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## STATE QUESTION NUM. 1

Amendment to the *Nevada Constitution*

Senate Joint Resolution No. 8 of the 80th Session

Shall the *Nevada Constitution* be amended by adding a specific guarantee that equality of rights under the law shall not be denied or abridged by this State or any of its cities, counties, or other political subdivisions on account of race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry, or national origin?

Yes .....

No .....

## EXPLANATION & DIGEST

**EXPLANATION**—This ballot measure would add new language to the *Nevada Constitution* specifically guaranteeing that equality of rights under the law shall not be denied or abridged by the State or any of its cities, counties, or other political subdivisions based on race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry, or national origin.

**A “Yes” vote would amend the *Nevada Constitution* to add new language specifically guaranteeing that equality of rights under the law shall not be denied or abridged by the State or any of its cities, counties, or other political subdivisions based on race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry, or national origin.**

**A “No” vote would not amend the *Nevada Constitution* to add new language specifically guaranteeing that equality of rights under the law shall not be denied or abridged by the State or any of its cities, counties, or other political subdivisions based on race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry or national origin.**

**DIGEST**—Existing federal and state constitutional and statutory provisions prohibit discrimination based on race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry, or national origin in various manners. For example, the First Amendment to the *United States Constitution* prohibits discrimination based on creed or religion. (*Lee v. Weisman*, 505 U.S. 577, 590 (1992) (explaining that the government cannot violate “the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored.”); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, --- U.S. ---, 137 S. Ct. 2012, 2019-21 (2017) (explaining that the First Amendment prohibits laws that discriminate against or impose unequal treatment on persons based on creed or religion))

The Equal Protection Clause of the Fourteenth Amendment to the *U.S. Constitution* also prohibits states and local governments from denying “to any person within its jurisdiction the equal protection of the law.” Equal protection requirements apply to the federal government through the Due Process Clause of the Fifth Amendment to the *U.S. Constitution*. The U.S. Supreme Court has interpreted the Equal Protection Clause as not requiring the government to treat every person the same, but instead as requiring the government to treat persons who are in similar conditions or circumstances, or “similarly situated,” in the same way. (*City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985))

For the purposes of the federal Equal Protection Clause, the U.S. Supreme Court has developed a three-tiered test that courts apply to determine whether a law that imposes a burden upon or provides a benefit to one class of persons to the exclusion of others is valid. Depending on the classification involved, courts apply tests known as strict scrutiny, intermediate scrutiny, or rational basis scrutiny to analyze the government’s justification for the classification. (*City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-41 (1985); *Rico v. Rodriguez*, 121 Nev. 695, 703 (2005)) The Nevada Supreme Court also applies those tests to equal protection challenges to the validity of laws under the *Nevada Constitution*. (*Rico v. Rodriguez*, 121 Nev. 695, 703 (2005)) Under the three-tiered analysis, courts apply the strict scrutiny test to laws that classify persons by race, national origin, religion, or alienage or that infringe upon certain fundamental rights. The strict scrutiny test requires the government to prove that the classification is narrowly tailored to serve a compelling government interest. (*Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *Tarango v. State Indus. Ins. Sys.*, 117 Nev. 444, 454 (2001)) Courts apply the intermediate scrutiny test to laws that classify persons by gender or their status as having been born out of wedlock. The intermediate scrutiny test requires the government to prove that the classification has a substantial relationship to an important government interest. (*United States v. Virginia*, 518 U.S. 515, 532-33 (1996); *Olson v. State*, 95 Nev. 1, 3 (1979)) For all other classifications, courts typically apply scrutiny under a rational basis test which only requires the government to demonstrate that the classification is rationally related to a legitimate government interest. (*City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Rico v. Rodriguez*, 121 Nev. 695, 703 (2005))

Although not certified as part of the *U.S. Constitution*, a proposed amendment is currently pending to the *U.S. Constitution*, which states that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.” This federal Equal Rights Amendment was passed by a two-thirds majority of Congress in 1973 and ratified by three-fourths of the states in 2020. However, the National Archivist has not certified the federal Equal Rights Amendment as part of the *U.S. Constitution* pursuant to 1 U.S.C. § 106b as a result of several unresolved legal issues regarding the ratification process that are subject to ongoing litigation, including the expiration of ratification deadlines set by Congress and the passage in several states of legislative measures intended to rescind prior ratifications by those states. (*Virginia v. Ferriero*, 525 F. Supp. 3d 36 (D.D.C. 2021), *appeal docketed sub nom. Illinois v. Ferriero*, No. 21-5096 (D.C. Cir. May 7, 2021)) Although Nevada voters rejected ratification of the federal Equal Rights Amendment in an advisory question at the 1978 General Election, the Nevada Legislature ratified the Amendment in 2017. (*Senate Joint Resolution No. 2*, File No. 13, 79th Session)

Existing federal statutes also prohibit discrimination based on the classifications enumerated in this ballot measure in various manners. For example, the Religious Freedom Restoration Act of 1993 prohibits the federal government from substantially burdening the exercise of religion. (42 U.S.C. §§ 2000bb et seq.) With respect to employment, Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e et seq.), the Equal Pay Act of 1963 (29 U.S.C. § 206(d)), the Age Discrimination in Employment Act of 1967 (29 U.S.C. §§ 621-634), section 501 of the Rehabilitation Act of 1973 (29 U.S.C. § 791) and Titles I and V of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101 et seq.) prohibit discrimination in employment based on race, color, religion, sex (including sexual orientation, gender identity, and pregnancy), age (40 years or older), disability, ancestry, or national origin. Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 et seq.) prohibits discrimination on the basis of sex in educational programs and activities that receive federal funding. Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§ 3601-3609), known as the Fair Housing Act, prohibits housing discrimination based on race, color, national origin, religion, sex (including gender, gender identity, sexual orientation, and sexual harassment), familial status, or disability. Title II of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000a et seq.) prohibits discrimination on the basis of race, color, religion, or national origin in places of public accommodation. Title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d et seq.) prohibits discrimination on the basis of race, color, or national origin in programs or activities that receive federal funding. These laws are a nonexhaustive listing of the federal laws that prohibit discrimination based on certain classifications.

The *Nevada Constitution* also prohibits discrimination based on the classifications enumerated in this ballot measure in various manners. For example, Section 4 of Article 1 of the *Nevada Constitution* guarantees the free exercise of religion. In addition, the Nevada Supreme Court has interpreted the requirement in Section 21 of Article 4 of the *Nevada Constitution* that “all laws shall be general and of uniform application throughout the State” to be coextensive with the guarantees of the Equal Protection Clause of the Fourteenth Amendment to the *U.S. Constitution*. (*Laakonen v. District Court*, 91 Nev. 506, 508 (1975)) Furthermore, the U.S. Supreme Court has held that states are free to provide additional constitutional protections beyond those provided by the *U.S. Constitution*. (*California v. Ramos*, 463 U.S. 992, 1014 (1983))

Existing Nevada statutory law also prohibits discrimination based on the classifications enumerated in this ballot measure in various manners. For example, these statutory prohibitions against discrimination apply to juvenile rights, eligibility for certain grants, housing assistance, college admission standards, gaming regulations, employment practices, eligibility for apprenticeships, and places of public accommodation. (*See, for example, Nevada Revised Statutes* (NRS) 62B.510, 217.420, 274.140, 281.370, 284.150, 288.270, 319.060, 338.125, 396.530, 463.151, 463.4076, 610.020, 610.150, 613.330, and 651.070.) These laws are a nonexhaustive listing of Nevada statutory laws that prohibit discrimination based on certain classifications.

This ballot measure proposes to amend the *Nevada Constitution* by adding a specific guarantee that equality of rights under the law shall not be denied or abridged by this State or any of its cities, counties, or other political subdivisions based on race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry, or national origin.

## ARGUMENTS FOR PASSAGE

Equality is a cornerstone of our democracy, but not everyone enjoys full equality. Historically, certain groups have been discriminated against because of their characteristics. One of the most effective ways to help ensure equality is to specifically include protections from discrimination in the *Nevada Constitution*, making them far more difficult to repeal, undermine, or overturn based on the political mood of the day. Approving Question 1 will establish an enduring commitment to equality for everyone.

Although some protection against discrimination exists in federal and state law, there are gaps in the existing legal patchwork that have resulted in unavailable or inadequate protection for certain classes of people, including instances of unequal pay for women and pregnancy discrimination. This ballot measure fills those gaps by providing comprehensive state constitutional guarantees of equal treatment under the law for the classifications of race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry, and national origin.

Contrary to opponents' arguments, religion is one of the classifications protected by this ballot measure because courts interpret "creed" to have the same meaning as "religion." Therefore, by prohibiting discrimination based on a person's "creed," this ballot measure adds an additional layer of constitutional protection for our religious liberties.

Approving Question 1 will also improve outcomes for people in the protected classifications who have been discriminated against in Nevada by allowing our courts to apply a heightened level of scrutiny to laws or actions of the State or local governments that violate any of the protected classifications. This ballot measure will provide clear guidance to courts and lawmakers on Nevada's commitment to protect against discrimination and advance equality based on the unique text and history of Nevada's equal rights amendment.

Do not be misled by opponents' arguments about Question 1. Their arguments consist of unfounded speculation intended to distract from the clear goal of this ballot measure, which is to ensure equality. They argue that this ballot measure may be used to protect abortion rights, undermine women's sports by allowing male and transgender athletes to compete unfairly against women and girls in school sports, and challenge the traditional separation of men's and women's restrooms and locker rooms in government-owned facilities. First, Nevada law already guarantees the right to an abortion, and this ballot measure will not change that right. Second, this ballot measure will not remove the State's ability to ensure competitive balance in school sports. Finally, it will not prevent the traditional separation of men's and women's restrooms and locker rooms in government-owned facilities, such as public schools, universities, and colleges.

This ballot measure will not diminish the rights of some people at the expense of others but, instead, will advance equality for all by filling the gaps in existing protections. Additionally, this ballot measure will not eliminate the authority of the State and local governments to protect classifications of people, including children and other vulnerable populations, who have always been entitled to such protections. Governmental entities will still be able to pass laws or take actions to protect classifications of people but will have to honor Nevada's constitutional commitment to equality when doing so.

Everyone deserves to be treated equally under the law. Vote "Yes" on Question 1.

## ARGUMENTS AGAINST PASSAGE

Proponents fail to acknowledge the impact Question 1 may have on individual liberties and safety. They state that this ballot measure will protect against religious discrimination based on a person's "creed" or religion. But they fail to explain how this ballot measure can give new constitutional protections to classifications such as sex, sexual orientation, and gender identity or expression and, at the same time, actually protect the religious liberties of individuals who hold traditional views on marriage and gender and want to live according to those values.

Question 1 may also be used by proponents to support access to abortion. Already, the highest courts in some states have interpreted their constitutional equal rights provisions to mandate taxpayer funding of medically necessary abortions through Medicaid. If Question 1 is approved, proponents may use this ballot measure as a basis to demand taxpayer funding of abortions in Nevada. And if the U.S. Supreme Court overturns *Roe v. Wade*, proponents may use this ballot measure as a basis to claim abortion rights in Nevada despite the Supreme Court's decision.

Further, Question 1 may be used by biological males and transgender athletes as a basis to undermine women's sports by demanding equal rights that allow them to compete unfairly against women and girls in school sports and for athletic scholarships. Question 1 may also be used to challenge the traditional separation of men's and women's restrooms and locker rooms in government-owned facilities, such as public schools, universities, and colleges, potentially allowing biological men and women in each other's restrooms and locker rooms and threatening everyone's personal safety and privacy.

In 1978, Nevadans overwhelmingly voted against the proposed Equal Rights Amendment to the *U.S. Constitution*, which was limited to protecting against discrimination on account of sex. If passed, Question 1 would dramatically expand the equal rights protected specifically in the *Nevada Constitution* beyond sex to include a total of ten classifications. However, this ballot measure contains no provisions to guide courts in resolving conflicts among the protections provided to all of these classifications. For instance, there is no way to know how courts would resolve challenges to existing age-based laws regarding sexual consent, child endangerment, and parental consent and notification, some of which involve classifications based on both age and sex. No other state has implemented such a broad and legally untested constitutional provision protecting equal rights, and Nevada should not be the first state to do so.

Enshrining such broad and untested equal rights language into the *Nevada Constitution* will make it difficult to fix its inevitable unintended consequences. Approval of Question 1 will result in a flood of litigation, clogging our court system because of its vague and expansive language. Further, because Question 1 cements this language into the *Nevada Constitution*, it will require another lengthy constitutional amendment process to undo its negative effects.

This ballot measure is harmful and misguided. Vote "No" on Question 1.

## FISCAL NOTE

### **Financial Impact—Cannot be Determined**

If approved, Question 1 would amend the *Nevada Constitution* to specify that equality of rights under the law shall not be denied or abridged by this State or any of its cities, counties, or other political subdivisions on account of race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry, or national origin. It is not anticipated that passage of this ballot measure would result in immediate increases in expenditures for the State or local governments. However, it is not possible to predict whether the future application of Question 1 will require additional fiscal resources by the State or local governments. Therefore, any potential financial impacts on the State or local governments relating to the application of Question 1 cannot be determined with any reasonable degree of certainty.