is
6 supported by the attached memorandum of points and authorities, any attached exhibits, and the
7 pleadings and papers filed with this Court.

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 In 2022, just months after the U.S. Supreme Court overturned *Roe v. Wade*, a resounding
10 majority of Nevadans voted to adopt the Equal Rights Amendment (“ERA”), a sweeping
11 constitutional measure that provides: “Equality of rights under the law shall not be denied or
12 abridged by this State or any of its political subdivisions on account of race, color, creed, sex,
13 sexual orientation, gender identity or expression, age, disability, ancestry or national origin.” Nev.
14 Const. art. I § 24. In so doing, Nevadans reaffirmed their “enduring commitment to equality for
15 everyone,” and sought to “advance equality for all by filling the gaps in existing protections” in
16 state and federal law. Nev. Statewide Ballot Questions 2022, at 7.¹

17 This lawsuit seeks to close one glaring gap in Nevada’s guarantee of equality: the
18 prohibition on abortion coverage in the Nevada Medicaid program (“coverage ban”). The
19 Medicaid program is administered by the Division of Health Care Financing and Policy
20 (“Division”) within the Nevada Department of Health and Human Services “to assist in providing
21 quality medical care for eligible individuals and families with low incomes and limited
22

23
24 ¹ Available at
<https://www.nvsos.gov/sos/home/showpublisheddocument/10970/637992808153270000>.

1 resources.”² The Division’s stated mission is to, *inter alia*, “promote equal access to health care,”³
2 yet Nevada’s Medicaid plan explicitly denies coverage for abortion for some of the most
3 marginalized Nevadans who receive health care coverage through the Medicaid program.

4 Where the Division has turned its back on the people it serves, Nevadans have stepped up.
5 Plaintiff Silver State Hope Fund (“Silver State”) is a Nevada nonprofit organization that offers
6 grants to people with the fewest resources to pay for their abortions, and to pay for their travel,
7 lodging, and childcare to ensure that they can attend their abortion appointments. Silver State is
8 dedicated to ensuring that every person has access to the future of their choice and strives to
9 provide dignified access to abortion through equitable funding. The majority of Silver State’s
10 clients meet the income threshold for Medicaid yet are unable to obtain coverage for the cost of
11 their abortion due to the coverage ban. Demand for assistance far outstrips Silver State’s resources,
12 and Silver State is unable to fully fund all who come to them for help. The coverage ban
13 particularly burdens Silver State clients who are people of color, poor and low-income people,
14 young people, people with disabilities, and/or LGBTQ people, as these communities already face
15 especially high barriers to accessing health care, including abortion.

16 In addition to inflicting needless cruelty on already marginalized Nevadans, the abortion
17 coverage ban violates the Nevada Constitution. The exclusion of abortion coverage is not
18 authorized, much less required, by the Nevada Medicaid statute or any other Nevada law, and flies
19 in the face not only of the stated goals of the program but also the newly adopted ERA. The
20 coverage ban violates the ERA’s clear mandate by denying coverage for abortion—sex-linked and
21 pregnancy-related medical care—while imposing no such carve-outs on medical care specific to
22

23 ² *About Us*, Nev. Dep’t of Health & Hum. Servs. Div. of Health Care Fin. & Pol’y,
<https://dhcfp.nv.gov/About/Home/> (last visited Aug. 24, 2023).

24 ³ *Id.*

1 people who cannot become pregnant. In so doing, it creates and reinforces inequalities on account
2 of capacity for pregnancy, further entrenching sex inequality. Moreover, by engaging in such
3 discrimination through a public funding program, Nevada further disenfranchises its most
4 marginalized residents. Striking the coverage ban is required under the ERA and would bring
5 Nevada’s Medicaid program in line with the State’s commitments to reproductive freedom and
6 equality.

7 Additionally, by striking the coverage ban, Nevada would join a growing number of states
8 that provide equal access to medical care for their residents who are enrolled in Medicaid. Today,
9 seventeen states, including two of Nevada’s neighbors,⁴ cover abortion in their state Medicaid
10 programs.⁵ Twelve of these states cover abortion because their courts have found abortion
11 coverage bans unconstitutional under their state constitutions:⁶ State courts in “the majority of
12 jurisdictions that have considered” similar coverage bans “have concluded that, under their state
13 constitutions, government health care programs that fund other medically necessary procedures
14 may not deny assistance to eligible women” for abortion. *Planned Parenthood of Alaska*, 28 P.3d
15

16 ⁴ California and Oregon each cover abortion under their state Medicaid programs. *See* Or. Rev.
17 Stat. § 743A.067; *Comm. to Def. Reprod. Rts. v. Myers*, 625 P.2d 779 (Cal. 1981).

18 ⁵ *State Funding of Abortions Under Medicaid*, Kaiser Fam. Found. (June 1, 2023),
19 <https://www.kff.org/medicaid/state-indicator/abortion-under-medicicaid/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>.

20 ⁶ *See Dep’t of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska
21 2001); *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28 (Ariz. 2002); *Myers*,
22 625 P.2d 779; *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986); *Doe v. Wright*, No. 91 CH
23 1958 (Ill. Cir. Ct. Dec. 2, 1994); *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 (Ind.
24 2003); *Moe v. Sec’y of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981); *Women of Minn. v. Gomez*,
542 N.W.2d 17 (Minn. 1995); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982); *N.M. Right
to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998); *Doe v. Celani*, No. S81-84CnC (Vt.
Super. Ct. May 26, 1986); *Women’s Health Ctr. of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658,
(W. Va. 1993).

1 at 905. Two states, New Mexico and Connecticut, have explicitly relied on their state ERAs in
2 making this determination. *See N.M. Right to Choose*, 975 P.2d at 859; *Maier*, 515 A.2d at 160–
3 62.

4 Nevada’s equal rights guarantee, “widely considered the most comprehensive state . . .
5 Equal Rights Amendment in the nation,”⁷ demands nothing less. This Court should issue a writ of
6 mandamus directing the Division to remove the abortion coverage ban from the Medicaid Services
7 Manual (“Manual”) and order that abortion care is eligible for reimbursement under the Nevada
8 Medicaid program.

9 **I. STATEMENT OF FACTS**

10 **A. Nevada Medicaid**

11 Medicaid is a public health insurance program designed for people with low incomes. Each
12 participating state administers its own Medicaid plan within broad federal requirements, and
13 finances it jointly with the federal government.⁸ Nevada’s state program is known as Nevada
14 Medicaid and is administered by the Division of Health Care Financing and Policy within the
15 Nevada Department of Health and Human Services.⁹ The Division “works in partnership with the
16 [federal] Centers for Medicare & Medicaid Services to assist in providing quality medical care for
17
18

19 _____
20 ⁷ *Silver State Passes Sweeping Version of Equal Rights Amendment*, 2news.com (Nov. 10, 2022),
21 [https://www.2news.com/news/campaign/silver-state-passes-sweeping-version-of-equal-rights-
amendment/article_0d74aafe-6148-11ed-aad3-d727d3faaeec.html](https://www.2news.com/news/campaign/silver-state-passes-sweeping-version-of-equal-rights-amendment/article_0d74aafe-6148-11ed-aad3-d727d3faaeec.html).

22 ⁸ *See Nevada Medicaid Fact Book*, Nev. Dep’t of Health & Hum. Servs. Div. of Health Care Fin.
& Pol’y, at 1,
23 [https://dhcfnv.gov/uploadedFiles/dhcfpnavgov/content/Resources/Medicaid%20and%20Nevada
%20check%20Up%20Fact%20Book1.pdf](https://dhcfnv.gov/uploadedFiles/dhcfpnavgov/content/Resources/Medicaid%20and%20Nevada%20check%20Up%20Fact%20Book1.pdf) (last visited Aug. 24, 2023).

24 ⁹ NRS Chapter 422.

1 eligible individuals and families with low incomes and limited resources.”¹⁰ The Division states
2 that its mission is to, *inter alia*, “promote equal access to health care” for Nevadans.¹¹

3 Households with annual incomes of up to 138% of the federal poverty level (FPL) qualify
4 for coverage under the state Medicaid program.¹² Currently, this means that an individual with an
5 annual income at or below \$16,753 would qualify, as would a family of four making up to
6 \$34,638.¹³ As of June 2023, there were 895,847 Nevadans enrolled in the state’s Medicaid
7 program, accounting for approximately 21% of the state population.¹⁴ The program covers 1 in 6
8 adults (ages 19–64), 3 in 8 children, and 3 in 10 people with disabilities in the state.¹⁵ In addition,
9 of non-elderly Medicaid enrollees in Nevada, 66% are working adults and 71% are people of
10 color.¹⁶

11 Nevada Medicaid provides a broad array of health care coverage, including covering
12 “reasonable and medically necessary” medical services,¹⁷ such as preventive health services,

13
14 ¹⁰ *About Us*, Nev. Dep’t of Health & Hum. Servs. Div. of Health Care Fin. & Pol’y,
<https://dhcfnv.gov/About/Home/> (last visited Aug. 24, 2023).

15 ¹¹ *Id.* See also NRS 422.061 (naming one of the purposes of the Division as “promot[ing] access
16 to quality health care for all residents of” Nevada).

17 ¹² *Medicaid Information*, Nev. Health Link, [https://www.nevadahealthlink.com/medicaid-](https://www.nevadahealthlink.com/medicaid-information/)
18 [information/](https://www.nevadahealthlink.com/medicaid-information/) (last visited Aug. 24, 2023). As of June 2023, 32% of Nevadans were considered
low-income, meaning their income is less than 200% FPL. *Nevada Medicaid Fact Sheet*, Kaiser
Fam. Found., at 1 (June 2023), <https://files.kff.org/attachment/fact-sheet-medicaid-state-NV>.

19 ¹³ *Medicaid Information*, *supra* note 12.

20 ¹⁴ *Nevada Medicaid Fact Sheet*, *supra* note 12, at 1.

21 ¹⁵ *Id.*

22 ¹⁶ *Id.*

23 ¹⁷ Medicaid Servs. Manual 2023 (“Manual”) § 603.1A (“Nevada Medicaid reimburses for
24 covered medical services that are reasonable and medically necessary, ordered or performed by a
... licensed health care provider ..., and that are within the scope of practice of their license as

1 inpatient and outpatient care, emergency care, and family planning services,¹⁸ as well as a variety
2 of mental health services, prescription drugs, and dental, vision, and hearing care, among other
3 services.¹⁹ The plan’s reproductive health care coverage is wide-ranging: It covers family planning
4 services for both men and women of childbearing age, including contraception, such as condoms
5 and oral contraceptives, and sterilization, such as vasectomies and tubal ligations.²⁰ It also covers
6 pregnancy-related care for people carrying pregnancies to term, such as prenatal care, obstetrics,
7 childbirth, and doula services, as well as neonatal care, post-partum care, and breastfeeding
8 support.²¹ Nevada Medicaid also covers gender-affirming care for transgender patients of any sex,
9 including gender-affirming surgeries, such as chest or genital surgery, and mental health services
10 and hormone therapy for treatment of gender dysphoria.²²

11 Despite this comprehensive coverage, including for services related to miscarriage,
12 carrying a pregnancy to term, and giving birth, the plan explicitly excludes from coverage care for
13 terminating a pregnancy.²³ Without any implementing statute authorizing—let alone requiring—
14 such an exclusion,²⁴ Nevada Medicaid regulations expressly exclude abortion from Medicaid

15 defined by state law.”),
16 https://dhcfnv.gov/uploadedFiles/dhcfpnavgov/content/Resources/AdminSupport/Manuals/MSM/Medicaid_Services_Manual_Complete.pdf; *id.* § 103.1 (defining medical necessity).

17 ¹⁸ See generally *id.* Chapter 600.

18 ¹⁹ See generally *id.*

19 ²⁰ *Id.* § 603.3. “Family Planning Services” is defined to exclude abortion and hysterectomies. *Id.*

20 ²¹ *Id.* § 603.4A–E.

21 ²² *Id.* §§ 608 & 608.1.

22 ²³ *Id.* § 603.4F.

23 ²⁴ Although federal law limits federal funding for abortion to life-threatening situations or
24 pregnancies resulting from rape or incest, Consolidated Appropriations Act, 2023, Pub. L. No.
117-328, div. H, §§ 506–07, “the state is free to include in its program medically necessary

1 coverage in all but the most extreme situations. Indeed, Nevada denies state funding for induced
2 abortions, except for abortion “to save the life of the mother” or for a pregnancy “resulting from a
3 sexual assault (rape) or incest.”^{25,26} The exceptions are so limited as to be virtually nonexistent;
4 between 2018 and 2022, Nevada funded, on average, fewer than ten abortions per year.²⁷ In fiscal
5 year 2010, Nevada funded *zero* abortions under this restrictive policy.²⁸

6 7 **B. Abortion Seekers in Nevada**

8
9 abortions, whether or not it is subject to federal reimbursement. Federal law merely sets the
10 minimum which the state must provide,” *Maher*, 515 A.2d at 145. *See also N.M. Right to*
11 *Choose*, 975 P.2d at 851 (“Neither the Hyde Amendment nor the federal authorities upholding
the constitutionality of that amendment bar this Court from affording greater protection of the
rights of Medicaid-eligible women under our state constitution[.]”).

12 ²⁵ Manual § 603.4F(1)–(2). To obtain reimbursement for an abortion provided “to save the life of
13 the mother,” a provider must certify “that on the basis of his/her professional judgment, and
14 supported by adequate documentation, the life of the mother would be endangered if the fetus
15 were carried to term.” Manual § 603.4F(1); FA-57 Certification Statement for Abortion to Save
16 the Life of the Mother. To Plaintiff’s knowledge, no other Medicaid reimbursement is
17 conditioned on a showing that the procedure is necessary to prevent death. In cases of sexual
18 assault, reimbursement is available only where the patient certifies, under penalty of perjury, that
19 they are pregnant as a result of rape or incest, or the provider certifies that, “in [their]
20 professional opinion, [the] individual is not psychologically or physically capable of complying
21 with the affidavit requirements.” FA-54 Abortion Declaration (Rape); FA-55 Abortion
22 Declaration (Incest); Manual § 603.4F(2).

18 ²⁶ Nevada Medicaid will reimburse for medical care to treat spontaneous abortions, also known
19 as miscarriages. *Id.* § 603.4F(3) (“Reimbursement is available for the treatment of incomplete,
missed, or septic abortions[.]”).

20 ²⁷ During that same time period, Nevada denied more than twice as many claims as it approved.
21 *See Nevada Medicaid Abortion and Miscarriage Claims by Procedure Code, Calendar Years*
22 *2018-2022 with Paid or Denied Status*, Dep’t of Health and Hum. Servs., Office of Analytics
(data obtained from the Nevada Dep’t of Health and Hum. Servs. on July 25, 2023, pursuant to a
public records request, attached as Ex. 1).

23 ²⁸ Adam Sonfield & Rachel Benson Gold, *Public Funding for Family Planning, Sterilization,*
24 *and Abortion Services, FY 1980–2010*, at 18 (Mar. 2012),
https://www.guttmacher.org/sites/default/files/report_pdf/public-funding-fp-2010.pdf.

1 There is significant overlap between the Medicaid-eligible population and those seeking
2 abortions in Nevada. Most of Silver State’s clients meet the income requirements for Nevada
3 Medicaid. *See* Declaration of Erin Bilbray-Kohn on behalf of Silver State (“Silver State Decl.,”
4 attached as Ex. 2) ¶ 30. Women living below the FPL experience rates of unintended pregnancies
5 five times greater than do women with higher incomes.²⁹ Nationally, around 75% of abortion
6 patients are poor or low income, with nearly half (49%) having family incomes below 100% FPL
7 and another quarter (26%) having family incomes between 100–199% FPL.³⁰ In addition, Nevada
8 abortion seekers, like Nevada Medicaid recipients, are disproportionately people of color: Over
9 65% of abortion seekers in Nevada who reported their race and ethnicity were Black,
10 Hispanic/Latino, Asian, Pacific Islander, other races, or multiple races,³¹ whereas approximately
11 28% of the Nevada population is comprised of people of color.^{32, 33} Nevada abortion seekers are

12 ²⁹ Lawrence B. Finer & Mia R. Zolna, *Declines in Unintended Pregnancy in the United States*
13 *2008–2011*, 374 *New Eng. J. Med.* 843, 846 (2016),
<https://www.nejm.org/doi/full/10.1056/nejmsa1506575>.

14 ³⁰ Jenna Jerman et al., *Characteristics of U.S. Abortion Patients in 2014 and Changes Since*
15 *2008*, at 7 (May 2016), [https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-](https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf)
16 [us-abortion-patients-2014.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf).

17 ³¹ Katherine Kortsmitt et al., *Abortion Surveillance—United States, 2020*, *Ctrs. for Disease*
18 *Control and Prevention: Morbidity and Mortality Wkly. Rep.*, at 18 (Nov. 25, 2022),
<https://www.cdc.gov/mmwr/volumes/71/ss/pdfs/ss7110a1-H.pdf>.

19 ³² *QuickFacts: Nevada*, U.S. Census Bureau, <https://www.census.gov/quickfacts/NV> (last visited
20 Aug. 24, 2023).

21 ³³ “[O]verall, Black, Hispanic, American Indian and Alaska Native (AIAN), and Native
22 Hawaiian and Other Pacific Islander (NHOPI) women have more limited access to health care,
23 which affects women’s access to contraception and other sexual health services that are
24 important for pregnancy planning.” Samantha Artiga et al., *What are the Implications of the*
Overturing of Roe v. Wade for Racial Disparities?, Kaiser Fam. Found. (July 15, 2022),
[https://www.kff.org/racial-equity-and-health-policy/issue-brief/what-are-the-implications-of-the-](https://www.kff.org/racial-equity-and-health-policy/issue-brief/what-are-the-implications-of-the-overturing-of-roe-v-wade-for-racial-disparities/)
[overturing-of-roe-v-wade-for-racial-disparities/](https://www.kff.org/racial-equity-and-health-policy/issue-brief/what-are-the-implications-of-the-overturing-of-roe-v-wade-for-racial-disparities/). In addition, limited access to contraception, the
“long history of racist practices targeting the sexual and reproductive health of people of color,
including forced sterilization, medical experimentation, the systematic reduction of midwifery,”

1 also disproportionately young: over a third of abortion patients are under 25 and close to 10% are
2 younger than 19.³⁴ These are precisely the populations for whom barriers to accessing abortion are
3 already highest. *See* Silver State Decl. ¶ 27.

4 **C. Plaintiff Silver State Hope Fund**

5 Due in part to barriers like the coverage ban, many abortion seekers rely on the assistance
6 of charitable organizations to cover the costs of their abortion care. Plaintiff Silver State is one
7 such organization. Silver State is a nonprofit organization that offers grants to people with the
8 fewest resources to pay for their abortions, and to pay for their travel, lodging, and childcare to
9 ensure that they can attend their abortion appointments. Silver State Decl. ¶¶ 6–8. Silver State
10 provides assistance to people from all corners of the state, as well as to clients who come from
11 other states to obtain abortions in Nevada. *Id.* ¶ 13. Many of Silver State’s clients are people of
12 color, have low-incomes, are young, and/or have disabilities; they face a number of challenges and
13 barriers in addition to lack of access to health care, such as housing and food insecurity and
14 unemployment.

15 Funding for abortion is critical to accessing abortion itself. Many people with low incomes
16 are forced to find funding for their abortion from multiple sources, which can delay their care. *Id.*
17 ¶¶ 34, 36. Although abortion is very safe, and safer than childbirth, each week of delay increases
18 the risks associated with the procedure.³⁵ Moreover, the further along a pregnancy is, the more
19 expensive abortion can be. Silver State Decl. ¶¶ 22, 34. If a person cannot raise enough money for

20
21 discrimination by individual providers, as well as “inequities across broader social and economic
22 factors — such as income, housing, and safety and education” also “affect decisions related to
family planning and reproductive health” and contribute to racial disparities in abortion rates. *Id.*

23 ³⁴ Kortsmit et al., *supra* note 31, at 15.

24 ³⁵ Linda Bartlett et al., *Risk factors for legal induced abortion-related mortality in the United States*, 103 *Obstetrics & Gynecology* 729, 731–33, 735 (2004).

1 their abortion before their pregnancy progresses past the legal limit for abortion, they will likely
2 be forced to carry their pregnancy to term. *Id.* ¶ 36.

3 To ensure that people are able to effectuate their abortion decision and are not forced to
4 carry their pregnancies to term, Silver State strives to provide as much funding as possible to as
5 many clients as possible. The amount of money that Silver State can pledge to each client varies
6 depending on Silver State’s resources at the time and the cost of care. *Id.* ¶ 22. Since the Supreme
7 Court overturned *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973), in *Dobbs v. Jackson Women’s*
8 *Health*, 142 S. Ct. 2228 (2022), Silver State has seen a significant increase in the number of clients
9 seeking assistance and is often only able to fund a portion of their clients’ care. Silver State Decl.
10 ¶ 18. Most Silver State clients are enrolled in or are income eligible for Medicaid but cannot use
11 this health insurance to cover abortion because of the coverage ban. *Id.* ¶ 30. Still other Silver State
12 clients may not be eligible for Medicaid because of their immigration status, or because their
13 incomes exceed the threshold amount (notwithstanding the fact that they may still be financially
14 insecure and—as such—may nevertheless still struggle to pay for their abortions). *Id.* ¶ 31. The
15 coverage ban strains Silver State’s resources: if Medicaid covered abortion, Silver State would not
16 have to pay for abortions for their clients enrolled in Medicaid. Silver State would then have more
17 resources to fund other clients’ abortions as well as provide more funding for travel, lodging, and
18 childcare, including for clients traveling to Nevada from states that ban abortion. *Id.* ¶¶ 32–36.

19 **D. Reproductive Freedom in Nevada**

20 Nevada’s imposition of barriers to abortion for some of its most marginalized residents is
21 wholly out of step with the State’s commitments to reproductive freedom and equality. For half a
22 century, Nevada has repeatedly and emphatically protected access to abortion. Since 1973,
23 abortion has been legal in Nevada up to 24 weeks gestation, and available after 24 weeks to protect
24 the health or life of the pregnant person. NRS 442.250. In 1990, Nevada voters overwhelmingly

1 reaffirmed these protections, shielding NRS 442.250, the statutory right to abortion, from
2 amendment or repeal without a direct vote by the people. *See* Nev. Const. art. XIX § 1 ¶ 3; Nev.
3 Ballot Questions 1990, No. 7.³⁶ In 2019, the Nevada Legislature passed the Trust Nevada Women
4 Act, which decriminalized the provision of abortion³⁷ and removed antiquated pre-abortion biased
5 counseling requirements and other barriers to accessing this health care. S.B. 179, 80th Leg. Sess.
6 (Nev. 2019). Following the gutting of the federal constitutional right to abortion in *Dobbs*, then-
7 Governor Sisolak, noting that “the State of Nevada has long protected reproductive freedom,”
8 reaffirmed the state’s unwavering “commitment to protecting reproductive freedom for any person
9 seeking access to reproductive health care in this State,” and signed Executive Order No. 2022-
10 08.³⁸ Also known as a “shield law,” the Order protects both abortion providers and patients
11 accessing care in Nevada from civil and criminal investigations by other states. *Id.* Earlier this
12 year, Governor Lombardo signed Senate Bill 131, codifying the shield law’s protections. *See* S.B.
13 131, 82nd Leg. Sess. (Nev. 2023), to be codified in NRS Chapters 629, 179, and 232.

14 In addition to these specific protections for abortion, Nevada also has strong protections
15 against pregnancy discrimination more broadly. For example, the Nevada Pregnant Workers
16 Fairness Act, passed with the express “intent . . . to fight against [pregnancy] discrimination . . . ,
17 promote public health and ensure that women realize full and equal participation in the workforce,”
18 protects employees against discrimination based on pregnancy, childbirth, or other related medical
19 conditions, such as “physical or mental condition[s] related to . . . loss or end of pregnancy.” NRS
20 613.4368; NRS 613.4365. *See also* NRS 608.0193 (requiring Nevada employers to provide

21 ³⁶ Available at
22 <https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/1990.pdf>.

23 ³⁷ Until 2019, NRS 201.120 made it a category B felony, punishable by up to 10 years
24 imprisonment and up to \$10k in fines, for a person to terminate a pregnancy unless done
pursuant to certain conditions set out in NRS 442.250.

³⁸ Available at https://gov.nv.gov/layouts/full_page.aspx?id=360658.

1 employees with break time to express breast milk). Just this past legislative session, the Nevada
2 Legislature passed Assembly Bill 292 to protect access to reproductive health care for incarcerated
3 women, including requiring medical and behavioral health care services for pregnant women in
4 custody; the provision of free menstrual products; annual pelvic examinations and mammograms;
5 prenatal and postnatal care; and issuing a general prohibition on the use of restraints while giving
6 birth in custody. Assemb. B. 292, 82nd Leg. Sess. (Nev. 2023), to be codified in NRS Chapter
7 209; NRS 209.376.

8 The ERA is Nevadans’ most recent direct affirmation of this state’s steadfast commitment
9 to equality for all. In 2022,³⁹ just months after the U.S. Supreme Court overturned *Roe v. Wade*, a
10 resounding majority of Nevadans decisively voted to adopt the ERA.⁴⁰ This sweeping
11 constitutional measure provides: “Equality of rights under the law shall not be denied or abridged
12 by this State or any of its political subdivisions on account of race, color, creed, sex, sexual
13 orientation, gender identity or expression, age, disability, ancestry, or national origin.” Nev. Const.
14 art. I § 24.

15 **II. LEGAL STANDARD**

16 Writ relief is available “where there is no ‘plain, speedy and adequate remedy in the
17 ordinary course of law.’” *Segovia v. Eighth Jud. Dist. Ct.*, 133 Nev. 910, 912, 407 P.3d 783, 785

18 ³⁹ Pursuant to Nevada procedure for constitutional amendments, Nev. Const. art. XIV § 1(1), the
19 Nevada Legislature passed the proposed ERA twice before the measure was presented to Nevada
20 voters. First introduced in 2019 as Senate Joint Resolution 8, the Amendment passed both
21 chambers of the Nevada Legislature with overwhelming, bipartisan majorities in 2019 and 2021
22 before being presented to Nevada voters on the 2022 ballot. *See* SJR8, 80th Leg. Sess. (Nev.
23 2019), <https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/7076/Votes>; SJR8* of the
24 80th (2019) Session, 81st Leg. Sess. (Nev. 2021),
<https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7336/Votes>.

⁴⁰ Nearly 60% of voters chose to adopt the amendment, far exceeding the simple majority
required for its passage. *See Silver State General Election Results 2022*,
<https://silverstateelection.nv.gov/ballot-questions/> (last visited Aug. 24, 2023).

1 (2017) (quoting NRS 34.170 and NRS 34.330). While an “extraordinary remedy,” it is within the
2 court’s sole discretion to determine when such relief is proper. *Id.* Even when a legal remedy is
3 available, the court can “still entertain a petition for writ ‘relief where the circumstances reveal
4 urgency and strong necessity.’” *Id.* (quoting *Barngrover v. Fourth Jud. Dist. Ct.*, 115 Nev. 104,
5 111, 979 P.2d 216, 220 (1999)).

6 The court will generally exercise its discretion to consider an extraordinary writ where an
7 important legal issue that needs clarification is raised or to promote judicial economy and
8 administration. *State Office of the Att’y Gen. v. Just. Ct. of Las Vegas Twp.*, 133 Nev. 78, 80, 392
9 P.3d 170, 172 (2017). When a petition for extraordinary relief “involves a question of first
10 impression that arises with some frequency, the interests of sound judicial economy and
11 administration favor consideration of the petition.” *A.J. v. Eighth Jud. Dist. Ct.*, 133 Nev. 202,
12 204–05, 394 P.3d 1209, 1212 (2017) (quoting *Cote H. v. Eighth Jud. Dist. Ct.*, 124 Nev. 36, 39,
13 175 P.3d 906, 908 (2008)).

14 **III. ARGUMENT**

15 **A. The coverage ban violates the ERA because it discriminates on the basis of capacity for** 16 **pregnancy and further entrenches sex inequality, denying equality of rights on account** 17 **of sex.**

18 **1. Equality review applies to claims brought under the ERA.**

19 The Nevada ERA is the “most inclusive state ERA [] in the country.”⁴¹ The framers of the
20 ERA, and the Nevadans who adopted it, embraced an expansive conception of equality—above
21 and beyond the Equal Protection Clause. Given the ERA’s “protective purpose,” it “should be
22 liberally construed *in order to effectuate the benefits intended to be obtained.*” *Colello v. Adm’r of*

23 ⁴¹ Camalot Todd, *With Question 1, Nevada Passes Most Inclusive States Equal Rights*
24 *Amendment In Nation*, Nev. Current (Nov. 10, 2022),
<https://www.nevadacurrent.com/2022/11/10/with-question-1-nevada-passes-most-inclusive-states-equal-rights-amendment-in-nation/>.

1 *Real Est. Div. of Nev.*, 100 Nev. 344, 347, 683 P.2d 15, 17 (1984) (emphasis added). The ERA’s
2 explicit purpose is to remedy existing inequalities. Nev. Statewide Ballot Questions 2022, at 7
3 (noting that “not everyone enjoys full equality, because “[h]istorically, certain groups have been
4 discriminated against,” and that the ERA was intended to “improve outcomes for people in the
5 protected classifications who have been discriminated against in Nevada”); *see also id.* (“One of
6 the most effective ways to help ensure equality is to specifically include protections from
7 discrimination in the Nevada Constitution, making them far more difficult to repeal, undermine,
8 or overturn based on the political mood of the day.” (emphasis omitted)).

9 In adopting the ERA, Nevadans embraced a substantive vision of “actual,” not simply
10 “theoretical[,] equality of rights,” *Sw. Wash. Chapter, Nat’l Elec. Contractors Ass’n v. Pierce*
11 *Cnty.*, 667 P.2d 1092, 1102 (Wash. 1983) (citation omitted), and thus actions or policies that
12 operate to further entrench inequality on account of a protected characteristic are unconstitutional.
13 Importantly, “where damage has been done by a violator who acts on the basis of a [protected]
14 characteristic, the enforcing authorities may also be compelled to take the same characteristic into
15 account in order to undo what has been done.” *Id.* Accordingly, even where a law discriminates
16 on the basis of a protected characteristic, if it “is intended solely to ameliorate the effects of past
17 discrimination, it simply does not implicate the ERA.” *Id.*

18 The ERA thus demands a two-part test.⁴² First, the court must determine if the challenged

19 ⁴² The ERA demands a single test that applies to all protected characteristics. Given that the
20 amendment is expressly intended to “fill[] gaps” in existing legal protections, Nev. Statewide
21 Ballot Questions 2022, at 7, that test “[s]urely” must be more exacting than the existing standard
22 of review under the Equal Protection Clause, *Maher*, 515 A.2d at 161. *See also, e.g., N.M. Right*
23 *to Choose*, 975 P.2d at 851 (where New Mexico Constitution already contained an equal
24 protection guarantee and “[t]he Equal Rights Amendment added a new sentence to . . . [the] state
constitution,” “[w]e construe . . . this amendment as providing something beyond that already
afforded by the general language of the Equal Protection Clause”). Here, where the ERA covers
characteristics, such as race, that trigger strict scrutiny under the Equal Protection Clause, the
ERA must require a higher standard of review. *See Nev. Const. Art. I § 24; Loving v. Virginia*,

1 enactment discriminates on the basis of a characteristic protected by the ERA. Next, the court must
2 evaluate whether the policy entrenches inequality on account of a protected characteristic. If so,
3 the enactment violates the ERA and is therefore unconstitutional.

4 As discussed in greater detail below, the coverage ban cannot survive equality review. The
5 coverage ban discriminates on the basis of capacity for pregnancy, a sex-linked trait, and therefore
6 it discriminates on the basis of sex. The coverage ban also exacerbates inequality on account of
7 sex: By denying coverage for abortion, sex-linked care, from an otherwise generally
8 comprehensive health care plan, the coverage ban denies people with the capacity for pregnancy
9 reproductive autonomy, erecting a devastating and unconstitutional barrier to their ability to
10 participate equally in all spheres of life.

11 **2. The coverage ban discriminates on the basis of sex.**

12 The coverage ban discriminates on the basis of sex in several ways. First, the coverage ban
13 is facially discriminatory because it provides less comprehensive coverage on the basis of the
14 insured individual’s capacity for pregnancy, a sex-linked characteristic. By its own terms, the
15 coverage ban singles out people who are or can become pregnant for exclusion from coverage for
16 medically necessary care: Those who cannot become pregnant have their reproductive health care
17 fully covered under Nevada Medicaid, while those who can become pregnant do not. This is
18 explicitly sex-based, in the same way that a hypothetical Medicaid program excluding treatment
19 for all uterine-related diseases but broadly covering other treatments for other medical conditions
20 would necessarily be explicitly sex-based.

21 By restricting treatment options for pregnancy, a sex-linked medical condition, from

22 388 U.S. 1, 11, 87 S. Ct. 1817, 1823 (1967) (strict scrutiny applies to federal equal protection
23 challenges on the basis of race); *In re Candelaria*, 126 Nev. 408, 416, 245 P.3d 518, 523 (2010)
24 (holding that “[t]he standard for testing the validity of legislation” under Nevada’s equal
protection clause “is the same as the federal standard” for the U.S. Constitution’s equal
protection clause (internal quotations and citations omitted)).

1 otherwise comprehensive reproductive health coverage, the coverage ban impermissibly confers
2 different benefits and burdens on the basis of sex. *Cf. Complete Care Med. Ctr. v. Beckstead*, No.
3 75908, 2020 WL 3603881 (Nev. July 1, 2020) (unpublished disposition) (affirming trial court’s
4 finding of “discrimination on the basis of sex,” in violation of Nevada anti-discrimination law,
5 where plaintiffs presented evidence of “discrimination on the basis of pregnancy”), *vacated in part*
6 *on reconsideration en banc*, 2021 WL 1345693 (Nev. Apr. 9, 2021). *See also Maher*, 515 A.2d at
7 159 (holding that the coverage ban discriminates on the basis of sex and observing that “all the
8 male’s medical expenses associated with their reproductive health, for family planning and for
9 conditions unique to his sex are paid and the same is provided for women except for the medically
10 necessary abortion that does not endanger her life”); *N.M. Right to Choose*, 975 P.2d at 856
11 (holding that the coverage ban “undoubtedly singles out for less favorable treatment a gender-
12 linked condition,” from an otherwise comprehensive plan, and noting that “there is no comparable
13 restriction on medically necessary services relating to physical characteristics or conditions that
14 are unique to men,” nor any “provision . . . that disfavors any comparable, medically necessary
15 procedure unique to the male anatomy”). As the Superior Court of Connecticut held when
16 evaluating a similar coverage ban under a similar equal rights guarantee, “any classification which
17 relies on pregnancy as the determinative criterion is a distinction based on sex.” *Maher*, 515 A.2d
18 at 159. *See also State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 988 (Alaska 2019)
19 (holding that “facially different treatment of pregnant women based upon their exercise of
20 reproductive choice” violates the state constitution’s equal protection guarantee).

21 Second, the coverage ban discriminates on the basis of sex because it disproportionately
22 burdens women. The overwhelming majority of abortion seekers are women, who primarily have
23 the capacity for pregnancy, and thus women disproportionately bear the brunt of the coverage ban.
24 *See also supra* (Nevada abortion seekers are also disproportionately low-income, people of color,

1 and young).

2 Third, the coverage ban discriminates on the basis of sex because it singles out people who
3 are or can become pregnant for coercive regulation. For many pregnant people, the coverage ban
4 will amount to a complete bar on their ability to access abortion.⁴³ See Silver State Decl. ¶ 36; see
5 also *Myers*, 625 P.2d at 793 (“[W]e cannot characterize” Medicaid’s selective funding of childbirth
6 but not abortion “as merely providing a public benefit which the individual recipient is free to
7 accept or refuse[.] . . . On the contrary, the state is utilizing its resources to ensure that women who
8 are too poor to obtain medical care on their own will exercise their right of procreative choice only
9 in the manner approved by the state.”). By fully covering the costs of medical care for those who
10 choose to continue their pregnancy but denying coverage in all but the most extreme circumstances
11 for those who decide to terminate their pregnancy, the coverage ban effectively coerces those with
12 the capacity for pregnancy to carry to term, interfering with their reproductive autonomy. In so
13 doing, the abortion coverage ban denies only those capable of pregnancy, a sex-linked
14 characteristic, the ability to control their reproductive futures. By contrast, those who cannot
15 become pregnant have all of their reproductive health care covered—and their reproductive
16 decisions supported.

17 Fourth, the coverage ban discriminates on the basis of sex because it is based on, and
18 perpetuates, invidious sex-based stereotypes. The coverage ban perpetuates the stereotype that
19 women are, by nature, destined to become mothers. Women’s capacity for pregnancy is the very
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21 ⁴³ “Bans on state Medicaid . . . coverage of abortion . . . make[] abortion inaccessible to many.”
22 Ushma D. Upadhyay et al., *State abortion policies and Medicaid coverage of abortion are*
23 *associated with pregnancy outcomes among individuals seeking abortion recruited using Google*
24 *Ads: A national cohort study*, Soc. Science & Med., Apr. 2021, at 2; see also *id.* at 1
24 (“Restrictive state-level abortion policies are associated with not having an abortion at all and
lack of coverage for abortion is associated with prolonged abortion seeking. Medicaid coverage
of abortion appears critical to ensuring that all people who want abortions can obtain them.”).

1 characteristic that has historically been invoked to justify their unfavorable treatment: “Since time
2 immemorial, women’s biology and ability to bear children have been used as a basis for
3 discrimination against them.” *Maher*, 515 A.2d at 159. Historically, “as a basis for imposing
4 restrictions on women’s ability to work and participate in public life, courts have accepted at face
5 value . . . a legislative solicitude for the moral . . . well-being of women, including the need to
6 protect a woman’s physical structure and a proper discharge of her maternal functions, and the
7 rationale that woman is still regarded as the center of home and family life.” *N.M. Right to Choose*,
8 975 P.2d at 855 (internal quotations and citations omitted).

9 But stereotypes dictating that “[t]he paramount destiny and mission of woman are to fulfil
10 the noble and benign offices of wife and mother,” have led to “statute books . . . laden with gross,
11 stereotyped distinctions between the sexes,” prohibiting women from “hold[ing] office, serv[ing]
12 on juries, or bring[ing] suit in their own names, and married women traditionally were denied the
13 legal capacity to hold or convey property or to serve as legal guardians of their own children.”
14 *Frontiero v. Richardson*, 411 U.S. 677, 685, 93 S. Ct. 1764, 1769 (1973) (quoting *Bradwell v.*
15 *Illinois*, 16 Wall. 130, 141, 21 L. Ed. 2d 442 (1873) (Bradley, J., concurring)); *see also Hodes &*
16 *Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 491 (Kan. 2019) (“[W]e cannot ignore . . . the reality
17 that” “prevailing views justifying widespread legal differentiation between the sexes” “were
18 reflected in policies impacting women’s ability to exercise their rights of personal autonomy,
19 including their right to decide whether to continue a pregnancy,” and that “the history of women’s
20 rights . . . reflects a paternalistic attitude and . . . a practical lack of recognition that women, as
21 individuals distinct from men, possessed natural rights.”); *N.M. Right to Choose*, 975 P.2d at 853–
22 54 (detailing discriminatory community property laws “reflect[ing] the attitudes of an era when
23 married women were expected to rear children, care for home and husband, and do nothing else”
24

1 (internal quotations and citation omitted)).⁴⁴

2 The coverage ban is particularly offensive to Nevada’s commitment to equality because it
3 not only reflects stereotypes limiting women’s roles in society, but also “*create[s]* a self-fulfilling
4 cycle of discrimination[.]” *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 736, 123 S. Ct. 1972,
5 1982 (2003) (emphasis added). Here, that discrimination “force[s] women to continue to assume
6 the role of primary family caregiver,” *id.*, at the expense of their ability to fully participate in other
7 spheres of life.

8 For these four reasons, each sufficient on its own, the coverage ban discriminates on the
9 basis of sex.

10 **3. The coverage ban entrenches inequality on the basis of capacity for pregnancy, a
sex-linked characteristic.**

11 Because the coverage ban discriminates on the basis of sex, the court must next apply the
12 second part of the ERA’s equality review test: Does the challenged action entrench inequality on
13 the basis of a protected characteristic? The coverage ban does exactly that.

14 Women and people with the capacity for pregnancy have been historically oppressed
15 precisely because of their capacity for pregnancy, a sex-linked characteristic. *See supra* Section
16 III(A)(2) (discussing history of discriminatory laws based on stereotypes against women as
17 destined to be mothers); *Maher*, 515 A.2d at 159 (“Since time immemorial, women’s biology and
18 ability to bear children have been used as a basis for discrimination against them.”). The coverage
19 ban further entrenches this inequality in several ways.

21 ⁴⁴ Gender-based stereotypes burden not only women, but also men, insofar as they bear the
22 weight of performing traditional conceptions of what it means to be masculine, as well as people
23 with other gender identities, who often experience discrimination for refusing to conform to
24 traditional expectations of what it means to be a man or a woman. The coverage ban penalizes *all*
who do not conform to the sex-based stereotype that women are destined to be biological
mothers and caregivers within the home, particularly women, trans men, and people with diverse
gender identities.

1 To start, as discussed *supra*, the coverage ban will push abortion entirely out of reach for
2 many pregnant people, forcing them to carry their pregnancies to term. In so doing, the coverage
3 ban further entrenches the unequal status of women and those with the capacity for pregnancy.
4 Research shows that abortion access significantly affects women’s educational attainment, job
5 opportunities, labor force participation, occupations, and earnings.⁴⁵ Being denied access to
6 abortion hinders women’s equal participation in political, social and economic life, erecting a
7 substantial barrier to their ability to engage as full citizens. Conversely, those who are most
8 severely burdened by restrictions on abortion stand to gain from the removal of barriers: increased
9 access to abortion has had particularly positive impacts on Black women’s and young women’s
10 education and careers, and on their families.⁴⁶

11 Indeed, the ability to determine one’s reproductive future “is central to a woman’s control
12 not only of her own body, but also to the control of her social role and personal destiny.” *Myers*,
13 625 P.2d at 792. By forcing women and people with the capacity for pregnancy to carry their
14 pregnancies to term, the coverage ban denies them agency over their own lives. People who are
15 denied access to abortions that they decided to have—and who are thereby forced to continue their
16 pregnancies, give birth, and, in most cases, parent a child—are necessarily denied autonomy over
17 their own futures, and thus dignity and equality. This is precisely why, “in a society recognizing
18 women as full and equal participants in both the benefits and burdens of that society, self-

20 ⁴⁵ Kelly Jones, *At a Crossroads: The Impact of Abortion Access on Future Economic Outcomes*
21 14–16 (American Univ. Working Paper, 2021), <https://doi.org/10.17606/0Q51-0R11>; Jason M.
22 Lindo et al., *Legal Access to Reproductive Control Technology, Women’s Education, and*
Earnings Approaching Retirement, 110 AEA Papers & Proc. 231, 233–34 (2020).

23 ⁴⁶ Jones, *supra* note 45, at 14–17; David E. Kalist, *Abortion and Female Labor Force*
24 *Participation: Evidence Prior to Roe v. Wade*, 25 J. of Lab. Rsch. 503, 503 (2004); Lindo et al.,
supra note 45, at 233–34; Ali Abboud, *The Impact of Early Fertility Shocks on Women’s*
Fertility and Labor Market Outcomes 4 (Nov. 22, 2019), <https://ssrn.com/abstract=3512913>.

1 determination necessarily precludes the government from dictating fundamental decisions
2 regarding reproduction and severely fences governmental intrusion otherwise aimed at influencing
3 those decisions or impeding their implementation.” *Hodes & Nauser, MDs, P.A. v. Schmidt*, 368
4 P.3d 667, 680 (Kan. App. 2016) (Atcheson, J., concurring), *aff’d*, 440 P.3d 461 (Kan. 2019). *See*
5 *also Moe*, 417 N.E.2d at 402 (the “government is not free to achieve with carrots what it is
6 forbidden to achieve with sticks” (internal quotations and citation omitted)). As the Nevada
7 legislature recognized in passing the state Pregnant Workers’ Fairness Act, this “full and equal
8 participation” requires freedom from discrimination on the basis of the full range of pregnancy-
9 related conditions, including conditions related to the “loss or end of pregnancy.” NRS 613.4368;
10 NRS 613.4365; *see also Nev. Statewide Ballot Questions 2022*, at 7 (the ERA seeks to achieve
11 “full equality” by filling “gaps in the existing legal patchwork that have resulted in unavailable or
12 inadequate protection for certain classes of people, including instances of . . . pregnancy
13 discrimination”).

14 The coverage ban’s reinforcement of the sex stereotypes on which it is based, *see supra*,
15 also further entrenches women’s inequality, as well as the unequal status of trans men and gender
16 non-binary people who can become pregnant. By using state power to selectively penalize
17 Nevadans who do not conform to gender-based stereotypes regarding pregnancy and child-
18 bearing, while fully funding medical care for those who do conform and for those who cannot
19 become pregnant, the abortion coverage ban denies only those capable of pregnancy the ability to
20 control their reproductive futures. But the ERA does not permit relegating the needs of these
21 individuals to second class status. *See Nev. Const. Art. I § 24* (prohibiting the “deni[al] or
22 abridge[ment]” of “[e]quality of rights under the law . . . on account of,” inter alia, “sex” and
23 “gender identity or expression”); *Maher*, 515 A.2d at 159 (noting the “devastating effect”
24 “discrimination” in the form of sex stereotyping laws “has had . . . upon women”); *N.M. Right to*

1 *Choose*, 975 P.2d at 850–56. As Nevadans implicitly recognized when they adopted the ERA,
2 “[w]e no longer live in a world of separate spheres for men and women. True equality of
3 opportunity in the full range of human endeavor is a [] constitutional value[.]” *Hodes & Nauser*,
4 440 P.3d at 491.

5 As other state courts have recognized in striking similar coverage bans, reproductive
6 autonomy is itself a central pillar of equality. *See N.M. Right to Choose*, 975 P.2d at 852–56;
7 *Maher*, 515 A.2d at 157–62; *Myers*, 625 P.2d at 792. Nevada cannot simultaneously coerce the
8 reproductive decisions of its residents through discriminatory funding practices and honor the
9 broad vision of equality embraced by Nevadans in the ERA.⁴⁷ Nevada’s ERA, the most sweeping
10 in the nation, “reflect[s] an evolving concept of [] equality,” *N.M. Right to Choose*, 975 P.2d at
11 852. Its broad range of protections reflects the reality that inequality and oppression do not operate
12 in discrete silos. The coverage ban’s infringement of reproductive autonomy not only discriminates
13 on the basis of sex and entrenches women’s inequality, but also further compounds the systemic
14 oppression of already marginalized Nevadans. *See supra* (abortion seekers in Nevada are
15 disproportionately young and people of color); *see also* Silver State Decl. ¶ 27 (barriers to
16 accessing abortion are particularly high for people of color, poor and low-income people, young
17 people, people with disabilities, and LGBTQ people). Indeed, just as sex intersects with other
18 marginalized characteristics, sex discrimination implicates and further entrenches intersecting

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20 ⁴⁷ The equality principles that prohibit a state from coercing people to bear children by rendering
21 abortion inaccessible likewise protect individuals from state-created barriers to procreation. “[I]f
22 the State has the power to infringe the right of procreative autonomy in favor of birth, then,
23 necessarily, it also has the power to *require* abortion under some circumstances.” *Armstrong v.*
24 *State*, 989 P.2d 364, 377 (Mont. 1999). *See also, e.g., Myers*, 625 P.2d at 780 (abortion coverage
ban implicates “the protection of either procreative choice from discriminatory governmental
treatment,” and “similar constitutional issues would arise if the . . . [state] funded [Medicaid]
abortions but refused to provide comparable medical care for poor women who choose
childbirth.”).

1 oppressions and inequalities.⁴⁸

2 “[B]y adopting the ERA, [Nevadans] determined that the state should no longer be
3 permitted to disadvantage women because of their sex[,] including their reproductive capabilities.”
4 *Maher*, 515 A.2d at 160. The coverage ban does precisely that, and, as a result, it is
5 unconstitutional.

6 **B. In the alternative, the coverage ban cannot withstand strict scrutiny.**

7 Although equality review is the appropriate standard for the groundbreaking ERA, in the
8 alternative, at minimum, strict scrutiny applies to policies that, like the coverage ban, discriminate
9 on the basis of sex.

10 For over 150 years prior to the peoples’ adoption of the ERA, Nevada’s Constitution
11 contained a general guarantee of equal protection. Nev. Const. art. IV, § 21. Under this equal
12 protection clause, courts have applied intermediate scrutiny to enactments that discriminate on the
13 basis of sex. *See Salaiscooper v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 117 Nev. 892, 903,

14 ⁴⁸ State control of women’s reproductive lives has historically been a means of not only sex
15 discrimination, but also myriad other forms of oppression in this country—entrenching
16 inequality on account of, *inter alia*, race, ancestry, national origin, and disability status. *See, e.g.,*
17 *Buck v. Bell*, 274 U.S. 200, 205, 207, 47 S. Ct. 584, 584–85 (1927) (upholding involuntary
18 sterilization of “feeble-minded white woman” “in order to prevent our being swamped with
19 incompetence” and “socially inadequate offspring”); *Madrigal v. Quilligan*, No. 75 Civ. 2057
20 (C.D. Cal. June 30, 1978) (ruling against plaintiffs in class action brought by women of Mexican
21 origin challenging their involuntary sterilizations), *aff’d*, 639 F.2d 789 (9th Cir. 1981); *Naim v.*
22 *Naim*, 87 S.E.2d 749, 756 (Va. 1955) (upholding anti-miscegenation law, and annulment of
23 marriage of white woman and man of Chinese descent, because there is “no requirement that the
24 State shall not legislate to prevent the obliteration of racial pride, [or] the corruption of blood
even though it weaken or destroy the quality of its citizenship” and thus it may regulate
reproduction “so that it shall not have a mongrel breed of citizens”), *vacated*, 350 U.S. 891
(1955); *see also* Dorothy Roberts, *Killing the Black Body: Race, Reproduction and the Meaning
of Liberty* 6 (2017) (“[R]egulating Black women’s reproductive decisions has been a central
aspect of racial oppression in America.” (emphasis omitted)); Alexandra Minna Stern, *Sterilized
in the Name of Public Health: Race, Immigration, and Reproductive Control in Modern
California*, 95 Am. J. Public Health 1128, 1128 (2005) (“[T]he experiences of the Mexican-
origin women [in *Madrigal v. Quilligan*] mirror those of the African American, Puerto Rican,
and Native American women who came forth with comparable stories during the same years.”).

1 34 P.3d 509, 517 (Nev. 2001).⁴⁹ Adopting the ERA against this backdrop, Nevada voters
2 demanded higher protections. Where a “State equal rights amendment was adopted at a time when
3 equal protection principles under the State and Federal Constitutions required a level of judicial
4 scrutiny greater than the rational basis test but less than the strict scrutiny test, . . . to use a standard
5 in applying the [state] equal rights amendment which requires any less than the strict scrutiny test
6 would negate the purpose of the equal rights amendment and the intention of the people in adopting
7 it.” *Op. of the Justs. to the House of Representatives*, 371 N.E.2d 426, 428 (Mass. 1977). While
8 the equality review test described *supra* better befits an amendment with such sweeping safeguards
9 as Nevada’s ERA, at a minimum, strict scrutiny must apply to claims brought under this
10 amendment. *See, e.g., N.M. Right to Choose*, 975 P.2d at 853–57 (applying “heightened scrutiny,”
11 a “more stringent” standard than the federal intermediate scrutiny standard, for sex discrimination
12 claims brought under the state constitution’s Equal Rights Amendment); *Maher*, 515 A.2d at 157–
13 62 (“[A]t the very least, the standard for judicial review of sex classifications under our ERA is
14 strict scrutiny.”). The coverage ban cannot withstand this level of review either.

15 As discussed above, the coverage ban discriminates on the basis of sex in four ways, each
16 sufficient to trigger this heightened review, *see supra*. Because the coverage ban discriminates on
17 the basis of sex, it is presumptively unconstitutional and can survive strict scrutiny “only if it is
18 narrowly tailored and necessary to advance a compelling state interest.” *Gaines v. State*, 116 Nev.
19 359, 371, 998 P.2d 166, 173 (2000). The State cannot meet its heavy burden here. There is no
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21 ⁴⁹ “The standard for testing the validity of legislation” under Nevada’s equal protection clause “is
22 the same as the federal standard” for the U.S. Constitution’s equal protection clause. *In re*
23 *Candelaria*, 126 Nev. 408, 416, 245 P.3d 518, 523 (2010) (internal citation and quotation
24 omitted). Under both, sex discrimination claims are evaluated under intermediate scrutiny. *See,*
e.g., United States v. Virginia, 518 U.S. 515, 532–33, 116 S. Ct. 2264, 2275–76 (1996) (noting
that the state must “demonstrate an exceedingly persuasive justification” to “defend gender-
based government action” (internal quotations omitted)).

1 governmental interest that is compelling enough to warrant the coverage ban, a discriminatory
2 governmental scheme inconsistent on its face with not only the Nevada Constitution's equal rights
3 guarantee, but also Nevada's explicit commitments to equal access to health care, and particularly
4 reproductive health care. No state interest could justify such a facially discriminatory scheme, and
5 the coverage ban unquestionably fails strict scrutiny.


6 * * *

7 For the reasons stated herein, Petitioner respectfully requests that this Court grant a writ of
8 mandamus directing the Nevada Division of Health Care Financing and Policy to remove the
9 abortion coverage ban from the Medicaid Services Manual and order that abortion care is eligible
10 for reimbursement under the Nevada Medicaid program.

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1 Dated this 29th day of August, 2023.

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3 **AMERICAN CIVIL LIBERTIES
UNION OF NEVADA**

4 

5 CHRISTOPHER M. PETERSON, ESQ. (13932)
6 SADMIRA RAMIC, ESQ. (15984)
7 4362 W. Cheyenne Ave.
8 North Las Vegas, NV 89032
9 Telephone: (702) 366-1226
Facsimile: (702) 366-1331
Emails: peterson@aclunv.org
ramic@aclunv.org

10 REBECCA CHAN*
11 CHELSEA TEJADA*
12 ZORAIMA PELAEZ*
13 BRIGITTE AMIRI*
14 MING-QI CHU*
15 American Civil Liberties Union
16 125 Broad Street, 18th Floor
17 New York, NY 10004
18 Telephone: (212) 549-2633
19 Emails: rebeccac@aclu.org
20 ctejada@aclu.org
21 zpelaez@aclu.org
22 bamiri@aclu.org
23 mchu@aclu.org

24 *Attorneys for Petitioner*

*Application for *pro hac vice* forthcoming