

IN THE SUPREME COURT OF THE STATE OF NEVADA

UBER SEXUAL ASSAULT
SURVIVORS FOR LEGAL
ACCOUNTABILITY; and NEVADA
JUSTICE ASSOCIATION,

Appellants,

vs.

UBER TECHNOLOGIES, INC., a
Delaware corporation; MATT
GRIFFIN, JOHN GRIFFIN, SCOTT
GILLES, and TIA WHITE, individuals;
“NEVADANS FOR FAIR
RECOVERY,” a registered Nevada
political action committee; and
FRANCISCO AGUILAR, in his official
capacity as Nevada Secretary of State,

Respondents.

Case No.: 88813

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On Appeal from the First Judicial District Court,
Case No. 24-OC-000561B (Hon. James T. Russell)

***AMICI CURIAE* BRIEF OF NEVADA TRUCKING ASSOCIATION, INC.
AND AMERICAN TORT REFORM ASSOCIATION
IN SUPPORT OF RESPONDENTS**

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, undersigned counsel states that *amici curiae*, American Tort Reform Association (“ATRA”) and Nevada Trucking Association, Inc. have no parent corporations and that no publicly held company owns 10% or more of the organizations’ stock.

The law firm that appears for *amici* in this matter is Evans Fears Schuttert McNulty Mickus. *Amici* and their counsel did not appear in the proceedings before the District Court.

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AMICI IDENTITY, INTEREST, AND AUTHORITY TO FILE

Amici American Tort Reform Association (“ATRA”) and Nevada Trucking Association, Inc. are non-profit organizations whose members operate in Nevada and throughout the United States. ATRA is a national, nonpartisan, nonprofit coalition of large and small businesses, trade associations, and professional firms. ATRA is dedicated to improving the civil justice system, with a focus on promoting fairness, balance, efficiency and predictability in civil litigation. ATRA is especially concerned with the costs that excessive civil litigation imposes on society. In addition to legislative efforts and public education outreach, ATRA has filed *amicus curiae* briefs, including in this Court, in cases involving important civil justice issues.

Nevada Trucking Association, Inc. is a nonprofit organization representing over 500 member companies, operating in both intrastate and interstate commerce, which employs thousands of Nevadans. Nevada Trucking Association is dedicated to advocating for laws and regulations that enhance the safety and profitability of the trucking industry in Nevada.

Amici attach this brief to their motion for leave to appear as *amicus curiae* pursuant to NRAP 29. *Amici* have an interest in ensuring that Nevada’s economy is not overburdened by the costs of excessive tort litigation. As organizations whose membership includes a wide range of employers who contribute to Nevada’s

economy, *amici* are well suited to comment on the initiative to cap contingency fees in Nevada at 20% and the potential benefits of this particular tort reform for Nevadans.

ARGUMENT

A. Judicial review of ballot initiative petitions is limited to the requirements of NRS 295.009 and Article 19 of the Nevada Constitution—it does not include policy considerations.

Appellants Nevada Justice Association (“NJA”), Uber Sexual Assault Survivors for Legal Accountability, and their *amici curiae*¹ ask the Court to strike the initiative petition in this case for a host of declared policy reasons. But as the district court correctly found, those policy considerations are “not germane” to the legal analysis. *See* JA 748 (Corrected Findings of Fact and Conclusions of Law and Order Denying Plaintiffs’ Legal Challenge to Initiative Petition S-04-2024). The district court correctly limited its review to whether the petition: (1) addresses one subject matter consistent with NRS 295.009(1)(a) and (2), (2) includes the full text of the proposed measure consistent with Article 19 Section 3 of the Nevada Constitution, and (3) contains a legally adequate description of effect consistent with

¹ *See generally* Brief of Amici Curiae Nevada AFL-CIO, National Employment Law Project, and Powersiwtch [sic] Action in Support of Appellants (“Nevada AFL-CIO Amicus Brief”); Brief of Amici Consumer Action, Consumer Federation of America, and National Association of Consumer Advocates (In Support of Appellants) (“Consumer Action Amicus Brief”).

NRS 295.009(1)(b). *See* JA 750–54. As Respondents have fully briefed, the district court appropriately applied that narrow review and determined the petition is valid. *See* Answering Brief at 9-41; JA 764.

Despite the district court’s properly narrow focus, the arguments Appellants and their *amici* advance on appeal largely sound in policy. These arguments are not proper considerations at this stage. *See* JA 748. But while this Court’s ruling should not be based on policy arguments from either side, there are strong policy considerations that favor the initiative petition.

B. There are strong policy reasons for a 20% cap on contingency fees.

1. Overlitigation is a drain on Nevada’s economy.

Nevada lawyers file civil cases, particularly those sounding in tort, at a disproportionate rate in comparison to lawyers in other states with similar population densities.² During the 2023 fiscal year, 180,274 new civil lawsuits were filed in Nevada.³ By contrast, that same year only 113,211 civil lawsuits were filed in

² Nevada has a population density of 28.64 per square mile according to available statistics. *See* U.S. DEPARTMENT OF COMMERCE, *Population Density of the 50 States, the District of Columbia, and Puerto Rico: 1910 to 2020* at 1, <https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/population-density-data-table.pdf> (last visited July 28, 2024). The closest four states in density are Oregon, Utah, Kansas, Nebraska. *Id.* Kansas did not have publicly available caseload data for fiscal year 2023.

³ SUPREME COURT OF NEVADA, *Trial Court Statistics*, <https://nvcourts.gov/aoc/statistics> (last visited July 28, 2024).

Oregon,⁴ 81,086 civil lawsuits were filed in Utah,⁵ and 62,106 civil lawsuits were filed in Nebraska⁶ statewide. Focusing just on tort litigation, 7,936 new tort cases were filed in Nevada district courts during fiscal year 2023.⁷ By comparison, only about one-third as many tort lawsuits—2,518—were filed in Utah district courts during fiscal year 2023.⁸

An overly aggressive tort system is exceedingly expensive. According to one 2023 study by The Perryman Group, excessive tort costs resulted in \$342.9 billion

⁴ OREGON CIRCUIT COURTS, *Cases Filed*, <https://app.powerbigov.us/view?r=eyJrIjojZjNINjNkYTMtOWMzNy00MDM4LWE0ODgtYmQ5ZWQ2OTVjY2MwIiwidCI6IjYxMzNIYzg5LWU1MWItNGExYy04YjY4LTE1ZTg2ZGU3MWY4ZiJ9>.

⁵ *Utah District Courts: FY2023 Case Type by Court* at 2, <https://www.utcourts.gov/content/dam/stats/files/2023fy/district/0-Statewide.pdf> (last visited July 28, 2024) (recording 64,145 general civil lawsuits and 2,518 tort lawsuits in the Utah District Courts for fiscal year 2023); *Utah Justice Courts: FY2023 Case Type by Court* at 1, <https://www.utcourts.gov/content/dam/stats/files/2023fy/justice/0-Statewide.pdf> (last visited July 28, 2024) (recording 14,423 small claims matters in the Utah Justice Courts for fiscal year 2023).

⁶ NEBRASKA JUDICIAL BRANCH, *County Court Annual Caseload Report Fiscal Year 2023* at 4, <https://supremecourt.nebraska.gov/sites/default/files/publication-report-files/C-C-annual-caseload-fy-23.pdf> (last visited July 28, 2024).

⁷ SUPREME COURT OF NEVADA, *Annual Report of the Nevada Judiciary Fiscal Year 2023 Appendix Tables* at 23, https://nvcourts.gov/data/assets/pdf_file/0012/43014/2023AnnualReportAppendix.pdf (last visited July 28, 2024).

⁸ *Utah District Courts*, *supra* n. 4. Nebraska and Oregon do not provide publicly available statistics specific to tort caseload for fiscal year 2023.

in direct annual costs to Americans, and \$520.2 billion in annual gross product.⁹ Another study found aggregate tort costs in the United States amounted to \$443 billion of U.S. gross domestic product in 2020 and that the U.S. tort system is growing at an average annual rate of 6%, outpacing growth rates for both inflation and GDP.¹⁰

A prior report by The Perryman Group found that Nevada business activities in 2020 were hit with an estimated \$5.2 billion due to excessive tort costs.¹¹ This figure included an estimated \$1.7 billion in lost “personal income” to Nevadans in 2020, the vast majority of which constituted forfeited employee earnings.¹²

The Perryman Group estimates that excessive tort costs bled individual Nevadans in the amount of \$1,103.05 per person in 2022, with an expectation that

⁹ See The Perryman Group, *Economic Benefits of US Tort Reform*, at 1 (Oct. 2023) (“2023 Perryman Group Report”).

¹⁰ See *Tort Costs in America An Empirical Analysis of Costs and Compensation of the U.S. Tort System* at 24, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM (2022), <https://www.instituteforlegalreform.com/wp-content/uploads/2022/11/Tort-Costs-in-America-An-Empirical-Assessment-of-Costs-and-Compensation-of-the-U.S.-Tort-System.pdf>.

¹¹ The Perryman Group, *Economic Benefits of Tort Reform*, at 67 (Dec. 2021) (“2020 Perryman Group Report”), <https://perrymangroup.com//media/uploads/report/perryman-economic-benefits-of-tort-reform-02-01-22.pdf>.

¹² *Id.* at 12, 67.

this “tort tax”¹³ will increase over time absent meaningful reform.¹⁴ Indeed, the 2022 tort tax to Nevadans represents a 28% increase from the tort tax Perryman Group calculated for Nevadans in 2020.¹⁵ The U.S. Chamber of Commerce similarly published what it estimated to be the “tort costs”¹⁶ to Nevadans based on 2020 data. The U.S. Chamber estimated the 2020 tort cost to be \$3,757 per Nevada household, which was higher than the national average.¹⁷

On top of these costs, excessive tort litigation has prompted high car insurance premiums for Nevadans. According to one source, as of 2024 Nevada has the second most expensive car insurance in the country.¹⁸ The percentage of income Nevadans

¹³ The Perryman Group defines “tort tax” as a per capita manifestation of the reduction in output due to excessive tort costs. *See* 2023 Perryman Group Report, *supra* n. 8, at 13. In other words, “tort tax” accounts for lost economic output.

¹⁴ *See id.* at 11, 30.

¹⁵ The Perryman Group estimated the tort tax to Nevadans in 2020 at \$857.78. *See* 2020 Perryman Group Report, *supra* n. 10, at 30.

¹⁶ The U.S. Chamber defines “tort costs” as the “aggregate amount of judgments, settlements, and legal and administrative costs to adjudicate private claims and enforcement actions. The costs of the tort system also include the market-determined gross profits for insurers, as policyholders are required to pay these costs to create a sufficient incentive for insurance companies to willingly bear the transferred liability risks.” U.S. Chamber of Commerce, *supra* n. 9, at 8.

¹⁷ *See* U.S. Chamber of Commerce, *supra* n.9, at 18.

¹⁸ *See* Cassie Sheets, Tanveen Vohra, & Betsy Stella, *New Report: Car Insurance Costs to Increase 7% in 2024 After 24% Hike in 2023*, INSURIFY (Jan. 9, 2024), <https://insurify.com/car-insurance/report/>.

contribute to car insurance is almost double what the average American pays.¹⁹ The Chief Deputy Commissioner for the Nevada Division of Insurance attributes these prices at least in part to overlitigation, stating “the cost of litigation is a significant driver of [increased insurance] costs.”²⁰

Finally, The Perryman Group assesses that excessive tort litigation cost Nevada \$178,450,000 and \$151,841,000 in 2022 tax revenues at the State and local levels, respectively.²¹ This is a significant increase from the figures reported in The Perryman Group’s 2020 report, which calculated \$137,046,000 and \$116,611,000 at the State and local levels lost to excessive tort litigation in 2020.²² Nevada needs that revenue in order to support programs like Medicaid,²³ which Appellants have

¹⁹ *Id.* (Nevadans contribute 4% of their annual income to car insurance while the average American contributes 2.6%).

²⁰ See Jarah Wright, *Nevada auto insurance premiums expected to stay high through 2025*, KTNV (Nov. 2, 2023), <https://www.ktnv.com/news/nevada-auto-insurance-premiums-expected-to-stay-high-through-2025>.

²¹ See 2023 Perryman Group Report, *supra* n. 8, at 31.

²² See 2020 Perryman Group Report, *supra* n. 10, at 31. The Perryman Group also estimated excessive tort litigation cost Nevada 26,216 jobs in 2020. *Id.* at 67.

²³ Medicaid is a publicly funded program. See *Nevada Medicaid Fact Book* at 8, DIVISION OF HEALTH CARE FINANCING & POLICY, <https://dhcfp.nv.gov/uploadedFiles/dhcfpnev.gov/content/Resources/Medicaid%20and%20Nevada%20check%20Up%20Fact%20Book1.pdf> (last visited July 28, 2024).

highlighted in their brief as a resource they aim to protect. *See* Opening Brief at 34–37.

2. *Excessive tort litigation threatens Nevadans’ access to competent healthcare.*

Overlitigation also has direct public health consequences for Nevadans. 2023 Perryman Group Report, at 1. According to one study, there is evidence to support the theory that tort reforms which reduce the amount of lawsuits filed in turn lead to lower liability costs for “injurers.”²⁴ Importantly, the authors of this paper reported that “many” studies find lower liability costs lead to lower medical malpractice and general liability insurance premiums.²⁵

²⁴ Paul H. Rubin & Joanna M. Shepherd, *Tort Reform and Accidental Deaths*, 50 J.L. & ECON. 221, 233 (2007); *see also* Yoon, Albert, *Damage Caps and Civil Litigation: An Empirical Study of Medical Malpractice Litigation in the South*, 3 Am. L & Econ. Rev. 199, 199–227 (2001) (referred to in the Shepherd article); Browne, Mark J., and Robert Puelz, *The Effect of Legal Rules on the Value of Economic and Non-economic Damages and the Decision to File*, 18 J. RISK & UNCERTAINTY 189, 189–213 (1999) (same).

²⁵ *See* Rubin & Shepherd, *supra* n. 23, at 233; *see also* Kip W. Viscusi et al., *The Effect of the 1980s Tort Reform Legislation on General Liability and Medical Malpractice Insurance*, 6 J. RISK & UNCERTAINTY 165, 196 (1993); Patricia H. Born & Kip Viscusi, *Insurance Market Responses to the 1980s Liability Reforms: An Analysis of Firm-Level Data*, 61 J. RISK & INSURANCE 192, 218 (1994); Kenneth E. Thorpe, *The Medical Malpractice “Crisis”*: *Recent Trends and the Impact of State Reforms*, HEALTH AFFAIRS (Jan. 2021), <http://content.healthaffairs.org/cgi/reprint/hlthaff/w4.20v1.pdf>; Kip W. Viscusi & Patricia H. Born, *Damage Caps, Insurability, and the Performance of Medical Malpractice Insurance*, 72 J. RISK & INSURANCE 23, 43 (2005)

High medical malpractice liability insurance premiums have historically plagued Nevadans. In the 1970s, medical malpractice insurers abandoned Nevada due to high litigation costs, and as a result, physicians struggled to obtain liability insurance.²⁶ In response, the State formed Nevada Medical Liability Insurance Association to furnish Nevada doctors with liability coverage.²⁷

But in the early 2000s, medical malpractice premiums increased substantially, causing four carriers to stop offering coverage to Nevada doctors. Some doctors in the State faced premium increases of 400% and many others were unable to purchase coverage at all. This led thirty (30) OB-GYNs to leave Clark County, and a number of other physicians limited their practices.²⁸ One-hundred and fifty doctors from University Medical Center resigned in July 2002 to protest high insurance premiums, causing Nevada's only level 1 trauma center to shut down for 10 days.²⁹

²⁶ See *Letter to the Assembly Judiciary Committee re: AB209* at 1, NEVADA HOSPITAL ASSOCIATION (Apr. 10, 2023), https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/ExhibitDocument/OpenExhibitDocument?exhibitId=67079&fileName=0412_AB209_Nevada.Hospital.Assn_opltr_Redacted.pdf.

²⁷ *Id.*

²⁸ *Id.*

²⁹ David B. Caruso, *Some Penn. Surgeons Threaten to Stop Work*, MIDLAND DAILY NEWS (Dec. 26, 2002), <https://ourmidland.com/news/article/Some-Penn-Surgeons-Threaten-to-Stop-Work-7146404.php>.

Nevadans voted to codify certain protections against spikes in liability insurance in the mid-2000s in hopes of addressing these issues. According to the Nevada Hospital Association, these tort reforms caused the number of meritless lawsuits to drop and health insurance premiums to stabilize.³⁰ But recent legislation sought to undo those measures, namely by removing the current cap on noneconomic damages as well as the cap on contingency fees for medical malpractice cases. *See* A.B. 209, 82nd Leg. Sess. (2023). Although that legislation was not successful, a bill to raise the noneconomic damages cap for medical malpractice cases was enacted, and new legislation to undo caps is waiting in the wings. *See infra* Part B.3.

Against this backdrop, it is imperative that the contingency fee cap initiative be allowed to go forward. As several studies have found, an overall reduction in the number of lawsuits filed in turn leads to lower medical malpractice liability insurance premiums. Keeping premiums low in turn keeps competent doctors in Nevada, who according to proponents of tort reform “WILL” leave or cease

³⁰ *Id.*

practicing altogether if premiums go back up.³¹ These forewarnings are particularly troubling given that Nevada is ranked 50th in the country for healthcare access.³²

In addition to promoting vital access to healthcare, tort reforms may have a direct impact on the accidental death rate in Nevada, which has increased each year since 2014.³³ Rubin & Shepherd found evidence to support the conclusion that tort reform decreases the number of accidents by decreasing the number of lawsuits, which in turn reduces liability costs and makes them more predictable.³⁴ Tort reforms lead to lower prices for risk-reducing products, such as safety equipment, medicines, or medical services.³⁵ Rubin & Shepherd conclude that tort reforms in the United States between 1981 and 2000 had the effect of preventing approximately

³¹ See Sean Golonka & Jacob Solis, *Bill to ax caps on malpractice damages pits lawyers against doctors, insurers*, THE NEVADA INDEPENDENT (Apr. 12, 2023), <https://thenevadaindependent.com/article/bill-to-ax-caps-on-malpractice-damages-pits-lawyers-against-doctors-insurers>.

³² See *Health Care Access*, U.S. NEWS & WORLD REPORT, <https://www.usnews.com/news/best-states/rankings/health-care/healthcare-access> (last visited July 29, 2024).

³³ See *Accidental Mortality by State*, CDC, https://www.cdc.gov/nchs/pressroom/sosmap/accident_mortality/accident.htm (last visited July 28, 2024) (comparing data from 2022 through 2014; post 2022 data unavailable).

³⁴ See Rubin & Shepherd, *supra* n. 23, at 224.

³⁵ See *id.*; see also Manning, Richard L., *Changing Rules in Tort Law and the Market for Childhood Vaccines*, 37 J. L. & Econ. 247, 272–73 (1994).

24,000 accidental deaths during that period.³⁶ Tort reform can be expected to produce these effects in Nevada today.

Tort reforms, such as contingency fee caps, yield a wide range of benefits including reducing accidental deaths, improving access to healthcare through lower costs, and reducing the tort costs to Nevadans. On the other hand, excessive contingency fees tethered only to the “reasonableness” standard benefit only certain lawyers to the detriment of injured parties.

3. *Certain Nevada lawyers benefit from a limitless contingency fee system to the detriment of injured parties.*

The going rate for contingency fees in Nevada has reached a staggering forty percent (40%). *See O’Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 559, 429 P.3d 664, 671 (Nev. App. 2018) (“the typical contingency fee rate charged by attorneys of this jurisdiction . . . for trial is consistently set at 40% of the gross recovery”).³⁷

³⁶ *See Rubin & Shepherd, supra* n. 23, at 233.

³⁷ *See also Stehlik v. Wafa Abdulmalek Haza Al Okaibi*, No. A-19-799462-C, 2021 WL 7968008, at *5 (Nev. Dist. Ct. Sep. 29, 2021) (“In this Court’s experience, the ‘going rate’ for contingency fees charged after the filing of a Complaint, but before the case is appealed, is forty percent (40%) of the gross recovery.”); *Garcia v. Taylor*, No. A-20-808557-C, 2021 WL 7967966, at *3 (Nev. Dist. Ct. Sep. 22, 2021) (“The Court . . . (based on the Court’s own experience as a Nevada attorney since 1986) finds that a 40% contingency fee for a matter which has progressed to the conclusion of both an arbitration and (due to Defendant’s request for trial de novo) jury trial is consistent with fees commonly charged in the community.”).

But what many Nevadans do not understand is that in addition to contingency fees, injured parties typically must pay back any costs associated with their case, such as medical expenses, expert witness fees and court reporter expenses, out of their settlement or jury award. Medical expenses alone can total hundreds of thousands of dollars even when the injured parties use insurance. *See, e.g., Canfora v. Coast Hotels and Casinos, Inc.*, 121 Nev. 771, 773, 121 P.3d 599, 601 (2005) (ordering plaintiff's law firm to reimburse plaintiffs' medical insurance \$227,000 in medical expenses). Once these costs are deducted, injured parties are often left with far less than 60% of the money awarded to them.³⁸ In fact, "a growing body of research supports the economic theory that plaintiffs who hire contingency fee lawyers are more likely to have their case settle to their own detriment."³⁹

³⁸ *See, e.g., In the matter of Casall*, 18-A-784761-M, 2018 WL 7823552 (Nev. Dist. Ct. Dec. 5, 2018) (\$55,000 settlement to personal injury plaintiff, who received 38% of that settlement after deducting \$18,692.64 in attorneys' fees and costs and \$14,912.07 in medical liens); *In re S.L.*, 17-A-763394-M, 2017 WL 9538891 (Nev. Dist. Ct. Oct. 23, 2017) (\$50,000 settlement to personal injury plaintiff, who received 45% of that settlement after deducting \$20,000 in attorneys' fees and costs and \$7,367.52 in medical expenses); *In the matter of Moore*, A-19-793210-M, 2019 WL 5390578 (Nev. Dist. Ct. Apr. 22, 2019) (\$27,000 settlement to personal injury plaintiff, who received 38% of that settlement after deducting \$7,669.11 for plaintiff's attorneys fees, \$606.61 for legal costs, \$6,510.59 for medical expenses, and \$1,115.00 for subrogation expenses).

³⁹ Steve P. Calandrillo et. al., *Contingency Fee Conflicts: Attorneys Opt for Quick-Kill Settlements When Their Clients Would Be Better Off Going to Trial*, 26 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 19 (2023). Notably, one study of the negative impacts of contingent fee arrangements concluded that worker's compensation claimants who hired contingency fee lawyers had their cases settle more frequently and received

The justification for high contingency fees is often regarded as accounting for the “risk” that counsel faces in a relationship where the lawyer can take nothing if there is no victory. *See O’Connell*, 134 Nev. at 559, 429 P.3d at 671 (“Courts have recognized an additional reason that supports awarding attorney fees—the risks attorneys take by offering or accepting contingency fee agreements.”).⁴⁰ Yet the overwhelming majority of cases settle, meaning that “the risk of no recovery is exceedingly rare.” Calandrillo, *supra* n.38, at 24.⁴¹

This outcome is in part due to legal reforms that increase the likelihood that a defendant will make a settlement offer. *Id.* Nevada, for example, has curbed tort

less money than claimants who did not retain counsel. Terry Thomason, *Are Attorneys Paid What They're Worth? Contingent Fee and the Settlement Process*, 20 J. LEGAL STUD. 187, 188 (1991). Another researcher found that contingency fee lawyers collected greater fees for class actions that settled than those that went to trial and concluded this was likely because the lawyers accepted smaller settlements for their clients in exchange for bigger legal fees. *See id.*

⁴⁰ *See also King v. Fox*, 851 N.E.2d 1184, 1191-92 (N.Y. 2006) (“In entering into contingent fee agreements, attorneys risk their time and resources in endeavors that may ultimately be fruitless.”); *Schefke v. Reliable Collection Agency, Ltd.*, 32 P.3d 52, 96-97 (Haw. 2001) (concluding that a contingency based fee award could be justified based on the risks associated with accepting a case on a contingency basis).

⁴¹ *See also id.* (explaining that approximately 96% of civil cases never go to trial); *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 185 (E.D. Pa. 2008) (“More than 98% of all civil cases filed in the federal courts result in disposition by way of settlement or pretrial adjudication.”); Frank E.A. Sander, *The Obsession with Settlement Rates*, 11 NEGOTIATION J. 329, 331 (1995) (“95 percent of all cases filed in court are likely to settle eventually”); W. Kip Viscusi, *Product and Occupational Liability*, 5 J. ECON. PERSPECTIVES 71, 84 (1991) (95% of products liability claims that are not dropped lead to a positive out-of-court settlement).

defenses such as comparative fault and assumption of the risk.⁴² Further, contingency fee lawyers often mitigate their risk through the prescreening process, declining to take high risk cases which chance no recovery. Jeffrey D. Swett, *Determining a Reasonable Percentage in Establishing a Contingency Fee: A New Tool to Remedy an Old Problem*, 77 TENN. L. REV. 653, 656 (2010). In fact, according to one article, contingency fee lawyers reject at least one half of the cases presented to them. See Herbert M. Kritzer, “Loser Pays” Doesn’t, LEGAL AFF.’S (2005). In this sense, high contingency fees are not reasonable in relation to the risk that justifies them in the first place. See Calandrillo at 24.

Despite facing only minimal risk of non-recovery, Nevada contingency fee lawyers, in some cases, receive millions of dollars in fees on a single case. See, e.g., *Capriati Constr. Corp. v. Yahyavi*, 137 Nev. 675, 679, 498 P.3d 226, 230 (2021) (affirming district court’s determination that 40% contingency fee of \$2.3 million was reasonable and appropriate); see also Plaintiffs’ Motion for Attorneys’ Fees, Costs, and Interest Pursuant to NRCP 68 and NRS 17.117 at 5, *Hunwardsen v. Affinitylifestyles.com, Inc. et al.*, Case No. A-21-831543-B (Nev. Dist. Ct. May 7,

⁴² See NRS 41.141 (codifying rule that plaintiff’s comparative negligence does not bar recovery unless it exceeds the combined negligence of the parties against whom recovery is sought); *Turner v. Mandalay Sprots Entm’t, LLC*, 124 Nev. 213, 221, 180 P.23d 1172, 1177 (2008) (holding that assumption of the risk is not an affirmative defense); *Woosley v. State Farm Ins. Co.*, 117 Nev. 182, 190 18 P.3d 317, 322 (2001) (holding that Nevada’s comparative negligence statute subsumes the doctrine of assumption of the risk).

2024) (disclosing 40% contingency fee of \$53,379,153.90); Order Granting Plaintiff’s Motion for Attorney Fees, Costs, and Interest, *Roybal v. Bellomo*, Case No. A-18-778040-C (Nev. Dist. Ct. Mar. 15, 2023) (determining 50% contingency fee of \$7,923,304.85 split between two law firms was reasonable); Plaintiff’s Motion for Attorney’s Fees, Costs, and Prejudgment Interest, *Hendrickson v. Lowe’s Home Centers, LLC*, Case No. A-13-687418-C (Nev. Dist. Ct. May 31, 2016) (disclosing 40% contingency fee of \$5,407,229.20).⁴³

Contingency fee lawyers then reinvest their fees into shaping Nevada laws that benefit their cause.⁴⁴ For example, out of “lawyers, law groups and legal political action committees, no single donor spent more on legislative campaigns [last election cycle] than Citizens for Justice—the political arm of the Nevada Justice

⁴³ *Amici* for Appellants make much out of Uber’s political spending on the initiative at issue here, *see* Consumer Action Amicus Brief at 8; Nevada AFL-CIO Amicus Brief at 13, which is less than the contingency fees sought in any one of these cases.

⁴⁴ The top 20 plaintiffs’ firms in Nevada have contributed approximately \$2.8 million to Citizens for Justice since 2017. *See Nevada 2017–2023 Campaign Finance Analysis Plaintiff’s’ Firms & PAC Contributions* at 3, ATRA, <https://www.atra.org/wp-content/uploads/2024/02/Campaign-Contributions-2024---NV-1-1.pdf> (last visited July 28, 2024).

Association.”⁴⁵ Citizens for Justice was “the third largest single donor overall, behind only the Nevada Association of Realtors and MGM Resorts International.”⁴⁶

Out of the \$274,000 Citizens for Justice contributed to Nevada lawmakers, \$239,000 of those distributions went to Democrats—all of whom voted for NJA’s 2023 initiative to raise the cap on noneconomic damages for medical malpractice claims.⁴⁷ Citizens for Justice also concentrated its distributions, giving the maximum contribution of \$10,000 to 16 lawmakers of which just one was a Republican. *Id.* “Just two of those [16] maximum contributions went to members who do not serve in leadership or as committee chairs.” *Id.*

This session, Citizens for Justice “is expected to pursue legislation to lift the cap on ‘pain and suffering’ damages for medical malpractice suits.” *Id.* The cap limiting noneconomic damages to \$350,000 per action originated from an initiative

⁴⁵ See Sean Golonka & Jacob Solis, *Follow the Money: Nevada Justice Association dominates law groups in campaign donations*, THE NEVADA INDEPENDENT (Mar. 26, 2023), <https://thenevadaindependent.com/article/follow-the-money-nevada-justice-association-dominates-law-groups-in-campaign-donations>.

⁴⁶ See *id.* This is not an outlier statistic. Citizens for Justice distributed approximately \$203,000 to state lawmakers during the 2020 cycle and \$305,000 to lawmakers during the 2018 cycle. See *id.*

⁴⁷ Compare Golonka & Solis, *supra* n. 43, (naming the lawmakers who received maximum contributions from Citizens for Justice), with *AB 404 Final Passage*, NELIS, <https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/Bill/10355/Votes> (last visited July 28, 2024) (naming the members of the assembly and senate who voted in favor of AB404 at the 82nd legislative session).

petition, just like this one, intended to keep doctors in Nevada amidst concerns that healthcare providers would leave the State for fear of overlitigation in the medical malpractice space.⁴⁸ This cap was approved by 59.3% of Nevada voters in 2004.⁴⁹ But NJA has already begun chipping away at the cap via recent legislation which codified annual increases to the cap starting January 1, 2024. *See* Minutes of the Meeting of the Assembly Committee on Judiciary, 82nd Leg. Sess. at 3 (May 9, 2023) (Nevada Justice Association’s representative advocating in favor of AB 404 to the Nevada Legislature).

In stark contrast to this cap which NJA has worked the legislative process to remove, Appellants would have this Court prevent Respondents from utilizing the same legislative process to seek a cap on contingency fees. Just as there are policy arguments that can be advanced for and against medical malpractice caps, there are policy arguments that can be made for and against the initiative at issue here. It is for Nevadans—not the judiciary—to decide which arguments carry the day.

⁴⁸ *See State of Nevada Statewide Ballot Questions 2004*, at 16 (2004), NELIS, <https://www.leg.state.nv.us/division/research/votenv/ballotquestions/2004.pdf> (last visited July 28, 2024).

⁴⁹ *See Nevada Healthcare Malpractice Damages, Question 3* (2004), BALLOTPEDIA, [https://ballotpedia.org/Nevada_Healthcare_Malpractice_Damages,_Question_3_\(2004\)](https://ballotpedia.org/Nevada_Healthcare_Malpractice_Damages,_Question_3_(2004)) (last visited July 28, 2024).

C. Nevadans support a 20% cap on contingency fees even after hearing Appellants’ policy arguments against the initiative petition.

Chief among Appellants’ policy arguments is their contention that the initiative preys on “voter confusion” and “obfuscation” in order to disguise the perceived harm it would impose on Nevadans. *See* Opening Brief, at 1; *see also* Nevada AFL-CIO Amicus Brief at 15; Consumer Action Amicus Brief at 4.⁵⁰ According to Appellants, if Nevadans only knew these consequences they would not vote for this legislation. But polling data debunks Appellants’ contention.

Contrary to Appellant’s assertions, a recent poll found that even after they were presented with Appellants’ very concerns, 72% of Nevada voters supported a 20% cap on contingency fees for civil cases.⁵¹ Specifically, polled respondents were fed anti-initiative messaging including:

- “Capping lawyer fees tilts the scales of justice in favor of corporate

⁵⁰ Although the Consumer Action *amici* seem to not even criticize the petition itself as deceptive—they instead focus on campaign messaging on the Nevadans for Fair Recovery website, which is not the basis for this appeal.

⁵¹ The poll surveyed 655 registered voters by phone or text between July 15 and July 17, 2024. *See* PUBLIC OPINION STRATEGIES, *Executive Summary: Nevada Statewide Survey*, at 1–2, https://s3.documentcloud.org/documents/25003000/pos-nevada-contingency-fee-survey-memo_july-2024-1.pdf (last visited July 28, 2024); *see also* Eric Neugeboren, *Uber-backed ballot question capping attorney fees widely supported, internal poll finds*, THE NEVADA INDEPENDENT (July 26, 2024), <https://thenevadaindependent.com/article/uber-backed-ballot-question-capping-attorneys-fees-widely-supported-internal-poll-finds>.

interests and against victims [because] Corporations could still spend millions of dollars on large teams of lawyers, but it would be harder for victims to find qualified lawyers”;

- “Sexual assault victims, victim advocates, consumer advocates, teachers, firefighters and other leading Nevada groups oppose this measure because it would impose the most restrictive cap on lawyer fees of any state in the country. It is a deceptive scheme by wealthy corporations to limit what they have to pay out to accident victims, protecting their bottom line while hurting victims”;
- “A contingency fee is the only way that ordinary victims can afford to hire attorneys to go toe-to-toe with large corporations and vindicate their rights”; and
- “Nevadans from all walks of life would be worse off by limiting victims’ access to the courts to get the justice they deserve. This measure would limit legal recourse for people wrongfully injured on the job, those hurt by a defective product, medical malpractice, abuse in nursing homes and many other instances.”

These messages are directly in line with Appellants’ policy arguments.⁵² Yet even after they were confronted with this messaging, a significant majority of polled Nevada voters still supported a 20% contingency fee cap.⁵³ In fact, the poll first asked respondents whether they supported the 20% contingency fee cap prior to providing any messaging, and overall support for the cap went up by two percent after hearing an equal number of messages both for and against the initiative.⁵⁴

⁵² See Opening Brief, at 1 (alleging the initiative is one-sided because it puts no limit on what corporations can pay their hourly rate lawyers while placing restrictions on contingency fee plaintiffs’ lawyers; claiming Uber is deceptively trying to make it harder to sue corporations), 22 (claiming Nevada voters are unaware that the initiative would cover a variety of cases including those for sexual assault and elder-abuse), 30 (claiming this initiative would limit ordinary Nevadans’ access to the justice system), 31–32 (claiming this initiative would make it harder for plaintiffs to obtain “competent” representation and that contingency fees allow those who cannot afford an attorney on an hourly fee basis access to the courts); see also Nevada AFL-CIO Amicus Brief at 12–13 (claiming the initiative allows Uber to spend millions on its lawyers while making it “impossible” for many Nevadans to afford representation), 13–14 (alleging the initiative does not disclose that it covers a variety of claims including sexual assault and elder abuse); Consumer Action Amicus Brief at 14 (claiming that “of course” if Nevada voters were told the initiative curtails litigation against Uber, voters would not approve of the initiative).

⁵³ See Public Opinion Strategies, *supra* n. 48, at 3.

⁵⁴ Messaging in favor of the initiative included statements such as “This measure ensures that more money goes directly to the victims. People involved in a serious accident should be entitled to eighty percent (80%) of what they win in court”; “Right now, lawyers can take up to half of all awards and settlements that are supposed to go to victims”; “Trial lawyers have been gaming the system and taking advantage of vulnerable victims for decades. They claim this measure is about denying victims justice. But the truth is these lawyers just want to charge as much as possible, which hurts the victims they claim to represent”; and “Nevada attorneys spend over a hundred million dollars a year advertising constantly on television,

Nevadans are entirely capable of weighing policy considerations from both sides and choosing for themselves how to vote. That is the democratic process.⁵⁵ It would be inconsistent with that democratic process for the judiciary to tip the scales. The district court was correct in declining to strike the initiative petition even in the face of Appellants' policy arguments because, at this stage, there are only limited and narrow bases for preventing a statutory initiative from going forward. As briefed by Respondents, the public policy arguments which Appellants raise in their Opening Brief should not be part of the current analysis. Notwithstanding, and contrary to what Appellants would have this Court believe, there are legitimate policy reasons why this initiative should go forward. That is precisely why Nevada voters should weigh and decide these considerations, not the judiciary.

radio, online, and on billboards all over the state. Lawyers are getting wealthy at the expense of the victims they are supposed to represent.” See Public Opinion Strategies, *supra*, at 3.

⁵⁵ Public Opinion Strategies, *supra* n. 48, at 3. According to one article, lead counsel for Appellants gave a statement to Reuters that “voters need to be truthfully informed about these important effects before Uber’s proposal can be placed on the ballot.” Alison Frankel, *Uber-backed proposal to cap Nevada lawyers’ contingency fees survives initial challenge*, Reuters (May 13, 2024), <https://www.reuters.com/legal/government/column-uber-backed-proposal-cap-nevada-lawyers-contingency-fees-survives-initial-2024-05-13/>. Yet that is exactly what would happen if the initiative were to go forward. In addition to running public campaigns, both sides would have the opportunity to address State approved descriptions that Nevada voters would receive before the initiative appears on the general election ballot. See *id.*

CONCLUSION

For these reasons, *amici* respectfully request that this Court affirm the district court's decision not to strike the initiative at this early stage. The policy arguments advanced by Appellants do not bear on the narrow questions at issue, as briefed by Respondents. And regardless, there are legitimate policy reasons that the initiative should go forward as stated in this brief.

Dated: August 8, 2024

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 29 (d) and 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 29e) and 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaces, has a typeface of 14 points or more, and **contains 5,581 words** (fewer than 7,000).

3. I certify that I have read this brief and, to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose.

4. I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including NRAP 29, which governs amicus briefs, and NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

5. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: August 8, 2024.

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CERTIFICATE OF SERVICE

I certify that on August 8, 2024, a true and correct copy of *AMICI CURIAE BRIEF OF NEVADA TRUCKING ASSOCIATION, INC., AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF RESPONDENTS* was served on all counsel of record by electronically filing the document using the Supreme Court of Nevada’s electronic filing system.

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