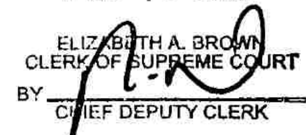
139 Nev., Advance Opinion 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, A TRADE ASSOCIATION,
Appellant,
vs.
THE STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY, DIVISION OF INSURANCE; AND BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF INSURANCE,
Respondents.

No. 82951



FEB 16 2023
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Appeal from a district court order partially denying appellant's request for a permanent injunction and declaratory relief. Eighth Judicial District Court, Clark County; Elizabeth Gonzalez, Judge.

Affirmed.

Pisanelli Bice PLLC and Jordan T. Smith and Dustun H. Holmes, Las Vegas,
for Appellant.

Aaron D. Ford, Attorney General, Steve Shevorski, Chief Litigation Counsel, and Craig A. Newby, Deputy Solicitor General, Carson City,
for Respondents.

Campbell & Williams and J. Colby Williams and Philip R. Erwin, Las Vegas,
for Amicus Curiae Chamber of Commerce of the United States of America.

23-04834

Leonard Law, PC, and Debbie Leonard, Reno,
for Amici Curiae Consumer Federation of America and Center for Economic Justice.

BEFORE THE SUPREME COURT, EN BANC.

OPINION

By the Court, PICKERING, J.:

The Nevada Insurance Code permits insurers to use consumer credit information when underwriting and rating personal property and casualty insurance, subject to restrictions designed to ensure the use of this information is fair and not discriminatory. The governor's COVID-19 declaration of emergency led to mass unemployment across Nevada and a corresponding decline in consumer credit scores. After investigation, the Nevada Division of Insurance (the Division) determined that it was unfair and actuarially unsound for insurers to use credit score declines against insureds who lost their jobs due to the pandemic, through no fault of their own. The Division therefore promulgated a regulation, R087-20, prohibiting insurers from adversely using consumer credit information changes that occurred during the governor's COVID-19 emergency declaration, plus two years.

Appellant National Association of Mutual Insurance Companies (NAMIC) is a private, nonprofit insurance trade association whose members include insurers that use consumer credit information to underwrite and rate personal home and auto insurance in Nevada. On behalf of itself and its members, NAMIC opposed the Division's adoption of R087-20 and sued to invalidate the regulation after it passed. The district

court enjoined the regulation to the extent it required insurers to give retroactive premium refunds but otherwise rejected NAMIC's suit.

The questions presented by this case are whether NAMIC has standing to sue based on harm R087-20 caused or threatened to cause some of its members and, if so, whether the Division had the statutory and constitutional authority to promulgate R087-20. Like the district court, we hold that the answer to both questions is "yes" and therefore affirm.

I.

A.

The insurance industry maintains that there is a correlation between consumer credit scores and the risk of insurance loss in personal home and auto insurance policies. Nevada permits insurers to use consumer credit information in underwriting and rating personal insurance policies, subject to the statutory requirements of NRS 686A.600 through 686A.730 and the Division's regulations. *See* NRS 679B.130(1)(a) (authorizing the Division to promulgate "reasonable regulations" to administer the Nevada Insurance Code). But this permission is limited by NRS 686A.680(1)(a), which prohibits insurers from using a consumer credit report to score an insured if the score is calculated using protected class-based information "or would otherwise lead to unfair or invidious discrimination." More generally, no property or casualty insurer "may make or permit any unfair discrimination between insured or property having like insuring or risk characteristics, in the premium or rates charged for insurance." NRS 686A.130(5); *see also* NRS 686B.050(4) ("One rate is unfairly discriminatory in relation to another in the same class if it clearly fails to reflect equitably the differences in expected losses and expenses.").

On March 12, 2020, hundreds of thousands of Nevadans became involuntarily unemployed due to the governor's COVID-19 declaration of emergency. In Las Vegas, where the governor's declaration effectively closed the city's robust travel and leisure industry, unemployment soared by the highest over-the-year percentage in the country, and in the months that followed, temporary unemployment became permanent and consumer credit scores declined. These declines cast doubt on the propriety of using credit scores to predict insurance risk, since the declines were due to the pandemic, not individual behavior in managing risk. In response, after investigation and proper notice-and-comment procedures, the Division promulgated R087-20, which prohibits insurers from adversely underwriting and rating insurance policies using changes in consumer credit occurring from March 1, 2020, to May 20, 2024 (two years following the May 20, 2022, end date of the emergency declaration). The Division found that R087-20 was necessary to protect Nevadans from unfairly discriminatory insurance practices during the pandemic. It further found that "[a]llowing two years of recovery to occur in the aftermath of the Declaration of Emergency being lifted [was] reasonable to accommodate affected workers and give them time to regain employment and financial stability."

Section 2 of R087-20 states the regulation's core prohibition against insurers making adverse use of consumer credit changes during the governor's emergency declaration, plus two years:

> 1. An insurer that uses information from a consumer credit report shall not increase a policyholder's premium or make an adverse underwriting decision as a result of any change in the policyholder's consumer credit report or insurance score which occurred on or after

> March 1, 2020, and on or before the date which is 2 years after the termination date of the Declaration of Emergency for COVID-19 issued by the Governor on March 12, 2020.
>
> 2. Every such change in the policyholder's consumer credit report or insurance score which occurred during the period of time described in subsection 1 shall be deemed by the Commissioner to be:
>
> (a) Caused by the COVID-19 emergency, which is the subject of the Declaration of Emergency mentioned in subsection 1;
>
> (b) Independent of the choice or the financial management decisions of any applicable individual; and
>
> (c) Unrelated to expected losses and expenses for all lines of insurance.
>
> 3. Any increase in a premium or adverse underwriting decision which violates the prohibition in subsection 1 shall be deemed by the Commissioner to be unfairly discriminatory.

Section 3 permits insurers to use credit score changes that benefit insureds, regardless of when the change occurred, and to continue to make adverse use of credit score deteriorations if they occurred before March 1, 2020, or after May 20, 2024. Section 4 requires insurers to revise insurance premiums that increased due to credit or insurance score deteriorations from March 1, 2020, to December 29, 2020 (the effective date of R087-20), and to refund policyholders the increased amount.

B.

NAMIC participated in the Division's rulemaking proceedings on R087-20, presenting policy objections and challenging the regulation's validity. After the Division adopted R087-20, NAMIC filed suit, seeking a declaratory judgment that (1) the Division exceeded its statutory authority

by enacting R087-20; (2) if the Division's enabling statutes granted the Division authority to pass R087-20, the enabling statutes are an unconstitutional delegation of power; and (3) R087-20 is unconstitutional under the United States and Nevada Constitutions' Contract Clauses. NAMIC moved for a preliminary injunction, which the district court granted as to Section 4 (the retroactive provision) and denied as to Sections 2 and 3 (the prospective provisions).

The Division and NAMIC stipulated that the dispute involved questions of law, not fact, so the district court could resolve the case on cross-motions for summary judgment. In its motion, the Division argued that the court should not hear the matter because NAMIC lacked standing. After briefing and argument, the district court rejected the Division's challenge to NAMIC's standing. On the merits, it held that, while the agency did not have statutory authority to enact R087-20 Section 4's refund provisions, the Division did have statutory authority to enact Sections 2 and 3. The district court also held that the Division's enabling statutes are not unconstitutional delegations of power and that R087-20 does not violate the contract clauses of either the United States or the Nevada Constitutions. Accordingly, the district court granted the Division's motion for summary judgment on Sections 2 and 3 and NAMIC's motion for summary judgment on Section 4 and denied the corresponding cross-motions. This appeal followed, with NAMIC challenging the district court's conclusions regarding Sections 2 and 3. On NAMIC's motion, this court enjoined R087-20 pending the outcome of this appeal. The Division does not cross-appeal the district court's conclusion regarding Section 4.

II.

We first consider NAMIC's standing. The Division argues that NAMIC has not shown the injury-in-fact to itself or its members from R087-20 needed to establish standing. NAMIC maintains that it has both statutory standing under NRS 30.040 and NRS 233B.110 and representational standing under the constitutional test established in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). Although we reject NAMIC's argument that it has statutory standing merely because it objected to R087-20 during the rulemaking process, we adopt *Hunt* and hold that NAMIC has representational standing under the test *Hunt* establishes.

A.

Standing presents a question of law. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011). The 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. *See Heller v. Leg. of Nev.*, 120 Nev. 456, 461 n.3, 93 P.3d 746, 749 n.3 (2004). But the Nevada Constitution includes a robust separation of powers clause that the United States Constitution does not. Nev. Const. art. 3, § 1(1). Both as a prudential matter, *see In re AMERCO Derivative Litig.*, 127 Nev. 196, 213, 252 P.3d 681, 694 (2011), and because of the justiciability requirements the separation-of-powers doctrine imposes on the Nevada judiciary, *see Nev. Policy Research Inst., Inc. v. Cannizzaro*, 138 Nev., Adv. Op. 28, 507 P.3d 1203, 1208 (2022), our caselaw generally requires the same showing of injury-in-fact, redressability, and causation that federal cases require for Article III standing. *See Stockmeier v. Nev. Dep't of Corr. Psychological Review Panel*, 122 Nev. 385, 393, 135 P.3d 220, 225 (2006), *abrogated on*

other grounds by Buzz Stew, LLC v. City of North Las Vegas, 124 Nev. 224, 181 P.3d 670 (2008); *Elley v. Stephens*, 104 Nev. 413, 416, 760 P.2d 768, 770 (1988); *see also Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443-45 (Tex. 1993) (holding that the state separation-of-powers doctrine imposes justiciability constraints like those Article III imposes on federal courts). We have made exceptions, however, for the rare case involving a constitutional expenditure challenge or separation-of-powers dispute that will evade review if strict standing requirements are imposed. *See Cannizzaro*, 138 Nev., Adv. Op. 28, 507 P.3d at 1207-08; *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016). We also recognize statutory standing in cases where the Legislature has created a right and provided a statutory vehicle to vindicate that right that relaxes otherwise applicable standing requirements. *Stockmeier*, 122 Nev. at 394, 135 P.3d at 226; *see Fergason v. Las Vegas Metro. Police Dep't*, 131 Nev. 939, 952, 364 P.3d 592, 600 (2015).

NAMIC brought this suit under NRS 30.040 and NRS 233B.110. It claims statutory standing under NRS 233B.110(1), which provides:

> The validity or applicability of any regulation may be determined in a proceeding for a declaratory judgment . . . when it is alleged that the regulation, or its proposed application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. *A declaratory judgment may be rendered after the plaintiff has first requested the agency to pass upon the validity of the regulation in question.* The court shall declare the regulation invalid if it finds that it violates constitutional or statutory provisions or exceeds the statutory authority of the agency.

(emphasis added). NAMIC maintains that its challenge to R087-20 during the rulemaking process gives it statutory standing to challenge the regulation in court and excuses it from having to show that R087-20 will cause injury-in-fact to itself or its members. But NAMIC reads too much into NRS 233B.110(1)'s statement that a declaratory judgment "may" be rendered after a plaintiff opposed an agency's adoption of a proposed regulation. Under NRS 233B.061(1), "[a]ll interested persons must be" given a reasonable opportunity to argue against a proposed regulation during the rulemaking process, whether the regulation directly affects them or not. But for a court challenge, the plaintiff must show "that the regulation, or its proposed application, *interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff.*" NRS 233B.110(1) (emphasis added). Unlike the statutory standing cases, which involve statutes that both create a right and provide a procedural vehicle to vindicate that right, NRS 233B.110(1) requires actual or threatened injury to independently established "legal rights or privileges."

That NRS 233B.110(1) does not afford standing without injury-in-fact is confirmed by NRS 233B.110(3), which specifies that "[a]ctions for declaratory judgment provided for in [subsection 1] shall be in accordance with the Uniform Declaratory Judgments Act (chapter 30 of NRS)." Nevada's "Uniform Declaratory Judgments Act does not . . . grant jurisdiction to the court when it would not otherwise exist," it "merely authorizes a new form of relief, which in some cases will provide a fuller and more adequate remedy than that which existed under common law." *Builders Ass'n of N. Nev. v. City of Reno*, 105 Nev. 368, 369, 776 P.3d 1234, 1234 (1989) (citing *Jenkins v. Swan*, 675 P.2d 1145, 1148 (Utah 1983)).

Declaratory relief actions under NRS 30.040 require a plaintiff to demonstrate a "legally protectible interest," *Knittle v. Progressive Cas. Ins. Co.*, 112 Nev. 8, 10, 908 P.2d 724, 726 (1996), or injury-in-fact, *Morency v. State, Dep't of Educ.*, 137 Nev., Adv. Op. 63, 496 P.3d 584, 588 n.5 (2021).

The Legislature drew NRS 30.040 and NRS 233B.110 from the Uniform Declaratory Judgment Act (UDJA) and the 1961 version of the Model Administrative Procedure Act (MAPA), respectively. Other states that also have the UDJA and MAPA hold that these statutes require a plaintiff to show direct or representational injury-in-fact from the regulation to sue for declaratory relief: "To have standing to bring [an action challenging a regulation] a plaintiff may not assert 'only a general interest he shares in common with members of the public at large,' but 'must be able to show that he has suffered some distinct and palpable injury that gives him a personal stake in the outcome of the legal dispute.'" *Utah Rest. Ass'n v. Davis Cty. Bd. of Health*, 709 P.2d 1159, 1162 (Utah 1985) (quoting *Jenkins*, 675 P.2d at 1148-49); *see Med. Ass'n of Ala. v. Shoemake*, 656 So. 2d 863, 866 (Ala. Civ. App. 1995) (requiring showing of injury to pursue declaratory judgment action challenging a regulation's validity under the UDJA and MAPA); *Conn. Ass'n of Health Care Facilities, Inc. v. Worrell*, 508 A.2d 743, 747-48 (Conn. 1986) (same); *Tex. Dep't of Ins. v. Tex. Ass'n of Health Plans*, 598 S.W.3d 417, 422 (Tex. App. 2020) (same). Thus, NAMIC does not have standing merely because it objected to R087-20 during the rulemaking process. It must demonstrate injury-in-fact to itself or its members to proceed. *See* NRS 30.160 (providing that Nevada's UDJA, "NRS 30.010 to NRS 30.160, inclusive, shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of those states

which enact them, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees").

B.

NAMIC is a private, nonprofit insurance trade association whose membership comprises 1400 property and casualty insurers from across the country. According to the declaration of NAMIC vice-president Erin Collins, seventy-six of NAMIC's members sell home and automobile insurance policies in Nevada, and "[m]ost" of those members use consumer credit scores to underwrite and rate these policies. R087-20 does not directly regulate NAMIC, since NAMIC is not itself an insurance company.[1] Rather, R087-20 regulates the 76 NAMIC members who issue personal property and casualty insurance policies in Nevada. NAMIC claims standing based on the harm R087-20 causes (or threatens to cause) its Nevada members.

A voluntary-membership trade association like NAMIC may establish Article III standing by showing injury to its members, even though the association itself suffered no direct injury. *Warth v. Seldin*, 422 U.S. 490, 511 (1975). In *Hunt*, the Supreme Court adopted a three-part test for representational standing, holding that an association has standing to sue

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[1]NAMIC separately argues that it has organizational standing due to the time and money it has spent challenging and educating its Nevada members about R087-20. NAMIC does not adequately develop the facts required to sustain organizational standing on its own behalf because it is unclear whether expending those resources frustrated NAMIC's organizational mission. *See, e.g.*, *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919-21 (D.C. Cir. 2015) (finding that use of resources for advocacy, "to educate its members and others," did not establish organizational standing since this did not frustrate the organization's mission) (internal quotation marks omitted).

on behalf of its members if it can establish that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U.S. at 343. Although we have not expressly addressed representational standing under *Hunt*, we implicitly endorsed the concept in *Nevada Attorney for Injured Workers v. Nevada Self-Insurers Ass'n*, where we reached and resolved the merits of a declaratory judgment action in which a trade association sued to invalidate a regulation affecting its members. 126 Nev. 74, 83 n.7, 225 P.3d 1265, 1270 n.7 (2010) (holding that a declaratory judgment action under NRS 233B.110(1) was "the appropriate mechanism" for a trade association to challenge a regulation adversely affecting its members). Like other state courts, we find the *Hunt* test pragmatic and helpful and adopt it as appropriate for Nevada, even though we are not constrained by strict Article III standing requirements. *See Utah Rest. Ass'n*, 709 P.2d at 1163 (adopting *Hunt* and noting that, "[w]here, as a practical matter, the rights asserted and the remedies sought do not require direct participation by affected individuals who would have standing, there is no reason not to permit associations to press claims common to their members"); *accord Tex. Ass'n of Bus.*, 852 S.W.2d at 447 (adopting the *Hunt* test for representational standing); *see also Conn. Ass'n of Health Care Facilities*, 508 A.2d at 747-48 (applying the *Hunt* standard to determine representational standing under the state's Administrative Procedure Act); *Human Rights Party v. Mich. Corr. Comm'n*, 256 N.W.2d 439, 443 (Mich. Ct. App. 1977) (same).

NAMIC and the Division agree that an insurer subject to R087-20 *could* suffer personal injury from the prohibition on use of consumer

credit information to raise insurance premiums over the applicable period. Nonetheless, relying on *Summers v. Earth Island Institute*, 555 U.S. 488, 499 (2009), the Division argues that NAMIC fails to meet the first prong in *Hunt*—requiring the association to show that one or more of its members would have standing to sue in their own right—because NAMIC did not "name" an individual member insurer harmed by R087-20. Instead, along with the Collins declaration, NAMIC provided a list copied from the Division's website, which names the 128 home or automobile insurers in Nevada that use consumer credit information in underwriting and rating insureds and the 43 such insurers that do not. The Collins declaration states that NAMIC has 76 members that write home or automobile insurance in Nevada, "[m]ost" of whom use consumer credit information in doing so. Therefore, even if all 43 home or automobile insurance companies the Division lists as not using consumer credit information are NAMIC members, at least 33 remaining NAMIC members would be subject to R087-20 per the Division's own classification of those insurers.

Federal courts disagree whether *Summers* requires an organization to identify by name the member(s) who suffered the injury needed to meet *Hunt*'s first element. *See Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 2 F.4th 1002, 1011 (7th Cir. 2021) (noting that it is unclear whether its prior rule that an organization need not "name" an individual member to assert representational standing survives *Summers*). *Compare Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (no representational standing where organization failed to specifically identify member that the challenged regulation harmed), *with Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015) (stating that it was "not convinced that *Summers*" stood "for the proposition that an injured member of an

organization must always be specifically identified in order to establish . . . standing for the organization"). For those circuits concluding that a specifically identified member is not required, the first element of *Hunt* is met when the party alleges nonspeculative member injury:

> Where it is relatively clear, rather than merely speculative, that one or more members have been or will be adversely affected by a defendant's action, and where the defendant need not know the identity of a particular member to understand and respond to an organization's claim of injury, [an organization need not] identify by name the member or members injured.

La Raza, 800 F.3d at 1041. We conclude that, in providing a list that includes 76 of NAMIC's member insurers that are or reasonably could be affected by R087-20, NAMIC sufficiently "named" individual members under either interpretation of *Summers*.

The Division also argues that the members' purported injuries are too speculative, claiming that NAMIC provided "no evidence that any of [its] members . . . even plan to use credit information in rate-making in the wake of the COVID-19 pandemic." But this is not accurate. Collins attested to the fact that several of NAMIC's 76 member insurers subject to R087-20 already had issued new policies. Collins' declaration also avers that members will not be able to recover premiums that R087-20 prevents them from charging and will need to reconfigure rating systems to adapt to this change, increasing costs. Collins further attests that its members asked NAMIC to intervene and advocate for their right to continue using consumer credit information in the wake of R087-20. *See* 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3531.9.5 (3d ed. 2008) (explaining that members' ask of an organization to represent their interests is evidence of member injury). The

Collins declaration provides uncontroverted evidence of nonspeculative injury to NAMIC's members and allows the Division to sufficiently understand and respond to NAMIC's declaratory relief action. Therefore, we find that NAMIC sufficiently demonstrated injury to its members to satisfy the first element of the *Hunt* test.

Hunt's second element—requiring that the interests the trade association seeks to protect be germane to its purpose—is designed to assure that the association has a sufficient stake in the resolution of the dispute to provide vigorous advocacy. *See United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555-56 (1996); *Schwartz*, 132 Nev. at 743, 382 P.3d at 894 (stating that standing assures that "the party seeking relief has a sufficient interest in the litigation" to "vigorously and effectively present his or her case against an adverse party"). The Collins declaration attests that NAMIC exists to advocate for and advance the interests of the casualty and property insurers who are its members; that R087-20 adversely impacts most of its members who issue home and auto policies in Nevada; and that NAMIC has spent time and money advocating against and educating its members about R087-20.[2] As the Division effectively concedes, these averments satisfy *Hunt*'s second element.

The Division also asserts that NAMIC does not meet the third element of the *Hunt* standard because its claim that R087-20 violates the

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[2]Although the Division concedes that NAMIC meets the second *Hunt* element, it quarrels with NAMIC's reliance on the Collins declaration in opposing summary judgment. The declaration adequately establishes Collins' personal knowledge of the facts to which she attests. *See* NRCP 56(c)(4) (on a motion for summary judgment, declarations must set out facts "that would be admissible in evidence").

United States and Nevada Constitutions' Contract Clauses requires individualized proof of how R087-20 impacts its members' contracts. While a party must demonstrate standing for each individual claim, a court's standing analysis should not reach the merits of a case. *See Tex. Dep't of State Health Servs. v. Balquinta*, 429 S.W.3d 726, 742 n.71 (Tex. App. 2014). Additionally, individual participation is ordinarily less significant where an association seeks declaratory relief for its members, rather than monetary damages, because declaratory relief is "properly resolved in a group context." *Hunt*, 432 U.S. at 343-44; *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 10 n.4 (1988); *see also Utah Rest. Ass'n*, 709 P.2d at 1163 (granting representational standing to seek declaratory relief but declining to grant standing to seek refunds for its members unless plaintiff seeks refunds on behalf of an established class).[3] Declaratory relief actions therefore do not require tailored proof of how a regulation will impact each member. *See United Food*, 517 U.S. at 553-54. Accordingly, we find that NAMIC satisfied the elements of the *Hunt* standard to challenge R087-20 on behalf of its members and grant NAMIC representational standing.

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[3]*Hunt*'s third element is prudential, not constitutionally driven; it concerns much the same "matters of administrative convenience and efficiency" as are implicated in class actions and suits by trustees representing creditors in bankruptcy. *United Food*, 517 U.S. at 555-57. Representational standing to seek damages on behalf of third parties is allowed when provided by statute or court rule. *See High Noon at Arlington Ranch Homeowners Ass'n v. Eighth Judicial Dist. Court*, 133 Nev. 500, 507, 402 P.3d 639, 645-46 (2017) (allowing an HOA to sue for damages on behalf of its members, per statutory authority); *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 125 Nev. 449, 457-58, 215 P.3d 697, 703 (2009) (similar); *see also* NRCP 23 (class actions).

III.

Having established NAMIC's standing to challenge R087-20, we reach NAMIC's challenges to the regulation's validity. NAMIC argues that the Division exceeded its statutory authority in passing R087-20, it conflicts with existing statutory provisions, and the regulation otherwise violates the United States and Nevada Constitutions. Courts may "declare a regulation invalid when the regulation violates the constitution, conflicts with existing statutory provisions or exceeds the statutory authority of the agency." *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000). NAMIC does not challenge the weight of the evidence before the Division and asks us to decide this case based on the regulation itself and the Division's enabling statutes.

A.

To determine whether the Division exceeded its authority in promulgating R087-20, we begin with the plain meaning of the statutory text. *See, e.g., Pub. Agency Comp. Tr. (PACT) v. Blake*, 127 Nev. 863, 866, 265 P.3d 694, 696 (2011); *see also Martinez Guzman v. Second Judicial Dist. Court*, 136 Nev. 103, 106, 460 P.3d 443, 447 (2020) (finding that unambiguous language defeats competing interpretations). NAMIC argues that the unambiguous text of the Division's enabling statutes does not grant it authority to pass R087-20. We disagree.

The Division relies on NRS 679B.130(1)(a), NRS 679B.150(1)(b), and NRS 686A.680(1)(a) as authority to promulgate R087-20. NRS 679B.130(1)(a) grants the Division general authority to promulgate "reasonable regulations" to administer the Nevada Insurance Code. NRS 679B.150(1)(b), covering standards for insurance policies regulated under the Nevada Insurance Code, provides:

> The Commissioner may: . . . Develop, promulgate and revise as the Commissioner deems appropriate, standards in each of the several areas of insurance appropriate to be applied to policies sold in the State of Nevada. The standards must seek to ensure that policies are not unjust, unfair, inequitable, unfairly discriminatory, misleading, deceptive, obscure or encourage misrepresentation or misunderstanding of the contract.

NRS 686A.680(1)(a) creates restrictions on the use of consumer credit information by insurers in Nevada:

> An insurer that uses information from a consumer credit report shall not . . . [u]se an insurance score that is calculated using income, gender, sexual orientation, gender identity or expression, address, zip code, ethnic group, religion, marital status or nationality of the consumer as a factor, or would otherwise lead to unfair or invidious discrimination.

NAMIC argues that the Division exceeded its statutory authority because R087-20 "does not relate to any insurance practice that is 'discriminatory' or 'would otherwise lead to unfair or invidious discrimination' within the commonly understood meaning" of NRS 679B.150(1)(b) and NRS 686A.680(1)(a). NAMIC presents the commonly understood meaning of "discrimination" as "the differential treatment of similarly situated groups." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 614 (1999) (Kennedy, J., concurring); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (affirming Justice Kennedy's *Olmstead* concurrence); *see also Salaiscooper v. Eighth Judicial Dist. Court*, 117 Nev. 892, 903, 34 P.3d 509, 517 (2001) (recognizing that "[a] discriminatory effect is proven where a defendant shows that other persons similarly situated" are treated differently). NAMIC also points to other uses of

"discrimination" throughout the Nevada Insurance Code, clarifying that "similarly situated groups" may be understood as individuals "of the same class and of essentially the same hazard," NRS 686A.100(2), or individuals "having like insuring or risk characteristics," NRS 686A.130(5). Further, rates are "unfairly discriminatory" among similarly situated individuals if the rates "fail[ ] to reflect equitably the differences in excepted losses and expenses." NRS 686B.050(4). The Division offers no competing definition for "discrimination," arguing that it promulgated R087-20 to address differential treatment between similarly situated groups resulting from the unique conditions of the pandemic and restrictions enacted by the governor's emergency declaration, which caused use of credit information to be an invalid statistical or actuarial basis for calculating risk.

NAMIC argues that, even "if the COVID-19 virus can somehow create two classes [of individuals]," insureds with recent negative credit events are not similarly situated to other insureds whose credit remained stagnant or improved since the governor's emergency declaration. *See City of North Las Vegas v. State Local Gov't Emp.-Mgmt. Relations Bd.*, 127 Nev. 631, 643, 261 P.3d 1071, 1079 (2011) (finding "[t]here must be a reasonably close resemblance of the facts and circumstances" between individuals to find them similarly situated). But the Division found, based on the evidence it considered, that the pandemic disrupted the correlation between credit and risk. For example, the Division found that individuals whose work was affected by the governor's emergency declaration and those whose work was not so affected, despite being otherwise similarly situated and exhibiting the same risk characteristics, would experience unjustified differential treatment from credit-based insurance models. *See* Legislative Review of Adopted Regulations Informational Statement, LCB File No. R087-20, at 6-

10 (referencing data from the Division's Fact Sheet: A Sample of Supporting Data for Regulation R087-20 and the United States Bureau of Labor Statistics Metropolitan Area Employment and Unemployment Summary (December 2020)). As NAMIC itself notes, in the context of R087-20, "unfairly discriminatory means that the rate fails to equitably reflect the difference in expected losses and expenses in relation to another in the same class." The regulation therefore falls under the Nevada Insurance Code's unambiguous language prohibiting unfair discrimination between similarly situated individuals.

NAMIC contends that the general prohibition against "unfair discrimination" in the Nevada Insurance Code is limited to protected class-based discrimination—that is, to prohibited discrimination based on race, sex, religion, or other protected class. *See* NRS 686A.680(1)(a) (providing that insurer shall not use credit information "that is calculated using income, gender, sexual orientation, gender identity or expression, address, zip code, ethnic group, religion, marital status or nationality"). But the limitation NAMIC would have us read into the Nevada Insurance Code contradicts the plain language of both NRS 686A.680(1)(a) and NRS 679B.150(1)(b). First, while the Division promulgated R087-20 pursuant to NRS 686A.680(1)(a), which includes prohibitions on protected class-based discrimination and creates restrictions on discriminatory uses of consumer credit information specifically, the Division also promulgated the regulation under its authority in NRS 679B.150, which makes no mention of protected class-based discrimination and grants the Division authority to regulate "unfair discrimination" throughout the Nevada Insurance Code generally. *See* NRS 679B.150(1)(b) (the Division's regulations "must seek to ensure that [insurance] policies are not . . . unfairly discriminatory"). Courts

generally assume equivalent words have equivalent meaning when repeated in a statute. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170-79 (2012). However, the Nevada Insurance Code's recognition of protected class-based discrimination in NRS 686A.680(1)(a) cannot be understood to erase the general prohibition against "unfair discrimination" that existed in the code more than three decades before the Legislature passed NRS 686A.680(1)(a). *See* NRS 679B.150(1)(b), 1971 Nev. Stat., ch. 661, § 5, at 1933; NRS 686A.680(1)(a), 2003 Nev. Stat., ch. 455, § 10, at 2802.

Second, within the context of NRS 686A.680(1)(a), we disagree with NAMIC's argument that the term "invidious," read in tandem with "unfair," limits discrimination regulated by NRS 686A.680(1)(a) to protected class-based discrimination. While associated words in a statute may bear on another's meaning, courts seek to give all terms meaning. *See* Scalia & Garner, *supra*, at 195 (describing associated-words canon *noscitur a sociis*). Read in context of the entire statute, as well as the general meaning of "unfair discrimination" throughout the Nevada Insurance Code, "invidious" and other protected class-based discrimination proscribed by NRS 686A.680(1)(a) is additive, not subtractive. *Compare Ojo v. Farmers Grp., Inc.*, 356 S.W.3d 421, 425, 434-35 (Tex. 2011) (holding that Texas Insurance Code's language limited to "unfair discrimination" does not reach protected class-based discrimination), *with Lumpkin v. Farmers Grp., Inc.*, No. 05-2568 Ma/V, 2007 WL 6996777, at *6-7 (W.D. Tenn. July 6, 2007) (holding that Tennessee Insurance Code does not distinguish between disparate-impact and intentional discrimination and that mandate against unfair discrimination reaches disparate-impact claims). Nevada's insurance code contemplates prohibitions on various forms of

discrimination, including both protected class-based discrimination *and* actuarial discrimination—the differential treatment of individuals without consideration of individual risk characteristics—as "unfair discrimination." This is clear from NRS 686A.130(5), which prohibits property and casualty insurers from "*any* unfair discrimination between insured or property *having like insuring or risk characteristics*, in the premium or rates charged for insurance." (emphases added). We therefore conclude that the Division's enabling statutes grant it authority to regulate the type of unfair actuarial discrimination that R087-20 seeks to address.

NAMIC next argues that the Division may only regulate intentional discrimination. But NRS 686A.680 does not incorporate an intent requirement, and this court will not imply one. *See Sheriff v. Witzenburg*, 122 Nev. 1056, 1061, 145 P.3d 1002, 1005 (2006) (affirming that "if the statute is clear," the court does "not look beyond the statute's plain language"). Although NRS 686A.680(1)(a) directs restrictions on the use of consumer credit information to insurers ("[a]n *insurer* that uses information from a consumer credit report *shall not*") (emphases added), the Division has general authority to promulgate "reasonable regulations" and standards to enforce compliance with statutory restrictions throughout the Nevada Insurance Code. NRS 679B.130(1)(a). Additionally, NRS 679B.150(1)(b) directs the Commissioner of the Division to develop standards "in each of the several areas of insurance appropriate to be applied to [insurance] policies," which applies to restrictions on the use of consumer credit information in NRS 686A.680(1)(a). Further, NAMIC's argument that "discrimination requires intent" is taken out of its context in a line of disparate-impact cases under Title VI of the federal Civil Rights Act of 1964 that apply to private challenges to alleged state discrimination.

See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001). This does not apply to the Division's authority to regulate private insurance practices that result in unfair class-based or actuarial discrimination, intended or not.

B.

We also conclude that R087-20 does not nullify or conflict with Nevada's statutory scheme allowing insurers to use consumer credit information in rating and underwriting insurance premiums. *See* NRS 686A.600-.730. An administrative regulation like R087-20 cannot contradict, conflict with, or otherwise nullify the statutes that it is designed to enforce. *Jerry's Nugget v. Keith*, 111 Nev. 49, 54, 888 P.2d 921, 924 (1995).

NAMIC argues that R087-20 conflicts with the statutory scheme at NRS 686A.600-.730 because the regulation entirely prohibits the use of consumer credit information NRS Chapter 686A generally allows. NAMIC directs this court to the Michigan Supreme Court's decision to invalidate a regulation promulgated by the Michigan Division of Insurance banning the use of consumer credit information. *See Ins. Inst. of Mich. v. Comm'r, Fin. & Ins. Servs., Dep't of Labor & Econ. Growth*, 785 N.W.2d 67, 77-83 (Mich. 2010). There, the court found that the regulation conflicted with the statutory scheme permitting use of consumer credit information "by enacting a *total ban* on a practice that the Insurance Code permits." *Id.* at 87 (emphasis added). But R087-20 does not impose a total ban on the use of consumer credit information: it is tailored to address unfairly discriminatory use of consumer credit information based on findings that NAMIC does not dispute. For example, the regulation does not apply to uses that lower premiums, R087-20 §§ 2.1, 3.4, and the regulation allows insurers to continue using credit information generated *before* March 1,

2020, to increase premiums or make adverse underwriting decisions, *id.* § 3.4. It also allows insurers to resume using changes in consumer credit occurring after March 1, 2020, upon the expiration of the regulation on May 20, 2024. *Id.* § 3.1. Neither does the regulation redefine a term in the statute to prohibit a practice the statute otherwise allows. *Cf. Pub. Agency Comp. Tr.*, 127 Nev. at 869, 265 P.3d at 698 (declaring regulation invalid because it permitted recalculation of disability injury percentages by *different means* than those *required* under the statute); *Clark Cty. Soc. Serv. Dep't v. Newkirk*, 106 Nev. 177, 179, 789 P.2d 227, 228 (1990) (striking regulation as in conflict with statute requiring county to provide financial aid "to the poor" where county limited eligibility to "employable" persons). Instead, based on the plain language of the statute and pursuant to its findings, the Division restricted the certain limited uses of consumer credit information it found unfairly discriminatory.

NAMIC also argues that R087-20 nullifies the major life-event exception in NRS 686A.685 because the exception already "provides a mechanism for insureds with credit-based policies to seek relief if their credit information has been harmed by an event outside their control," including the declaration of a federal or state emergency. *See* NRS 686A.685(1)(a) (providing that insurer using credit information shall provide reasonable exceptions where credit information directly influenced by, among others, "[a] catastrophic event, as declared by the Federal or State Government"). NAMIC asserts that, since the exception still allows insurers to use "credit information during a catastrophic event subject to an insured's ability to seek an exception" and subject to the "sole discretion" of an insurer to require verification from the insured, prohibiting the use of credit information due to a declared emergency without this mechanism

conflicts with the statute. We disagree that R087-20 "nullifies" this exception because the regulation still allows for other "reasonable exceptions" under NRS 686A.685(1) upon an individual's request that its insurer recognize pandemic-caused deteriorations in credit as extraordinary life events. *See* R087-20 § 3.3.

To the extent that NAMIC claims R087-20 "conflicts" with the verification mechanism provided in NRS 686A.685, this court must work to harmonize this mechanism with the Division's general authority to regulate practices that lead to "unfair discrimination." *See Guinn v. Leg. of Nev.*, 119 Nev. 277, 285, 71 P.3d 1269, 1274-75 (2003) (construing various provisions in a statute to give each meaning), *overruled on other grounds by Nevadans for Nev. v. Beers*, 122 Nev. 930, 142 P.3d 339 (2006). NAMIC reaches beyond the statute's text to argue that the Legislature's decision to pass the major life-event exception instead of a proposed bill eliminating all uses of consumer credit as evidence of its intent to make NRS 686A.685 the exclusive exception to uses of consumer credit otherwise allowed by NRS 686A.600-.730. *See* A.B. 162, 76th Leg. (Nev. 2011) (proposed, but not enacted, bill eliminating use of consumer credit); 2011 Nev. Stat., ch. 506, § 30, at 3367-68 (codified at NRS 686A.685). But "[u]npassed bills, as evidences of legislative intent, have little value." *Dyna-Med, Inc. v. Fair Emp't & Hous. Comm'n*, 743 P.2d 1323, 1333 (Cal. 1987) (collecting cases). And while the Legislature's failure to act in an area may suggest that a regulation enacting that same policy is invalid, *see Boreali v. Axelrod*, 517 N.E.2d 1350, 1356 (N.Y. 1987), as discussed above, R087-20 is tailored to address discriminatory uses of consumer credit information and is not a total ban on its use. Additionally, reading NRS 686A.685 as the exclusive restriction on use of consumer credit information would absorb restrictions

elsewhere in the code into an insurer's own determination of "reasonable exceptions" and vitiate the Division's authority to regulate unfairly discriminatory practices. Therefore, we hold that R087-20 does not conflict with the applicable statutes and affirm the regulation as within the Division's statutory authority.

C.

Finally, we reject NAMIC's constitutional challenges to R087-20. First, NAMIC argues that any reading of NRS 686A.680(1)(a), NRS 679B.150(1)(b), and NRS 679B.130(1)(a) that allows the Division to pass R087-20 renders the statutes an unconstitutional delegation of power. It is a fundamental tenet of the Nevada and federal Constitutions that the Legislature may not delegate its lawmaking power to another branch of government. *E.g.*, *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 227, 19 P.3d 245, 248 (2001); *see also* Nev. Const. art. 3, § 1 (delineating Nevada's separation-of-powers doctrine). But this court will uphold a delegation if the Legislature establishes "suitable standards" to govern the manner and circumstances under which an executive agency can exercise its delegated authority. *Sheriff v. Luqman*, 101 Nev. 149, 153, 697 P.2d 107, 110 (1985); 2 Am. Jur. 2d *Administrative Law* § 59 (2d ed. 2014). Where possible, this court will avoid interpreting a statute to render it an impermissible delegation of legislative authority. *See McNeill v. State*, 132 Nev. 551, 556, 375 P.3d 1022, 1025 (2016) ("Because we presume that the Legislature is aware that it may not delegate the power to legislate pursuant to the separation of powers, we presume that it acted in accordance.").

We conclude that the Legislature established suitable standards in NRS 686A.680(1)(a), NRS 679B.150(1)(b), and NRS 679B.130(1)(a) and that the statutes are not unconstitutional delegations of

power. Statutes empowering an agency to enforce an insurance code frequently are upheld as constitutional delegations of administrative and ministerial duties. *See, e.g.*, *Med. Society of New York v. Serio*, 800 N.E.2d 728, 736-37 (2003); *see also* 1 Steven Plitt *et al.*, *Couch on Insurance* § 2:8 & n.21 (3d rev. ed. 2009 & Supp. 2022) (listing cases upholding agency rulemaking authority under states' insurance codes). Here, the Legislature established standards in 686A.680(1) to guide the Division in enforcing the statutes governing the use of consumer credit in rating insurance by indicating that it should limit such use if insurers impermissibly "[u]se an insurance score that is calculated using income, gender, sexual orientation, gender identity or expression, address, zip code, ethnic group, religion, marital status or nationality of the consumer as a factor, or would otherwise lead to unfair or invidious discrimination." NRS 686A.680(1)(a). Regarding unfair actuarial discrimination, the Legislature provided various standards to define differential treatment. *See, e.g.*, NRS 686A.130(5) ("having like insuring or risk characteristics"). Therefore, we conclude that the Legislature properly delegated authority to the Division to engage in fact-finding and enact regulations based on these standards.

Second, NAMIC argues that if this court concludes that the Division had properly delegated statutory authority to enact R087-20, then the regulation unconstitutionally interferes with its members' contracts in violation of the United States and Nevada Constitutions' Contracts Clauses. Under the United States and Nevada Constitutions, the state may not pass a law that impairs the obligations of existing contracts. U.S. Const. art. 1, § 10 ("No State shall . . . pass any . . . Law Impairing the Obligations of Contracts . . . ."); Nev. Const. art. 1, § 15 ("No . . . law impairing the obligation of contracts shall ever be passed."). The district court correctly

rejected NAMIC's argument since NAMIC failed to provide an insurance policy or other proof that R087-20 impaired any preexisting contractual term. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978) (holding that the first step of a Contracts Clause challenge is to determine whether the challenged state law "operate[s] as a substantial impairment" to an existing contractual relationship). Without providing an actual policy or language from an existing policy, NAMIC failed to make the threshold "substantial impairment" showing to demonstrate how, and to what extent, R087-20 impaired that contract. Additionally, NAMIC's declaration of incidental harm to prospective contracts is not a valid state or federal Contracts Clause claim. *See Nw. Nat'l Life Ins. Co. v. Tahoe Reg'l Planning Agency*, 632 F.2d 104, 106-07 (9th Cir. 1980) (noting that the Contracts Clause does not protect against incidental effects on the subject matter of a contract); *Father & Sons & A Daughter Too v. Transp. Servs. Auth. of Nev.*, 124 Nev. 254, 263, 182 P.3d 100, 106 (2008) (holding that the Contracts Clause protects only existing, and not prospective, contracts). Without a basis to determine actual impairment and its severity, we therefore reject NAMIC's Contracts Clause claims. *See Allied Structural*, 438 U.S. at 244-45 (stating that court will end its inquiry of potential Contracts Clause violation if party challenging the statute only shows "minimal alteration of contractual obligations" rather than "substantial impairment"); *see also Hui Lian Ke v. Sandoval*, No. 17-cv-04229-EMC, 2018 WL 1763339, at *3 (N.D. Cal. Apr. 12, 2018) (dismissing a Contracts Clause claim because plaintiff's affidavit failed to allege the actual existence of impaired contract terms).

CONCLUSION

The economic shutdown that occurred in Nevada due to the emergency directive led to massive involuntary unemployment, with Las

Vegas suffering the highest unemployment in the country. The Division acted within the province of its authority when it found that using consumer credit scores against insureds during the pandemic and its aftermath would result in unfair actuarial discrimination. We therefore affirm the district court and lift the injunction on R087-20 issued by this court on September 16, 2021.

Pickering, J.

We concur:

Stiglich, C.J.

Cadish, J.

Herndon, J.

Parraguirre, J.