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

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| SILVER STATE HOPE FUND, a domestic nonprofit,<br><br>Petitioner,<br><br>vs.<br><br>THE STATE OF NEVADA ex rel. NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH CARE FINANCING AND POLICY, a public entity of the State of Nevada,<br><br>Respondent. | **Case No. A-23-876702-W**<br>**Dept. No. 24**<br><br>**JUDGMENT AND ORDER GRANTING PETITION FOR WRIT OF MANDAMUS** |

## INTRODUCTION

This matter having come before this Court on August 28, 2023, on Silver State Hope Fund's Petition for Writ of Mandamus; Christopher M. Peterson, Esq., and Sadmira Ramic, Esq., of the American Civil Liberties Union of Nevada, and Rebecca Chan, Esq., Chelsea Tejada, Esq., Zoraima Pelaez, Esq., Brigitte Amiri, Esq., and Ming-Qi Chu, Esq., of the American Civil Liberties Union Foundation appearing on behalf of Petitioner Silver State Hope Fund ("Silver State" or "Petitioner"); Marni Watkins, Esq., and Jessica Whelan, Esq., appearing on behalf of the State of Nevada *ex rel.* Nevada Department of Health and Human Services, Division of Health Care Financing and Policy ("State," "Division," or "Respondent"); the Court having reviewed the papers and pleadings on file herein, having held a hearing, and with good cause appearing, hereby finds, concludes, and orders as follows:

## BACKGROUND

Petitioner Silver State Hope Fund is, and was at all times relevant herein, a domestic nonprofit organization organized and existing under and by virtue of the laws of the State of Nevada. Based upon its uncontroverted declaration, Silver State offers grants to people with the fewest resources to pay for their abortions in addition to paying for and coordinating travel, lodging, and childcare to ensure their clients can attend their abortion appointments in Nevada. Decl. of Erin Bilbray-Kohn on behalf of Silver State Hope Fund, Supp. Pet. Writ Mandamus ("Silver State Decl.") ¶¶ 6, 8, 15. Silver State is dedicated to ensuring that every person has access to the future of their choice and works to provide dignified access to abortion through equitable funding. *Id.* ¶ 7. To ensure that people can effectuate their abortion decision and are not forced to carry their pregnancies to term, Silver State strives to use its limited funds to provide as much monetary and other support as possible to as many clients as possible. *Id.* ¶¶ 9, 36. Nevertheless,

there is more demand for assistance than Silver State is able to provide, and Silver State is not able to fully fund all those who call for help. *Id.* ¶¶ 18, 34.

Respondent Nevada Department of Health and Human Services, Division of Health Care Financing and Policy administers the Nevada Medicaid program that is at issue in this lawsuit. The Division's mission is to "purchase and provide quality health care services to low-income Nevadans in the most efficient manner" and "promote equal access to health care at an affordable cost to the taxpayers of Nevada."[1] The Division is a public entity of the State of Nevada with the power to sue and be sued, pursuant to NRS 12.105 and NRS 41.031.

The transactions and occurrences that give rise to the Petitioner's claim against Respondent occurred in the City of Las Vegas, Clark County, Nevada. Silver State operates out of and has its P.O. Box in Las Vegas, Nevada; all Silver State board members are located in Clark County, Nevada; and the vast majority of Silver State's clients either live in or obtain abortion care in Clark County. Silver State Decl. ¶¶ 12–13.

Nevada Medicaid is a public health insurance program, financed jointly with the federal government, that is designed to cover the health care needs of Nevadans with low incomes and limited resources. Households with annual incomes of up to 138% of the federal poverty level qualify for coverage.[2] Recent data indicate that approximately 21% of Nevadans are enrolled in the state's program, including one in six adults (ages 19–64), three in eight children, and three in

[1] Nev. Dep't of Health & Hum. Servs. Div. of Health Care Fin. & Pol'y, Medicaid Services Manual ("Manual") § 100(A), https://dhcfp.nv.gov/uploadedFiles/dhcfpnvgov/content/Resources/AdminSupport/Manuals/MSM/Medicaid_Services_Manual_Complete.pdf [https://perma.cc/P4UT-N6H7]; *About Us*, Nev. Dep't of Health & Hum. Servs. Div. of Health Care Fin. & Pol'y, https://dhcfp.nv.gov/About/Home/ [https://perma.cc/M64K-6EJG] (last visited Apr. 9, 2024).

[2] *Medicaid Information*, Nev. Health Link, https://www.nevadahealthlink.com/medicaid-information/ [https://perma.cc/S82B-2EK3] (last visited Apr. 9, 2024).

ten people with disabilities in the state.[3] In addition, 71% of non-elderly Medicaid enrollees are Nevadans of color.[4] The program provides a broad array of health care coverage for "reasonable and medically necessary" medical services, including preventive health services, inpatient and outpatient care, emergency care, and family planning services, *see generally* Manual Chapter 600, with the determination of medical necessity "made on the basis of the individual case," "clinically appropriate to the specific physical and mental/behavioral health care needs of the recipient," and "consistent with generally accepted professional standards." Manual §§ 103.1, 603.1A.[5] Nevada Medicaid coverage for pregnancy-related care includes contraception, *id.* § 603.3, medical care for patients carrying pregnancies to term, including prenatal care, obstetrics, childbirth, and doula services, as well as neonatal care, post-partum care, and breastfeeding support, *id.* § 603.4A–E, and miscarriage management for spontaneous loss of pregnancy, *id.* § 603.4F(3). However, the Nevada Medicaid Services Manual explicitly excludes abortion care from coverage unless terminating a pregnancy is necessary "to save the life of the recipient" or in cases of "sexual assault (rape) or incest." *Id.* § 603.4F(1)–(2) ("coverage exclusion").[6] Rather than applying the otherwise generally applicable medical necessity standard to abortion care, the Division's regulations only provide for abortion coverage where a provider certifies "that on the basis of his/her professional judgment, and supported by adequate documentation, the life of the recipient would be endangered

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[3] *Medicaid in Nevada*, Kaiser Fam. Found. 1 (June 2023), https://files.kff.org/attachment/fact-sheet-medicaid-state-NV [https://perma.cc/C5BM-W6J2].

[4] *Id.*

[5] The Medicaid Services Manual is a compilation of regulations adopted under NRS 422.2368 and 422.2369.

[6] There is no federal or state law authorizing or requiring this regulatory exclusion. Although federal law known as the Hyde Amendment limits federal Medicaid funding for abortion to life-threatening situations or pregnancies resulting from rape or incest, "[a] participating State is free . . . to include in its Medicaid plan those medically necessary abortions for which federal reimbursement is unavailable." *Harris v. McRae*, 448 U.S. 297, 311 n.16, 100 S. Ct. 2671, 2685 n.16 (1980).

if the fetus were carried to term," or the patient certifies under penalty of perjury that they are pregnant as a result of rape or incest. *Id*.

Nevada Medicaid's lack of abortion coverage burdens the most marginalized Nevadans. The parties do not dispute that low-income women, including those who are income-eligible for Medicaid, and people of color, who are more likely to be covered by Medicaid, comprise the majority of abortion seekers. Nearly all of Silver State's clients are low-income, and the majority are either enrolled in or income-eligible for Nevada Medicaid but cannot use their health insurance coverage for abortion care because of the coverage exclusion. Silver State Decl. ¶¶ 29–30. Without insurance coverage, these Nevadans are often forced to find funding for their abortion from multiple sources, including Silver State. *Id.* ¶¶ 37, 39. This can delay access to care, which can in turn increase health risks and the cost of that care. *Id.* ¶¶ 22, 34. Barriers to seeking and financing abortion care are particularly high for people of color, poor or low-income people, young people, people with disabilities, and LGBTQ people in Nevada. *Id.* ¶ 27. Many of Silver State's clients already face a number of challenges in addition to accessing abortion and other health care, such as housing and food insecurity or domestic abuse. *Id.* ¶ 28. Many are also already parents who struggle to provide for the children they have and to make ends meet. *See id.* Abortion care is time-sensitive and if a person cannot raise enough money before the legal limit for abortion, they will likely be forced to carry their pregnancy to term. *See id.* ¶¶ 29, 36. In other words, insurance coverage for abortion is critical to accessing this health care and, for many Nevadans, including Silver State's clients, "denial of funding may as well be denial of the procedure itself." *Id.* ¶ 36.

In 2022, Nevadans voted on and, with a resounding majority, passed the Equal Rights Amendment ("ERA"), a ballot initiative intended to "advance equality for all by filling the gaps

in existing [anti-discrimination] protections." Nev. Statewide Ballot Questions 2022, at 7.[7] Passage of the ERA resulted in the addition of Article I, Section 24 of the Nevada Constitution, which provides: "Equality of rights under the law shall not be denied or abridged by this State or any of its political subdivisions on account of race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry or national origin." Nev. Const. art. I, § 24. The Division has regularly updated the Medicaid Services Manual since the passage of the ERA but has not changed the existing limitations on abortion coverage. *See, e.g.*, Manual Chapter 600 (updated February 29, 2024).

In its Petition, Silver State requests that this Court issue a writ of mandamus directing the Division to remove the abortion coverage exclusion from the Medicaid Services Manual and to reimburse claims submitted for the provision of abortion care to Nevadans covered by the Nevada Medicaid program, on the basis that the coverage exclusion violates the ERA's prohibition on the denial or abridgment of equality of rights under the law "on account of . . . sex." Nev. Const. art. I, § 24.

## CONCLUSIONS OF LAW

### I. Procedural Matters

Respondent raises two threshold questions that this Court must answer before turning to the merits of the ERA claim. First, Respondent contends that the petition does not establish a proper basis for this Court to consider a Petition for Writ of Mandamus. Resp't's Answering Br. ("Ans. Br.") 7–10. Second, Respondent contests Petitioner Silver State's standing to bring this challenge. *Id.* at 3–7. For the reasons discussed below, this Court holds it can properly consider

[7] *Available at* https://www.nvsos.gov/sos/home/showpublisheddocument/10970/637992808153270000 [https://perma.cc/U27B-PGTC].

the Petition for Writ of Mandamus, and that Petitioner has beneficial interest standing to pursue this litigation.

### A. Writ of Mandamus

This Court has jurisdiction to issue writs of mandamus. *See* Nev. Const. art. VI, § 6 ("The District Courts and the Judges thereof have power to issue writs of Mandamus . . . ."); NRS 34.160 ("The writ [of mandamus] may be issued by . . . a district court or a judge of the district court . . . ."). Venue is proper in the Eighth Judicial District Court as the cause, or some part thereof, arose in Clark County, Nevada. *See* NRS 13.020; NRS 13.040.

Writ relief is an "extraordinary remedy" that "may be available where there is no 'plain, speedy and adequate remedy in the ordinary course of law.'" *Segovia v. Eighth Jud. Dist. Ct. ex rel. County of Clark*, 133 Nev. 910, 912, 407 P.3d 783, 785 (2017) (quoting NRS 34.170 and NRS 34.330). It is within this Court's discretion to determine whether to exercise its jurisdiction to consider a petition for a writ of mandamus. *See id.* Even when a legal remedy is available, a court can "still entertain a petition for writ 'relief where the circumstances reveal urgency and strong necessity.'" *Id.* (quoting *Barngrover v. Fourth Jud. Dist. Ct.*, 115 Nev. 104, 111, 979 P.2d 216, 220 (1999)). A writ may be appropriately "issued by . . . a judge of the district court, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station." NRS 34.160. Alternatively, a writ of mandamus may also appropriately be issued where a party "present[s] legal issues of statewide importance requiring clarification," and the court's decision would "promote[] judicial economy and administration by assisting other jurists, parties, and lawyers." *Debiparshad v. Eighth Jud. Dist. Ct. ex rel county of Clark*, 137 Nev. 691, 693–94, 499 P.3d 597, 600 (2021) (first alteration in original) (quoting *Walker v. Second Jud. Dist. Ct. ex rel. County of Washoe*, 136 Nev. 678, 682, 476 P.3d 1194, 1198 (2020)). Silver State's Petition meets both bases for writ review.

Under the statutory standard, "[a] writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, or to control a manifest abuse or an arbitrary or capricious exercise of discretion." *Segovia*, 133 Nev. at 912, 407 P.3d at 785 (quoting *Cote H. v. Eighth Jud. Dist. Court ex rel. County of Clark*, 124 Nev. 36, 39, 175 P.3d 906, 907–08 (2008)). Both circumstances are present here. First, a writ of mandamus is available because Silver State's Petition seeks to compel the Division to provide equitable Medicaid reimbursement for abortion services pursuant to the Division's obligations under the Nevada Constitution's ERA. *See* Reply Br. Supp. Pet. Writ Mandamus ("Pet'r's Reply") 11–12; Opening Br. Supp. Pet. Writ Mandamus ("Opening Br.") 15–27. It is axiomatic that executive agencies, like Respondent, have a legal duty to comply with the Nevada Constitution. Further, the Department of Health and Human Services's statutory obligation to administer the Medicaid program includes an explicit and ongoing legal duty to "[o]bserve and study the changing nature and extent of needs for Medicaid," and "develop . . . effective ways of meeting those needs." NRS 422.270.

Second, a writ is also available because the Petition seeks "to control a manifest abuse or an arbitrary or capricious exercise of discretion" by the Division. *Segovia*, 133 Nev. at 912, 407 P.3d at 785 (quoting *Cote H.*, 124 Nev. at 39, 175 P.3d at 907–08); *see also* Pet'r's Reply 12. The Division has discretion to promulgate regulations to administer the Medicaid program, NRS 422.2368, and Silver State asserts that it has abused that discretion by promulgating a discriminatory regulation that conflicts with the Nevada Constitution. *See State v. Eighth Jud. Dist. Ct., ex rel. County of Clark (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) ("A manifest abuse of discretion is [a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." (internal quotations and citation omitted)). Additionally, Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law to challenge the Division's

exclusion of abortion from Medicaid coverage. But even if it did, the circumstances—involving Nevada Medicaid recipients' ability to access essential and time-sensitive health care—reveal urgency and a strong necessity for speedy resolution of the matter. Thus, a writ of mandamus "may be issued" pursuant to NRS 34.160.

Alternatively, this Court may consider Silver State's petition because it presents a purely legal question of statewide importance: Whether the Medicaid abortion coverage exclusion violates the ERA. *See Debiparshad*, 137 Nev. at 693–94, 499 P.3d at 600; Pet'r's Reply 13–15; Silver State Decl. ¶¶ 32–33, 36. The parties do not dispute that this case presents only legal issues, and Silver State has established that this case is of statewide importance as it affects Medicaid-eligible Nevadans who can become pregnant, health care providers, and support organizations throughout the state. Pet'r's Reply 14; *see id.* (noting that Medicaid covers one in five Nevada women between ages 15 and 29); Pet. Writ Mandamus ¶ 33 (noting that a majority of abortion seekers are poor or low income); Silver State Decl. ¶¶ 29–30 (noting that a majority of Silver State's callers are income-eligible for Medicaid). Silver State has also demonstrated that resolution of this matter would serve the interest of judicial economy as this case presents frequently recurring and time-sensitive issues. Pet'r's Reply 14; *see also Criner v. Nev. Dep't of Pub. Safety*, No. A-21-841465-W, 2021 Nev. Dist. LEXIS 1956, at *8 (Nev. Dist. Ct. Nov. 17, 2021) (explaining that mandamus relief is available in the district court "when there are 'urgent circumstances or important legal issues that need clarification in order to promote judicial economy and administration'" (quoting *State v. Eighth Jud. Dist. Ct. ex rel. County of Clark (Logan D.)*, 129 Nev. 492, 497, 306 P.3d 369, 373 (2013))), *aff'd*, 524 P.3d 935 (Nev. 2023) (unpublished opinion). For these reasons, this Court may also exercise its authority under the constitutional standard to consider the requested writ. Nev. Const. art. VI, § 6.

**B. Standing**

Silver State raises three theories of standing in its Petition: beneficial interest, organizational, and public importance. Because this Court finds that Silver State has standing under the beneficial interest test, it need not address Petitioner's organizational or public importance arguments.

Nevada's "caselaw generally requires the same showing of injury-in-fact, redressability, and causation that federal cases require for Article III standing." *See Nat'l Ass'n of Mut. Ins. Cos. v. Dep't of Bus. & Indus.*, 139 Nev. Adv. Op. 3, 524 P.3d 470, 476 (2023). However, "[t]he Nevada Constitution does not include the 'case or controversy' requirement stated in Article III of the United States Constitution, so we are not strictly bound to federal constitutional standing requirements." *Id.* The standing inquiry in Nevada is instead "a self-imposed rule of restraint," *Fergason v. Las Vegas Metro. Police Dep't*, 131 Nev. 939, 952, 364 P.3d 592, 600 (2015) (quoting *Stockmeier v. Nev. Dep't of Corr. Psych. Rev. Panel*, 122 Nev. 385, 393, 135 P.3d 220, 225 (2006)), meant to ensure that a party "will vigorously and effectively present his or her case." *See Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016).

"To establish standing in a mandamus proceeding, the petitioner must demonstrate a 'beneficial interest' in obtaining writ relief." *Heller v. Legislature*, 120 Nev. 456, 460–61, 93 P.3d 746, 749 (2004). "To demonstrate a beneficial interest . . . , a party must show a direct and substantial interest that falls within the zone of interests to be protected by the legal duty asserted." *Id.* at 461, 749 (quoting *Lindelli v. Town of San Anselmo*, 4 Cal. Rptr. 3d 453, 461 (Cal. Ct. App. 2003)). "Stated differently, the writ must be denied if the petitioner will gain no direct benefit from its issuance and suffer no direct detriment if it is denied." *Id.* (quoting *Waste Mgmt. v. County of Alameda*, 94 Cal. Rptr. 2d 740, 747 (Cal. Ct. App. 2000)).

Respondent contends that Petitioner lacks a beneficial interest because the ERA was "not intended to protect Silver State's financial resources or its ability to achieve its mission as a nonprofit organization." Ans. Br. 5. Respondent also claims that Petitioner "seeks an indirect financial benefit through this court remedying an alleged violation of the rights of third parties." *Id.* Silver State asserts that it does not seek to raise the rights of third parties, but rather challenges the Division's discriminatory actions in order to redress injury to itself resulting from that discrimination. Pet'r's Reply 4. Silver State also argues that its interest is not an incidental financial benefit, but rather a substantial interest in the "eliminat[ion] [of] state discrimination that directly and negatively affects it and its operations," which falls within the zone of interest protected by the ERA. *Id.* at 6–7. This Court agrees with Petitioner.

The ERA protects a broad zone of interests. The Nevada Supreme Court has held that laws with a "protective purpose" should be "liberally construe[d] . . . in order to effectuate the benefits intended to be obtained," even when such laws "do[] not expressly address who can" sue to enforce them. *See Hantges v. City of Henderson*, 121 Nev. 319, 322–23, 113 P.3d 848, 850 (2005) (internal quotations omitted); *see also Mesagate Homeowners' Ass'n v. City of Fernley*, 124 Nev. 1092, 1098, 194 P.3d 1248, 1252 (2008) (holding nearby property owners had beneficial interest standing to challenge City's issuance of building permit for water treatment plant where statute imposed prohibitions only on public official's actions). The ERA is a "self-executing" provision, *see Mack v. Williams*, 138 Nev. Adv. Op. 86, 522 P.3d 434, 441–42 (2022), with a protective purpose—expressly limiting the State's ability to discriminate against Nevadans while imposing no explicit limitations on who may sue to enforce the government's obligations under the law. *See* Nev. Const. art. I, § 24 ("[e]quality of rights under the law *shall not be denied or abridged by this State or any of its political subdivisions* on account of . . . sex" and other protected characteristics) (emphasis added). In so doing, the ERA contemplates "the possibility of actions and petitions such

as" this one, where Petitioner suffers a redressable injury, and "implicitly recognizes [Petitioner's] interest in government compliance" with the ERA's mandate. *Cf. Mesagate*, 124 Nev. at 1098, 194 P.3d at 1252. Silver State here seeks to enforce the government's obligations under the ERA in order to redress its own injuries that result from the State's allegedly discriminatory behavior. This clearly falls within the ERA's broad zone of interests.[8] To effectuate the ERA's intended benefit of protecting Nevadans from unconstitutional, unequal treatment by the State, it must be liberally construed to allow Silver State, a party with a redressable injury caused by the State's discriminatory actions, the right to pursue judicial relief.

Silver State has shown that its interest is "direct and substantial," *Heller*, 120 Nev. at 461, 93 P.3d at 749 (quoting *Lindelli*, 4 Cal. Rptr. 3d at 461), such that it will directly benefit if the writ is granted and suffer detriment if it is not. The Division's denial of Medicaid coverage for abortion undermines Silver State's mission to ensure equitable access to abortion, and the State's selective withholding of funding for abortion creates the enormous—and discriminatory—gap in funding that Silver State struggles to fill. There can be no doubt that Silver State has a substantial interest in the elimination of this discrimination, which directly and negatively impacts the organization, its operations, and the clients it serves. *See* Opening Br. 11–12; *see also* Silver State Decl. ¶¶ 32–40. Moreover, the benefit to Silver State if the writ were granted is far from "incidental," Ans. Br. 4–5. Instead, granting the writ would *directly* benefit the organization "by eliminating the coverage exclusion, which strains [its] limited resources and hampers its mission to assist under-resourced abortion seekers to obtain the critical care they need." Pet'r's Reply 6–7 (citing Silver State Decl. ¶¶ 6–9; 32–40). If the writ were denied, Silver State would suffer direct detriment because it

[8] Contrary to the State's protests, the fact that Silver State asserts a financial interest in the enforcement of the ERA does not somehow negate that interest or remove it from the ERA's zone of interests. *See Lindelli*, 4 Cal. Rptr. 3d at 461 (holding that waste management company had beneficial interest in state compliance with election law, and could bring action to enforce it, where enforcement directly and substantially affected company's commercial interest).

"would be forced to continue paying for health care that is unlawfully excluded from Medicaid." *Id.*; Silver State Decl. ¶¶ 32, 36, 39–40.

Because Silver State has established a substantial interest that falls within the broad zone of interests protected by the ERA, it has demonstrated a beneficial interest in obtaining writ relief. *See Heller*, 120 Nev. at 461, 93 P.3d at 749. Further, Silver State has clearly met the standing inquiry's underlying purpose of "vigorously and effectively present[ing] [its] case." *Schwartz*, 132 Nev. at 743, 382 P.3d at 894. This Court accordingly rejects Respondent's arguments and holds that Petitioner Silver State has standing.

## II. Article I, Section 24 of the Nevada Constitution

Having established that this Court may appropriately consider the Petition for Writ of Mandamus and that Petitioner has standing, the Court now turns to the merits to determine whether the requested writ relief is warranted in this case. For the reasons below, this Court holds that Nevada's coverage exclusion discriminates on the basis of sex, in violation of Article I, Section 24 of the Nevada Constitution.

### A. Legal Standard

Petitioner claims that Nevada's coverage exclusion violates the ERA's protection against the "deni[al] or abridge[ment]" of "equality of rights . . . by this State . . . on account of . . . sex." Nev. Const. art. I, § 24. Due to that provision's recent adoption, no Nevada court has provided guidance on what standard applies either to ERA claims generally or to ERA sex discrimination claims specifically. Petitioner argues that, at a minimum, strict scrutiny must apply to classifications based on sex. Respondent agrees that, under the ERA, strict scrutiny applies to state classifications made on the basis of sex, Resp't's Suppl. Answering Br. ("Suppl. Ans. Br.") 5 n.4, but argues that only rational basis review is warranted here because the coverage exclusion is not a sex-based classification.

This Court agrees with the parties that, at a minimum, strict scrutiny applies to state action that classifies or discriminates on the basis of sex. For over 150 years prior to the people's adoption of the ERA, Nevada's Constitution contained a general guarantee of equal protection. Nev. Const. art. IV, § 21. Under the Nevada Equal Protection Clause, courts have applied intermediate scrutiny to enactments that discriminate on the basis of sex. *See Salaiscooper v. Eighth Jud. Dist. Ct. ex rel. County of Clark*, 117 Nev. 892, 903, 34 P.3d 509, 517 (2001).[9] Adopting the ERA against this backdrop, Nevada voters demanded higher protections against discrimination "on account of . . . sex." Nev. Const. art. I, § 24. Where a "State equal rights amendment was adopted at a time when equal protection principles under the State and Federal Constitutions required a level of judicial scrutiny greater than the rational basis test but less than the strict scrutiny test[,] . . . [t]o use a standard in applying the [State] equal rights amendment which requires any less than the strict scrutiny test would negate the purpose of the equal rights amendment and the intention of the people in adopting it." *Op. of the Justs. to the House of Representatives*, 371 N.E.2d 426, 428 (Mass. 1977). This Court will apply the strict scrutiny framework to the ERA sex discrimination claim at hand.[10] *See, e.g.*, *Doe v. Maher*, 515 A.2d 134, 157–62 (Conn. Super. Ct. 1986) ("At the very least, the standard for judicial review of sex classifications under our ERA is strict scrutiny."); *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 853–57 (N.M. 1998) (applying

[9] "The 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. *In re Candelaria*, 126 Nev. 408, 416, 245 P.3d 518, 523 (2010) (internal citation and quotation 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)).

[10] Because the Court holds below that the coverage exclusion cannot survive strict scrutiny, it does not reach the question of whether a standard of review that is higher than strict scrutiny, such as equality review, should apply to sex-based classifications under the ERA.

"heightened scrutiny," a "more stringent" standard than the federal intermediate scrutiny standard, to sex discrimination claims brought under the state constitution's Equal Rights Amendment).

**B. The coverage exclusion classifies on the basis of sex.**

Petitioner proposes that the abortion coverage exclusion discriminates on the basis of sex in four distinct ways, any one of which would be sufficient to trigger strict scrutiny. Respondent contends that strict scrutiny is not triggered because the coverage exclusion does not constitute a sex-based classification in the first instance. This Court agrees with Petitioner that the coverage exclusion classifies "on account of . . . sex," Nev. Const. art. I, § 24, triggering strict scrutiny.

Petitioner first argues that the coverage exclusion facially discriminates "on account of . . . sex" because it provides less comprehensive coverage on the basis of the insured individual's capacity for pregnancy, which is a sex-linked characteristic. The State responds by claiming that "the Nevada ERA does not guarantee equality of rights on account of pregnancy status." Suppl. Ans. Br. 6. Respondent's argument that the ERA does not protect against pregnancy discrimination cannot be reconciled with the text of the Amendment.

"To determine a constitutional provision's meaning, we turn first to the provision's language." *Miller v. Burk*, 124 Nev. 579, 590, 188 P.3d 1112, 1119–20 (2008). "When a constitutional provision's language is clear on its face, we will not go beyond that language in determining the voters' intent." *Strickland v. Waymire*, 126 Nev. 230, 234, 235 P.3d 605, 608 (2010) (quoting *Sec'y of State v. Burk*, 124 Nev. 579, 590, 188 P.2d 519, 521 (2008)); *see also ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 645–46, 173 P.3d 734, 739 (2007).[11] The ERA

[11] "Conversely, '[i]f a constitutional provision's language is ambiguous, meaning that it is susceptible to "two or more reasonable but inconsistent interpretations," we may look to the provision's history, public policy, and reason to determine what the voters intended.'" *Strickland*, 126 Nev. at 234, 235 P.3d at 608 (alteration in original) (quoting *Sec'y of State*, 124 Nev. at 590, 188 P.2d at 521); *see also ASAP Storage*, 123 Nev. at 645–46, 173 P.3d at 739. "Whatever meaning ultimately is attributed to a constitutional provision may not violate the spirit of that provision." *Miller*, 124 Nev. at 590–91, 188 P.3d at 1120.

provides: "Equality of rights under the law shall not be denied or abridged by this State or any of its political subdivisions on account of . . . sex." Nev. Const. art. I, § 24. This language protects Nevadans against sex discrimination by the State. On its face, this necessarily includes protection against discrimination on the basis of sex-specific traits, conditions, or capacities—i.e., those features that serve to define the protected category. As relevant here, pregnancy and the capacity for pregnancy are sex-specific features, and people with the capacity for pregnancy, typically women,[12] seek health care, like abortion, that is unique to that sex-related condition. The ERA's protection against discrimination on the basis of "sex" plainly encompasses protection against discrimination on the basis of sex-linked characteristics, including pregnancy, capacity for pregnancy, and pregnancy-related medical conditions. Put simply, the ERA protects against pregnancy discrimination, which includes discrimination on the basis of abortion. To read the ERA differently would not only "violate the spirit of the provision," *Miller*, 124 Nev. at 590–91, 188 P.3d at 1120, but also defy basic reason and public policy. Indeed, laws already on the books at the time Nevadans adopted the ERA, including NRS 613.330 and Title VII, encompass pregnancy and related medical conditions, such as abortion, within their statutory protections against discrimination on the basis of "sex." *See, e.g.*, *Complete Care Med. Ctr. v. Beckstead*, No. 75908, 2020 WL 3603881, at *1 (Nev. July 1, 2020) (unpublished disposition) (affirming trial court's finding of "discrimination on the basis of sex," in violation of Nevada anti-discrimination law, where plaintiffs presented evidence of "discrimination on the basis of pregnancy"), *vacated in part on reconsideration en banc*, 2021 WL 1345693 (Nev. Apr. 9, 2021); *Turic v. Holland Hosp., Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996) (holding that Title VII's prohibition on discriminating against

[12] While the vast majority of individuals targeted by the coverage exclusion are women, the ban also discriminates against transgender men and people with other gender identities who are capable of becoming pregnant. Actions that penalize pregnant people discriminate on the basis of sex against all individuals with the capacity for pregnancy.

employees "because of such individual's . . . sex" includes abortion as a pregnancy-related condition (quoting 42 U.S.C. § 2000e-2(a)(1))). The ERA does the same.[13]

The coverage exclusion facially discriminates on the basis of pregnancy and thus sex. By its own terms, the coverage exclusion singles out those who are or can become pregnant by excluding coverage for nearly all abortion care; applying a different, far more restrictive standard than is required for any other covered medical care; and providing less comprehensive health care coverage overall. By refusing to cover abortion—health care inextricably linked to the sex-specific capacity for pregnancy and sex-specific condition of pregnancy—Respondent denies pregnant Medicaid recipients the right to equal health care coverage "on account of . . . sex." Nev. Const. art I, § 24. This is the same "unremarkable conclusion" that the Pennsylvania Supreme Court recently reached in a challenge to a similar Medicaid coverage exclusion under that state's Equal Rights Amendment: "[T]o treat a woman differently based on a characteristic unique to her sex is to treat her differently because of her sex, which triggers enforcement of [the] Equal Rights

[13] Because the ERA's language is clear on its face, there is no need to look beyond the text itself. *Strickland*, 126 Nev. at 234, 235 P.3d at 608. However, even if this Court were to look beyond the provision's plain language, the ERA's history confirms that pregnancy discrimination constitutes sex discrimination for purposes of the ERA. With constitutional provisions like the ERA that are adopted by a direct vote of the people, "[t]he goal of constitutional interpretation is 'to determine the *public* understanding of a legal text' leading up to and 'in the period after its enactment or ratification.'" *Strickland*, 126 Nev. at 234, 235 P.3d at 608–09 (emphasis added) (quoting 6 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 23.32 (4th ed. 2008 & Supp. 2010)). Nevadans overwhelmingly voted to adopt the ERA, guided by the 2022 Statewide Ballot Initiatives Guide, which explained that the Amendment's purpose was to help achieve "full equality" by filling "gaps in the existing legal patchwork that have resulted in unavailable or inadequate protection for certain classes of people, including instances of . . . pregnancy discrimination." Nev. Statewide Ballot Questions 2022, at 7. As noted, that "existing legal patchwork" includes statutes, like NRS 613.330 and Title VII, that encompass pregnancy and related medical conditions, such as abortion, within their protections against discrimination on the basis of "sex." It was clearly the voters' intent for the ERA's protections against sex discrimination to include protections against pregnancy discrimination. *Cf. Maher*, 515 A.2d at 160 (it is "absolutely clear that the framers intended that pregnancy discrimination would come within the purview of the sex discrimination prohibited by [the state's] ERA" and, as a result, "the state should no longer be permitted to disadvantage women because of their sex including their reproductive capabilities").

Amendment." *Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs.*, 309 A.3d 808, 867 (Pa. 2024). *See also, e.g.*, *Maher*, 515 A.2d at 159 (holding that "any classification which relies on pregnancy as the determinative criterion is a distinction based on sex" and striking similar coverage exclusion under state's ERA (quoting *Mass. Elec. Co. v. Mass. Comm'n Against Discrimination*, 375 N.E.2d 1192 (Mass. 1978))); *N.M. Right to Choose*, 975 P.2d at 856 (holding that state's exclusion on Medicaid coverage for abortion "undoubtedly singles out for less favorable treatment a gender-linked condition" and striking it under state's ERA); *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 988 (Alaska 2019) (holding that "facially different treatment of pregnant women based upon their exercise of reproductive choice" violates the state constitution's equal protection guarantee). A law like the coverage exclusion that targets a sex-specific trait for worse treatment is therefore no less facially discriminatory than a law explicitly targeting "women." The abortion coverage exclusion facially discriminates on the basis of sex, triggering strict scrutiny.

And despite the State's arguments to the contrary, the coverage exclusion is no less discriminatory merely because it does not affect all women or all people with the capacity for pregnancy. "[L]aws that create subclasses within one sex" plainly "trigger[] the Equal Rights Amendment." *Allegheny Reprod. Health Ctr.*, 309 A.3d at 884. State action that exposes individuals to harm on the basis of a sex-linked characteristic thus creates a sex-based classification, regardless of whether every member of the protected class suffers harm. *See id.* ("Heinous instances of discrimination often affect only a subset of women, and sometimes only individual women.").

**C. The coverage exclusion also fails rational basis review.**

Even if the State were correct that strict scrutiny is not triggered because the coverage exclusion does not discriminate on the basis of sex, the restriction could not survive rational basis

review. Under this lower standard, a court will uphold a regulation if it "is rationally related to a legitimate governmental interest." *See Gaines*, 116 Nev. at 371, 998 P.2d at 172. The State asserts only a governmental interest in cost savings. But even if cost savings is a legitimate governmental interest, there is no rational relationship between that interest and the coverage exclusion, given that the coverage exclusion actually incurs higher costs for the state Medicaid program. Generally, the care that Medicaid patients receive when carrying a pregnancy to term, including prenatal care, childbirth, and postpartum care, costs more than an abortion. Other courts have found that, even with federal matching dollars, it costs state Medicaid programs more to fund the myriad pregnancy related care for indigent women who are forced to carry to term because similar coverage exclusions prevented them from accessing an abortion. *See, e.g.*, *Moe v. Sec'y of Admin. & Fin*., 417 N.E.2d 387, 403 n.20 (Mass. 1981) ("[T]he cost of providing the medical services necessary to support women through to childbirth, even offset by available Federal reimbursement, exceeds the cost of providing abortion services to eligible women who want them."); *Maher*, 515 A.2d at 151 n.34 ("[T]he state's cost for providing comprehensive maternity and childbirth care is significantly more than the costs of an abortion."); *Comm. to Def. Reprod. Rts.*, 625 P.2d at 794 (the "limitation on poor women's constitutional rights" imposed by the Medicaid coverage ban will result in the state paying "many times over in . . . maternity care and childbirth expenses"). Because it costs Nevada Medicaid more to deny coverage for abortion, the coverage exclusion is not rationally related to the State's interest in cost savings. The coverage exclusion has no rational basis as it runs directly counter to the stated goal of the Medicaid program to "promote equal access to health care." Manual § 100(A)(2). *See also State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 911 (Alaska 2001) (reasoning that coverage exclusion cannot withstand "even . . . our most deferential standard of review" where it contravenes Medicaid

program's mission). Even under this lower level of scrutiny, the coverage exclusion is unconstitutional.

* * *

Accordingly, this Court finds that a writ of mandamus may be issued pursuant to NRS 34.160 and Article VI, Section 6 of the Nevada Constitution, and that Petitioner has beneficial interest standing. In addition, this Court holds that a writ of mandamus should be granted because the State's exclusion on Medicaid coverage for abortion care discriminates on the basis of sex, in violation of the Nevada Constitution's Equal Rights Amendment. Nev. Const. art. I, § 24.

**ORDER**

**THEREFORE, IT IS HEREBY ORDERED THAT:**

1. Nevada Medicaid's administrative policies that limit abortion coverage, Medicaid Service Manual § 603.4F(1)–(2) Abortion/Termination of Pregnancy, are unconstitutional sex discrimination because they deny equality of rights under the law "on account of . . . sex," in violation of the Equal Rights Amendment, Nev. Const. art. I, § 24.
2. The Nevada Department of Health and Human Services, Division of Health Care Financing and Policy is ordered to amend its Medicaid coverage policy under Section 603.4F(1)–(2) Abortion/Termination of Pregnancy, to make clear that the Nevada Medicaid Program will cover, with state-only funds, abortion care for individuals enrolled in Nevada Medicaid under the same standard that applies to other covered medical care, which currently means that coverage for such service only applies if an abortion is medically necessary for the recipient, Medicaid

Services Manual §§ 103.1 Medical Necessity, & 603.1A Coverage and Limitations. [14]

3. The Nevada Department of Health and Human Services, Division of Health Care Financing and Policy is ordered to reimburse claims submitted for the provision of medically necessary abortion care to Nevadans covered by the Nevada Medicaid program, which is the same standard that applies to other covered medical care consistent with Paragraph 2, page 19, of this Order.
4. Respondent shall comply with the directives of this Order as soon as reasonably possible but no sooner than 90 days from the date of this Order.

Silver State Hope Fund's Petition for Writ of Mandamus is **GRANTED**.

[14] Medicaid Service Manual §103.1 MEDICAL NECESSITY
A. Medical Necessity is a health care service or product provided for under the Medicaid State Plan and is necessary and consistent with generally accepted professional standards to:
1. diagnose, treat or prevent illness or disease;
2. regain functional capacity; or
3. reduce or ameliorate effects of an illness, injury, or disability.
B. The determination of medical necessity is made on the basis of the individual case and takes into account:
1. the type, frequency, extent, body site, and duration of treatment with scientifically based guidelines of national medical or health care coverage organizations or governmental agencies.
2. the level of service that can be safely and effectively furnished, and for which no equally effective and more conservative or less costly treatment is available.
3. that services are delivered in the setting that is clinically appropriate to the specific physical and mental/behavioral health care needs of the recipient.
4. that services are provided for medical or mental/behavioral reasons, rather than for the convenience of the recipient, the recipient's caregiver, or the health care provider.
C. Medical necessity shall take into account the ability of the service to allow recipients to remain in a community-based setting, when such a setting is safe, and there is no less costly, more conservative or more effective setting.
Please note, the definition of "Medical Necessity", quoted above, is the definition contained in the Medicaid Service Manual at the time this Order was drafted. The definition may change in the future. The definition to be applied, should be the definition that exists at the time of the particular case at issue.

IT IS SO ORDERED this ___ day of August 2024.

**Dated this 8th day of August, 2024**

HONORABLE JUDGE ERIKA BALLOU
**1B9 C32 96F2 5D47**
**Erika Ballou**
**District Court Judge**

Respectfully submitted by:

**AMERICAN CIVIL LIBERTIES UNION**

By: /s/ Rebecca Chan
Rebecca Chan (appearing *pro hac vice*)
125 Broad Street, 18th Floor
New York, NY 10004

*Attorney for Petitioner*

Approved as to form and content by:

**AARON FORD**
**ATTORNEY GENERAL**

By: /s/ Marni Watkins
Marni Watkins (Bar No. 9674)
Chief Litigation Counsel
Jessica Whelan (Bar No. 14781)
Deputy Solicitor General

*Attorneys for Respondent*

**From:** Marni K. Watkins
**To:** Chris Peterson
**Cc:** Rebecca Chan - she/her/hers
**Subject:** RE: SSHF
**Date:** Tuesday, August 6, 2024 2:16:35 PM

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Chris,

The review took less time than I expected. You have my permission to use my e-signature for filing the order. Also, please send over the waiver for my e-signature.

Have a great day.

Marni Watkins, Esq.
Chief, Complex Litigation
Office of the Nevada Attorney General
1 State of Nevada Way
Suite 100
Las Vegas, NV 89119



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**From:** Chris Peterson <peterson@aclunv.org>
**Sent:** Tuesday, August 6, 2024 9:25 AM
**To:** Marni K. Watkins <MKWatkins@ag.nv.gov>
**Subject:** Fwd: SSHF



Hi Marni,

Four documents should be attached to this email: Word and PDF copies of the proposed order and Word and PDF copies of a proposed fees and appeal waiver. Please let me know if we may affix your signature to the proposed order and if we may send over a copy of the waiver for your e-signature.

Get Outlook for iOS

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**From:** Suzanne Lara <SLara@aclunv.org>
**Sent:** Tuesday, August 6, 2024 9:11:21 AM
**To:** Chris Peterson <peterson@aclunv.org>
**Subject:** SSHF

Best,

**Suzanne Lara**
Pronouns: she/her/hers
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**CSERV**

DISTRICT COURT
CLARK COUNTY, NEVADA

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|---|---|
| Silver State Hope Fund,<br>Plaintiff(s)<br><br>vs.<br><br>Nevada Department of Health and Human Services,<br>Defendant(s) | CASE NO: A-23-876702-W<br><br>DEPT. NO. Department 24 |

## AUTOMATED CERTIFICATE OF SERVICE

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Service Date: 8/8/2024

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