IN THE SUPREME COURT OF THE STATE OF NEVADA

FLOR MORENCY; KEYSHA NEWELL; BONNIE YBARRA; AAA SCHOLARSHIP FOUNDATION, INC.; SKLAR WILLIAMS PLLC; ENVIRONMENTAL DESIGN GROUP, LLC,

Appellants,

vs.

STATE OF NEVADA ex rel. the DEPARTMENT OF EDUCATION; JHONE EBERT, in her official capacity as executive head of the Department of Education; the DEPARTMENT OF TAXATION; JAMES DEVOLLD, in his official capacity as a member of the Nevada Tax Commission; SHARON RIGBY, in her official capacity as a member of the Nevada Tax Commission; CRAIG WITT, in his official capacity as a member of the Nevada Tax Commission; GEORGE KELESIS, in his official capacity as a member of the Nevada Tax Commission; ANN BERSI, in her official capacity as a member of the Nevada Tax Commission; RANDY BROWN, in his official capacity as a member of the Nevada Tax Commission; FRANCINE LIPMAN, in her official capacity as a member of the Nevada Tax Commission; ANTHONY WREN, in his official capacity as a member of the Nevada Tax Commission; MELANIE YOUNG, in her official capacity as the Executive Director and Chief Administrative Officer of the Department of Taxation,

Respondents,

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Supreme Court Case No. 81281

On Appeal from a Final Judgment of the District Court for Clark County, Nevada, Case No. A-19-800267-C, Hon. Rob Bare

Appellants' Opening Brief

and

THE LEGISLATURE OF THE STATE OF NEVADA,

Respondent-Intervenors.

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RULE 26.1 DISCLOSURE STATEMENT

FLOR MORENCY, *et al*., Appellants, vs. STATE OF NEVADA ex rel. the DEPARTMENT OF EDUCATION, *et al*. Respondents, and THE LEGISLATURE OF THE STATE OF NEVADA, Respondent-Intervenors.	Supreme Court Case No. 81281 On Appeal from a Final Judgment of the District Court for Clark County, Nevada, Case No. A-19-800267-C, Hon. Rob Bare **Rule 26.1 Disclosure Statement**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants Flor Morency, Bonnie Ybarra, and Keysha Newell are individuals and therefore have no corporate parents to disclose.

Plaintiff-Appellant AAA Scholarship Foundation, Inc. has no parent entity and no publicly held entity owns 10 percent or more of its stock.

Plaintiff-Appellant Sklar Williams PLLC discloses the following parent entities: Alan C. Sklar, Ltd., Bryan M. Williams, Ltd., and Henry E. Lichtenberger, Ltd.

Plaintiff-Appellant Environmental Design Group, LLC discloses the following parent entities: KNS Holdings, LLC.

All Plaintiff-Appellants have been represented in this case by the Institute for Justice; Saltzman Mugan Dushoff, LLC; and Kolesar & Leatham.

Dated July 10, 2020.

/s/Joshua A. House

Attorney of Record for Plaintiffs-Appellants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Rules

Other Authorities

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal under NRAP 3A(b)(1). In the proceeding below, final judgment was entered May 20, 2020, in favor of all Defendants-Respondents as a matter of law on all causes of action and claims for relief. 4 JA 558. Plaintiffs-Appellants filed their timely notice of appeal on May 29, 2020. 4 JA 560.

ROUTING STATEMENT

Under NRAP 17(a), this case shall be retained by the Supreme Court for two reasons:

First, the only issue in this case is a question of first impression involving Article 4, Section 18(2) of the Nevada Constitution. *See* NRAP 17(a)(11); 4 JA 543. This Court has never considered whether a bill should have received a supermajority under Article 4, Section 18(2).

Second, this matter raises a question of statewide public importance for two reasons. *See* NRAP 17(a)(12). First, it concerns whether the Legislature needs a two-thirds supermajority to raise revenue by repealing tax credits under the Nevada Constitution. 4 JA 543. Second, it concerns the Legislature's attempt to repeal tax credits that support Nevada's Choice Scholarship Program, resulting in the loss of scholarships and educational hardship to low-income families across the state. 1 JA 53; *see Schwartz v. Lopez*, 132 Nev. 732, 744, 382 P.3d 886, 895 (2016) (holding cases concerning education funding "are of significant statewide importance . . . under the public-importance exception" to standing).

ISSUE PRESENTED

Article 4, Section 18(2) of the Nevada Constitution requires a two-thirds legislative supermajority vote for a bill that "creates, generates, or increases any public revenue in any form." Assembly Bill 458 (2019) increased general fund revenue by repealing tax credits, but it did not receive a two-thirds supermajority vote in the Nevada Senate. Is A.B. 458 constitutional?

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STATEMENT OF THE CASE

This case is a constitutional challenge to Assembly Bill 458 (2019). Plaintiffs-Appellants filed their Complaint against the Department of Education and Department of Taxation (collectively, the State) on August 15, 2019. 1 JA 1–2, 16. On September 23, 2019, the Nevada Legislature moved to intervene as a defendant, which Plaintiffs-Appellants did not oppose and which the district court granted. 1 JA 30–31. The Legislature filed its Answer on October 10, 2019. 1 JA 32. The State filed a motion to dismiss, which the district court denied. 1 JA 49–54. The State filed its Answer on January 14, 2020. 1 JA 56.

All parties cross-moved for summary judgment. 2 JA 63, 2 JA 106–07, 3 JA 214–15. On May 20, 2020, the Eighth Judicial District Court granted the State's and Legislature's motions for summary judgment, denied Plaintiffs-Appellants' motion for summary judgment, and entered final judgment in favor of the State and Legislature. 4 JA 543, 558. Plaintiffs-Appellants timely appealed that May 20, 2020 order. 4 JA 562.

STATEMENT OF FACTS

In 2019 the Legislature passed, and the Governor approved, Assembly Bill 458. *See* A.B. 458—Overview—Bill History, https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6878/Overview. A.B. 458 eliminated tax credits that would have otherwise been available to Nevada businesses who donate to Nevada's Educational Choice Scholarship Program. *See* 2019 Nevada Laws Ch. 366 (A.B. 458). Consequently, A.B. 458 limited the number of scholarships the Scholarship Program could provide to low-income families. *See* 2 JA 96 ¶¶ 25–27. This case concerns whether A.B. 458 is constitutional. 4 JA 543.

I. Nevada's Educational Choice Scholarship Program Uses Tax Credits to Incentivize Donations to Private Scholarship Organizations.

Businesses that pay Nevada's payroll or excise taxes may qualify for a tax credit if they donate money to scholarships under Nevada's Educational Choice Scholarship Program. *See* NRS 363A.139(1); NRS 363B.119(1). The Scholarship Program provides tax credits for businesses that donate to registered scholarship organizations. *Id.* These scholarship organizations then distribute the scholarship funds to low-income Nevada families. NRS 388D.270(1)(e).

Most business donors would not donate to a scholarship organization without the tax credits provided by the Scholarship Program. 2 JA 96 ¶ 25. Businesses wishing to receive a tax credit apply for one with the scholarship organization of their choice. *See* NRS 363A.139(2); NRS 363B.119(2). The

scholarship organization then sends the tax-credit application to the Department of Taxation. *Id.* Tax credits are distributed on a first-come, first-served basis. NRS 363A.139(3); NRS 363B.119(3). If tax credits are available, the Department of Taxation issues a credit to the business donor, contingent on the business fulfilling its pledged donation. *See* NRS 363A.139(2); NRS 363B.119(2). However, if tax credits are not available, the donor must pay in taxes what it otherwise would have donated. *See id.*; 2 JA 102 ¶ 11, 104 ¶ 11.

The Scholarship Program is dependent on private donations: 100 percent of scholarships are donor-funded. 2 JA 96 ¶ 25. Under the Scholarship Program, there is a limited number of tax credits available each year. NRS 363A.139(4); NRS 363B.119(4). To compensate for rising education costs and growing families, the program's original design included a 10 percent annual increase in the amount of tax credits and related scholarships. 2015 Nev. Laws Ch. 22, § 4 (A.B. 165).

A.B. 458 reduced the number of tax credits available in fiscal year 2019–20, and each year thereafter, to $6,655,000. 2019 Nevada Laws Ch. 366 §§ 1–2 (A.B. 458). A.B. 458 thus removed $665,500 of tax credits for the current 2019–20 school year, $1,397,550 of tax credits for the 2020–21 school year, and many millions more of tax credits in the years following. *See id.*; 2 JA 96 ¶ 27. And with each reduction in credits comes a reduction in available scholarships to low-income families. 2 JA 96–97 ¶ 29.

II. The Legislature Passes A.B. 458 to Repeal Scholarship Program Tax Credits, but the Bill Does Not Get a Supermajority Vote in the Senate.

The Scholarship Program is popular: Each year, all the tax credits are claimed. 2 JA 96 ¶¶ 23–26. But because of a desire to increase state revenues, as shown below, the Scholarship Program found itself on the chopping block.

After its initial proposal, A.B. 458 was referred to the Assembly Committee on Taxation. *See* A.B. 458—Overview—Past Hearings, https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6878/Overview (stating bill first heard in Assembly Taxation Committee on April 4, 2019). In the Tax Committee, the bill's sponsor stated that the intent of the bill was to budget responsibly, accounting for "revenue and shortfalls." Minutes of Assemb. Comm. on Tax'n at 3, 80th Leg. (Nev. April 4, 2019), https://www.leg.state.nv.us/Session/80th2019/Minutes/Assembly/TAX/Final/792.pdf. When asked why the state would cut the popular Scholarship Program, the sponsor responded that "[w]e are not in the business of just giving away money in this state." *Id.* at 4. He continued, "[q]uite frankly, I think some of the resources we do not collect in the way of these taxes, and give away, is money we are taking away from the rest of the population." *Id*. The bill's sponsor insisted that A.B. 458 had nothing to do with education policy, it was simply a matter of prudent budgeting: "I am not trying to get rid of [the

Scholarship Program], but I do think that 10 percent automatic growth factor is just not a responsible way to budget in any capacity." *Id.*

While in the Assembly's Tax Committee, Defendant-Respondent Department of Taxation reviewed the bill. Dep't of Tax'n, Fiscal Note on A.B. 458 (Nev. Apr. 4, 2019), https://www.leg.state.nv.us/Session/80th2019/FiscalNotes/9327.pdf. The Department "determined [A.B. 458] would increase general fund revenue by $665,500 in fiscal year 2019-20 and $1,397,550 in fiscal year 2020-21," and it therefore labeled the bill as a "revenue" item. *Id*. The Department further explained that the bill reduced the amount of tax credits: "Under [the] existing statute the amount of credits available is $7,320,500 in fiscal year 2019-20 and $8,052,550 in fiscal year 2020-21. Sections 1 and 2 change the credits available for donations to a scholarship organization to a maximum of $6,655,000 available each fiscal year." *Id.* The Governor's Office of Finance reviewed the Department of Taxation's fiscal note and found that it "appears reasonable." *Id.* A.B. 458 passed the Assembly with the constitutionally required two-thirds supermajority vote and was then transmitted to the Senate. A.B. 458—Votes, https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6878/Votes.

Once in the Senate, A.B. 458 was referred to the "revenue and economic development" committee. A.B. 458—Overview—Past Hearings, https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6878/Overview (stating bill

heard in Senate Revenue and Economic Development Committee on May 2, 2019). There, the bill's sponsor cited budgetary concerns and argued that the Legislature has "an obligation to fund our budget responsibly." Minutes of S. Comm. on Revenue & Econ. Dev. at 4, 80th Leg. (Nev. May 2, 2019), https://www.leg.state.nv.us/Session/80th2019/Minutes/Senate/RED/Final/1120.pdf. Without the tax credits, he said, more money would "otherwise be in the General Fund." *Id.* at 3. He expressed his support for the Scholarship Program and stated that "[t]here is no doubt families have benefitted." *Id*. But, he said, "[w]ith the challenges our budget is facing, we have to take a measured approach and budget responsibly." *Id.* at 4.

The sponsor was asked whether, instead of reducing tax credits by so large an amount, he had considered allowing the bill to grow with inflation or other fixed costs. *Id.* The sponsor responded that such growth was "not consistent with [his] intent" because the state needs revenue: "We have to locate revenue to pay for rollups and raises, but every dollar we add to Opportunity Scholarships is a dollar we deplete from the General Fund." *Id.*

As the bill reached the Senate floor, it became clear there were not enough votes to pass A.B. 458 with a supermajority: The Las Vegas Review-Journal editorialized that the "Two-thirds requirement could save Opportunity Scholarships." Victor Joecks, *Two-thirds requirement could save Opportunity Scholarships*, Las Vegas Review-Journal (April 11, 2019), https://www.review

journal.com/opinion/opinion-columns/victor-joecks/two-thirds-requirement-could-save-opportunity-scholarships-video-1639289/. The Legislative Counsel Bureau then released an opinion arguing that a two-thirds supermajority was not required to repeal tax credits: "Nevada's two-thirds majority requirement does not apply to a bill which reduces or eliminates available tax exemptions or tax credits because such a reduction or elimination does not change the existing computation bases or statutory formulas used to calculate the underlying state taxes." 3 JA 255, 277 (Legislative Counsel Bureau, *Op. regarding the two-thirds majority requirement in Article 4, Section 18(2) of the Nevada Constitution* (May 8, 2019)).

The Senate passed A.B. 458 short of a two-thirds supermajority. A.B. 458—Votes, https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6878/Votes. The Governor signed the bill on June 3, 2019, and it became effective on July 1, 2019. A.B. 458—Overview—Bill History, https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6878/Overview.

III. By Repealing Tax Credits, A.B. 458 Requires Businesses to Pay More in Taxes and Reduces Scholarships Available to Low-Income Families.

The Plaintiffs-Appellants are two Nevada businesses, a registered scholarship organization, and three Nevada families. 4 JA 545. A.B. 458 has negatively affected each. *See* 1 JA 52–53.

Plaintiffs-Appellants Sklar Williams PLLC and Environmental Design Group have donated to scholarship organizations and received tax credits. 2 JA 102 ¶ 8, 104 ¶ 8. Because A.B. 458 reduced the tax credits available, and because each year all the available tax credits are claimed, their chances of receiving a tax credit in exchange for their donations are lower. 2 JA 102 ¶ 10, 104 ¶ 10. Without the tax credits, the Sklar Williams and Environmental Design Group will pay more in taxes. 2 JA 102 ¶ 11, 104 ¶ 11.

Plaintiff-Appellant AAA Scholarship Foundation, Inc. is a registered scholarship organization that distributes scholarships to families in need. 2 JA 94–95 ¶¶ 8–10. Since the Program's enactment, AAA has distributed scholarships to over a thousand low-income Nevada students. 2 JA 95 ¶ 11. The majority of Nevada families served by AAA have been racial or ethnic minorities and over 50 percent were at or below 185 percent of the federal poverty line. 2 JA 95 ¶¶ 12–13. Those families currently choose to send their children to 58 different schools. 2 JA 95 ¶ 19. Without tax credits, most of AAA's business donors would not donate. 2 JA 96 ¶ 25. The tax credits are a significant incentive and, each year, all the tax credits are claimed. 2 JA 96 ¶ 26. By removing millions of tax credits, A.B. 458 has removed millions of scholarship funds from organizations like AAA. 2 JA 96 ¶ 27. AAA will not, without additional donations incentivized by future tax-credits,

be able to fully fund scholarships for all the students it currently serves. 2 JA 96–97 ¶ 29.

Plaintiff-Appellants Flor Morency, Bonnie Ybarra, and Keysha Newell, are three Nevada mothers whose children have benefited from the Scholarship Program. *See* 1 JA 52. Their access to scholarships has been directly affected by A.B. 458. 1 JA 52–53.

Plaintiff-Appellant Morency is the mother of twin children who lost scholarships following A.B. 458's passage. 2 JA 83–84 ¶¶ 8, 19. In public school, her son was bullied because of his small size—a situation worsened by overcrowded public school classrooms. 2 JA 83–84 ¶¶ 10–14. Morency, a Salvadoran immigrant, applied to a scholarship organization and was granted two scholarships under the Scholarship Program, allowing her to send her children to a private school. 2 JA 84 ¶¶ 16–17. Since enrolling him in a private school, Morency has seen a marked improvement in her son's grades. 2 JA 84 ¶ 18. But last summer, after A.B. 458 went into effect, she received a letter from her scholarship organization stating that A.B. 458 made it a "statistical impossibility" to award her children a scholarship for the 2019–20 school year. 2 JA 84 ¶ 19. After the filing this case, Morency's children were granted scholarships from a different scholarship organization, Plaintiff-Appellant AAA. 2 JA 84 ¶ 22. But she is concerned that there will not be enough long-term funding to provide for her

children's private school education. 2 JA 84 ¶ 23. And she is worried that her youngest child, not yet of school age, will never be able to participate in the Program. 2 JA 84 ¶ 24.

Plaintiff-Appellant Ybarra is the mother of three young children, ages 10, 8, and 5. 2 JA 86 ¶ 6. One of her children did not do well in public school, receiving mostly D's and F's. 2 JA 86 ¶ 8. And another was physically assaulted, bullied, and described by her teachers as "working at the speed of a snail." 2 JA 86 ¶ 9. Ybarra first tried to work with the public school to identify appropriate supports for her children's learning, but to no avail. 2 JA 86–87 ¶ 10. Ybarra then applied for scholarships under the Scholarship Program. She received partial scholarships for both children, covering most of the tuition cost. 2 JA 87 ¶¶ 11–12. Since starting in private school, her academically struggling child has developed much better study habits, earning mostly A's and B's. 2 JA 87 ¶ 14. But last July, Ybarra received a notice that A.B. 458 made it "statistically impossible" to renew her children's scholarships. 2 JA 87 ¶ 18. Ybarra was able to receive small scholarships from Plaintiff AAA, but a $16,000 tuition gap remains. 2 JA 87 ¶ 19. She cannot afford to pay the remaining $16,000. 2 JA 88 ¶ 20. The private school agreed to reduce rates for Ybarra for the 2019–20 school year, on the condition that she occasionally work at the school and pay $240, out-of-pocket, each month. 2 JA 88 ¶ 22. But the school cannot offer this generous arrangement in the future. 2 JA 88 ¶ 24. And, as

of now, that school will close in part because so many students lost their scholarship funding. 4 JA 464 ¶¶ 3–4. The school calculated that its students lost a combined $240,000 in scholarships following the passage of A.B. 458. 4 JA 464 ¶ 3.

Plaintiff-Appellant Keysha Newell is the mother of two children, ages 7 and 3. 2 JA 91 ¶ 6. Her older daughter struggled in public school and has been diagnosed with a learning disability. 2 JA 91 ¶ 8. Although her daughter received special education services in preschool, in kindergarten she was mainstreamed by the public school. 2 JA 91 ¶ 9. Newell's requests for additional learning assistance went unheeded. 2 JA 91 ¶ 10. Newell then applied for and received a scholarship under the Scholarship Program. 2 JA 92 ¶ 11–12. Once enrolled in a private Montessori school, her daughter excelled both academically and socially. 2 JA 92 ¶¶ 11, 13. A.B. 458 has jeopardized Newell's future access to scholarships: If tuition goes up, and her daughter's scholarship decreases or remains the same, Newell will be unable to afford the Montessori school. 2 JA 92 ¶ 22. Newell cannot afford to spend any additional income on private school tuition. 2 JA 93 ¶ 21. In addition, given Newell's experience with her daughter, she wishes to apply for a scholarship for her younger son so that he can have the same learning opportunities as his sister. 2 JA 92 ¶ 16. But without additional tax credits, additional scholarships will not be available. *See* 1 JA 52; 2 JA 96 ¶ 27.

IV. The Plaintiffs-Appellants Sue to Enjoin A.B. 458 Under Article 4, Section 18(2) of the Nevada Constitution.

Plaintiffs-Appellants sued the Department of Education and the Department of Taxation (collectively "the State"), seeking an injunction against the enforcement of A.B. 458. 1 JA 2–3, 16. Under Article 4, Section 18(2) of the Nevada Constitution, each house of the Legislature must pass any bill that "creates, generates, or increases any public revenue in any form" by a two-thirds supermajority vote. Plaintiffs-Appellants alleged that A.B. 458 was unconstitutional because it raised revenue by repealing tax credits, but it did not receive a two-thirds supermajority in the Nevada Senate. 1 JA 15. The district court granted the Nevada Legislature's unopposed motion to intervene as a defendant, 1 JA 30–31.

The State filed a motion to dismiss arguing that Plaintiffs lacked standing, did not have ripe claims, and failed to state a legal claim. 1 JA 52. The district court denied the motion, finding that each of the Plaintiffs has standing and that Plaintiffs' claims are ripe. 1 JA 54. However, the district court reserved judgment on whether Plaintiffs stated a claim until completion of summary judgment briefing. 1 JA 54. All parties then cross-moved for summary judgment. 4 JA 543.

After a hearing, the district court denied Plaintiffs-Appellants' motion for summary judgment, and it granted the State's and Legislature's motions for summary judgment. 4 JA 542–43, 558. It did so on two grounds: First, it held that

Article 4, Section 18(2) did not apply because A.B. 458 did not raise revenue. 4 JA 551. Second, it held that, even if A.B. 458 did raise revenue, Article 4, Section 18(2) of the Nevada Constitution categorically does not apply to repeals of tax exemptions or credits. 4 JA 556–57. Plaintiffs-Appellants timely filed their notice of appeal. 4 JA 562.

SUMMARY OF THE ARGUMENT

Article 4, Section 18(2) of the Nevada Constitution requires that the Legislature obtain a two-thirds supermajority, in each legislative house, "to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form." Assembly Bill 458 increased revenue in the form of a bill repealing tax credits. But A.B. 458 did not receive a supermajority in the Nevada Senate. Thus, A.B. 458 did not receive the constitutionally required votes and should be enjoined.

The district court, however, concluded that A.B. 458 did not raise revenue and, even if it did, Article 4, Section 18(2) applies only to bills creating "new taxes," not to bills repealing tax credits. This was error.

First, A.B. 458 increased revenue because repealing tax credits increases tax receipts. Without the tax credits, Nevada businesses will pay more taxes into the state's general fund. Increasing revenue is the entire point of removing tax credits, and that was A.B. 458's purpose here. A.B. 458's legislative history shows that revenue and budgeting, not education policy, was the purpose of the bill. This Court should therefore reject Defendants-Respondents' position, formed after this litigation began, that A.B. 458 does not increase "any public revenue." Nev. Const. art. 4, § 18(2).

Second, Article 4, Section 18(2) applies to any bill that increases any revenue in any form, including tax-credit repeals. There is no support in the text or history of Nevada's Constitution for the limiting Article 4, Section 18(2) to "new taxes." The district court, therefore, mistakenly analogized Nevada's supermajority provision to Oklahoma's narrow supermajority provision. Oklahoma's provision is limited to "revenue bills," a centuries-old term of art referring only to bills that levy new taxes. Instead, Nevada's supermajority provision is analogous to other states' provisions that do not use the term "revenue bill." This includes provisions in Arizona, Florida, and Louisiana, each of which consider tax-credit repeals to be one form of revenue increase.

Because A.B. 458 increased general fund revenues without receiving a two-thirds supermajority in the Nevada Senate, it is therefore unconstitutional. Plaintiffs-Appellants respectfully request that this Court reverse the district court.

STANDARD OF REVIEW

"This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). All inferences from the record evidence must be made in favor of the nonmoving party. *Id.*

"On an appeal from cross-motions for summary judgment, the standard does not change . . . ." *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 89 (1st Cir. 2013). Each motion is analyzed separately, and no party waives its right to trial as applied to the other parties' motions. *Sherwood v. Washington Post*, 871 F.2d 1144, 1147 n.4 (D.C. Cir. 1989); *see Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) ("Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." (quotation marks omitted)).

ARGUMENT

Article 4, Section 18(2) of the Nevada Constitution requires a two-thirds supermajority in each legislative house for any bill that increases state revenues:

> [A]n affirmative vote of not fewer than two-thirds of the members elected to each House is necessary to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates.

Assembly Bill 458 (2019) is a bill that "increases any public revenue in any form," Nev. Const. art. 4, § 18(2), because it "increase[s] general fund revenue." Dep't of Tax'n, Fiscal Note on A.B. 458 (Nev. Apr. 4, 2019), https://www.leg.state.nv.us/Session/80th2019/FiscalNotes/9327.pdf. It therefore should have received a two-thirds supermajority vote in each Legislative house. Because it did not, A.B. 458 is unconstitutional.

Before A.B. 458 passed, Defendants-Respondents stated that A.B. 458 "reduces or eliminates available tax exemptions or tax credits," 3 JA 255, 277, and thereby "increase[s] general fund revenue," Dep't of Tax'n, Fiscal Note on A.B. 458 (Nev. Apr. 4, 2019), https://www.leg.state.nv.us/Session/80th2019/FiscalNotes/9327.pdf. But the Legislature and Department of Taxation changed their tune after this lawsuit. Below, the Legislature argued that A.B. 458 does not in fact eliminate tax credits, because it was passed before July 1, the beginning of the new fiscal year. 3 JA 230–31. And the Department of Taxation argued that

A.B. 458 did not increase revenue because, now that fewer children have scholarships, the state must increase expenditures to educate them in public schools. 3 JA 311.

The district court agreed with the State and Legislature that A.B. 458 did not increase revenue. 4 JA 551. It also held that, even if A.B. 458 did raise revenue, Article 4, Section 18(2) applies only to bills that impose "new taxes." 4 JA 556–57.

But the district court's decision was wrong on both counts. ***First***, A.B. 458 increased public revenue because repealing tax credits increases tax revenues. ***Second***, Nevada's supermajority provision means what it says: It applies to any "bill . . . which creates, generates, or increases any public revenue in any form." Nev. Const. art. 4, §18 (2). That means it applies even to a bill, like A.B. 458, that repeals tax credits, if that bill increases revenue. Because A.B. 458 increases revenue, but does not comport with Article 4, Section 18(2), its enforcement should be enjoined.

I. A.B. 458 Increases Revenue Because It Repeals Tax Credits.

The district court concluded that Article 4, Section 18(2) does not apply to A.B. 458 because A.B. 458 did not increase revenue. 4 JA 551. That conclusion is incorrect for three reasons. ***First***, by repealing tax credits, A.B. 458 forces taxpayers to pay more to the state. That increases tax revenue. ***Second***, A.B. 458's legislative history shows that it was intended to increase revenue. And ***third***, there

is no support for the Legislature's argument, accepted by the district court, that A.B. 458 is revenue-neutral because it went into effect before July 1 of the new fiscal year.

A. Repealing Tax Credits Increases Revenue.

Article 4, Section 18(2) applies to any bill that "increases any public revenue in any form." The district court determined that A.B. 458 did not increase revenue. It was incorrect.

A.B. 458 had the direct effect of increasing revenues. This Court has never considered whether a bill "creates, generates, or increases any public revenue" under Article 4, Section 18(2). It has, however, considered whether a bill was either "regulatory or revenue-raising" under the prohibition on special taxes in Article 4, Section 20 of the Nevada Constitution. *See Clean Water Coalition v. The M Resort*, 127 Nev. 301, 316, 255 P.3d 247, 257 (2011) (holding certain user fees become "taxes" when transferred into the State's general fund).

In *Clean Water Coalition*, this Court held that a fee is likely a revenue-raising tax if it is deposited into the general fund: "[A]pplying . . . fees to unrestricted statewide general fund uses . . . is of weight in indicating that the charge is a tax." *Id.* at 317, 255 P.3d at 258 (quotations omitted). This Court noted that the purpose of the challenged fee was "to help correct the state's revenue shortfall." *Id.* at 316, 255 P.3d at 258. Thus, this Court concluded that, even though

the Legislature called the collected money "user fees," the fees were actually a tax because they were "transferred to the State's general fund for unrestricted general use." *Id.* at 318, 255 P.3d at 259.

Here, A.B. 458 increases revenues because it will cause Nevadans to pay more in taxes to Nevada's general fund. The undisputed facts show that Plaintiffs-Appellants Sklar Williams and Environmental Design Group will pay more in taxes if they cannot obtain the tax credits. 2 JA 102 ¶ 11, 104 ¶ 11. With the tax credits in place, those businesses could spend their money as they wish: by donating to private scholarship organizations. Removing tax credits forces businesses to give their private funds to the government's general fund. That increases general fund revenue. And, as shown below in Part I.B., increasing revenue was what A.B. 458 was intended to do.

Other courts agree that repealing tax credits or exemptions increases tax revenues. The Ninth Circuit Court of Appeals has recognized that "the repeal of tax credits" is one way to "effectively and equitably raise revenues." *Univ. of Hawaii Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1107 (9th Cir. 1999) (internal quotation marks omitted). And precisely because rescinding tax credits increases tax revenue, federal district courts have held that the federal Tax Injunction Act[1]

[1] "[T]he Tax Injunction Act . . . prohibits a lower federal court from restraining 'the assessment, levy or collection of any tax under State law . . . .'" *Hibbs v. Winn*, 542 U.S. 88, 93 (2004) (quoting 28 U.S.C. § 1341).

applies to plaintiffs challenging state tax-credit laws. *See Landowners United Advocacy Found., Inc. v. Hartman*, No. 16-CV-00603-PAB-SKC, 2019 WL 1125866, at *3 (D. Colo. Mar. 12, 2019) (stating successful lawsuit challenging state tax-credit revocation "would have the result of lowering tax collections"); *LaBorde v. City of Gahanna*, 946 F. Supp. 2d 725, 735 (S.D. Ohio 2013) (applying Tax Injunction Act to plaintiffs challenging "incorrect calculation of a tax credit" because "[t]he TIA is designed to reach those cases . . . going to the validity of the particular taxes imposed upon them" (emphasis removed)), *aff'd*, 561 F. App'x 476 (6th Cir. 2014).

Other state supreme courts have also held that repealing tax exemptions increases revenue. The Oklahoma Supreme Court stated that it "isn't seriously in doubt" that repealing tax exemptions increased state revenues. *Okla. Auto. Dealers Ass'n v. State ex rel. Oklahoma Tax Comm'n*, 401 P.3d 1152, 1155–56, 1158 (Okla. 2017). "Why does government seek to close loopholes in its tax code? To collect more tax revenue, of course." *Id.* at 1158. Likewise, the Oregon Supreme Court has said that a tax-exemption repeal "does generate revenue." *City of Seattle v. Dep't of Revenue*, 357 P.3d 979, 988 (Or. 2015).

Although these other courts were applying a variety of different laws, they all agree that removing tax credits or exemptions increases tax revenue. A.B. 458

was therefore a "[r]evenue-raising act[]" designed "to help correct the state's revenue shortfall." *Clean Water Coal.*, 127 Nev. at 316–17, 255 P.3d at 258.

B. A.B. 458's legislative history shows that it was intended to raise revenue.

In *Clean Water Coalition*, this Court stated that "when it appears . . . that revenue is its main objective . . . the enactment is a revenue measure." *Clean Water Coal.*, 127 Nev. at 316, 255 P.3d at 258. Here, A.B. 458's legislative history shows that revenue was its sole objective.

After its initial proposal, A.B. 458 was referred to the Assembly's Committee on Taxation. There, the bill's sponsor characterized A.B. 458 as taking "a step toward ensuring we are being fiscally responsible with our entire budget. ***That is the intent of the bill.***" Minutes of Assemb. Comm. on Tax'n at 4, 80th Leg. (Nev. April 4, 2019), https://www.leg.state.nv.us/Session/80th2019/Minutes/Assembly/TAX/Final/792.pdf (emphasis added). When asked why the state would cut the popular Scholarship Program, the sponsor responded that "[w]e are not in the business of just giving away money in this state." *Id.* He continued, "[q]uite frankly, I think some of ***the resources we do not collect in the way of these taxes***, and give away, is money we are taking away from the rest of the population. . . . The fact of the matter is, if there is free money, of course people are going to apply for it . . . ." *Id.* (emphasis added).

In fact, A.B. 458's sponsor insisted that the bill had nothing to do with education policy, it was simply a matter of prudent budgeting: "I am not trying to get rid of [the Scholarship Program], but I do think that 10 percent automatic growth factor is just not a responsible way to budget in any capacity." *Id.* (Likewise, in the proceedings below, neither the State nor the Legislature suggested A.B. 458 was anything other than budgetary policy.)

While A.B. 458 was in the Nevada Assembly, it was reviewed by Defendant-Respondent Department of Taxation. The Department of Taxation "determined [A.B. 458] ***would increase general fund revenue*** by $665,500 in fiscal year 2019-20 and $1,397,550 in fiscal year 2020-21." Dep't of Tax'n, Fiscal Note on A.B. 458 (Nev. Apr. 4, 2019), https://www.leg.state.nv.us/Session/80th2019/FiscalNotes/9327.pdf (emphasis added). It therefore labeled A.B. 458 as a "revenue" item. *Id*. The Department further explained that "[u]nder existing statute the amount of credits available is $7,320,500 in fiscal year 2019-20 and $8,052,550 in fiscal year 2020-21. Sections 1 and 2 change the credits available for donations to a scholarship organization to a maximum of $6,655,000 available each fiscal year." *Id.*

After passing the Assembly by a two-thirds supermajority, A.B. 458 was referred to the Senate's Committee on Revenue and Economic Development. At a Senate hearing, the bill's sponsor said that without the tax credits more money

would "otherwise be in the General Fund." Minutes of S. Comm. on Revenue & Econ. Dev. at 3, 80th Leg. (May 2, 2019), https://www.leg.state.nv.us/Session/80th2019/Minutes/Senate/RED/Final/1120.pdf. When asked whether, instead of reducing tax credits by so large an amount, he had considered allowing the program to grow with rising costs, the sponsor responded that was "not consistent with [his] intent" because the state needs revenue: "***We have to locate revenue*** to pay for rollups and raises, but every dollar we add to Opportunity Scholarships is a dollar we deplete from the General Fund." *Id.* at 4 (emphasis added).

In sum, it was clear from the beginning that A.B. 458 would increase revenue. That was the bill's sole aim. It was debated in the Assembly's Committee on ***Taxation*** and in the Senate's Committee on ***Economic Development and Revenue***. This bill did not remove scholarships from Nevada families to modify the state's education policy. It did so to increase state revenues.

C. This Court should reject the argument that tax-credit repeals, if done before July 1, do not raise revenues.

The district court's order adopted Defendants-Respondents' argument—made for the first time at summary judgment—that tax credits do not go into effect until July 1 of the fiscal year in which they are available. 3 JA 230–31; 4 JA 551. According to this argument, because A.B. 458 was enacted prior to July 1, 2019, there was no change to the amount of 2019-20 tax credits.

Before this litigation, there was no question that A.B. 458 "reduces or eliminates available tax exemptions or tax credits." 3 JA 277 (Leg. Counsel Bureau Op.). The State even argued below that budgeting concerns were relevant to this case: "Nevada's finances are being stretched to the limits." 4 JA 468. It was only at summary judgment that Defendants-Respondents came up with this July 1 argument.

In any event, the July 1 argument should be rejected for three reasons. ***First***, it ignores that the Legislature, in 2015, statutorily set the amount of fiscal year 2019–20 tax credits. Because A.B. 458 reduced that set amount of tax credits—and increased revenue—it required a supermajority vote. ***Second***, if accepted by this Court, the July 1 argument would permit the Legislature in many cases to avoid the supermajority requirement. And ***third***, the July 1 argument creates a formalist deadline on July 1 of any year, despite no such requirement in the Nevada Constitution. Article 4, Section 18(2) does not contemplate that a bill, if passed after July 1, should be treated differently than if it was passed before July 1.

1. *The tax credits at issue here, for fiscal year 2019–20 and beyond, were effective at their passage in 2015.*

The district court held that the tax credits at issue here "were not legally operative and binding yet because they would not go into effect . . . until the commencement of FY 2019-2020 on July 1, 2019, and the commencement of each fiscal year thereafter." 4 JA 550. This is incorrect. The tax credits that were

repealed by A.B. 458 became effective in 2015 by setting the amount of available tax credits for each successive year. Repealing those set tax credits, to increase tax revenues, requires a supermajority vote.

A bill is effective on its statutory effective date. *See In re Leibowitz*, 217 F.3d 799, 805 (9th Cir. 2000). The Scholarship Program and its annual tax credit amounts became legally operative and "effective upon passage and approval" of the program on April 13, 2015. *See* 2015 Nev. Laws Ch. 22, § 9 (A.B. 165). The Legislature cannot annul four-year-old legislation without passing a new bill: If it disagrees with past revenue policies, it must get enough votes to pass new legislation.[2]

When the Scholarship Program was enacted in 2015, it created the tax credits at issue in this case. *See id*. NRS sections 363A.139(4) and 363B.119(4) set the amount of tax credits for each subsequent fiscal year: "For Fiscal Year 2015–2016, $5,000,000"; "For Fiscal Year 2016–2017, $5,500,000"; and increasing 10 percent each year thereafter. *Id.* The following chart shows the number of tax credits set during the first decade of the scholarship program:

[2] Defendants-Respondents argued below that one Legislature cannot bind another. 4 JA 497. But here, it is the Constitution that is binding the Legislature. A.B. 458 needs a two-thirds supermajority, not because a past Legislature said so, but because the Constitution says so.

Fiscal Year	**Credits available before A.B. 458**
2015-2016	$5,000,000
2016-2017	$5,500,000
2017-2018	$6,050,000
2018-2019	$6,655,000
2019-2020	$7,320,500
2020-2021	$8,052,550
2021-2022	$8,857,805
2022-2023	$9,743,586
2023-2024	$10,717,944
2024-2025	$11,789,738

A.B. 458 repealed the portions of NRS sections 363A.139(4) and 363B.119(4) that set forth the tax credits available for each successive fiscal year. A.B. 458 then replaced those tax credits with a lower, static amount of credits:

Fiscal Year	**Credits available *before* A.B. 458**	**Credits available *after* A.B. 458**
2019-2020	$7,320,500	$6,655,000.00
2020-2021	$8,052,550	$6,655,000.00
2021-2022	$8,857,805	$6,655,000.00
2022-2023	$9,743,586	$6,655,000.00
2023-2024	$10,717,944	$6,655,000.00
2024-2025	$11,789,738	$6,655,000.00

As the chart shows, A.B. 458 removed tax credits that the Legislature had already set for certain fiscal years. It did so to raise revenue, and it was successful: The

State will be reaping over $10 million in additional tax revenue over the next half-decade.

Defendants-Respondents argued below that A.B. 458 merely "froze" the current amount of tax credits. *See, e.g.*, 3 JA 309. As shown above, that is a misunderstanding of A.B. 458. In 2015, the Legislature set the amount of tax credits available for the 2019–20 fiscal year. A.B. 458, in the words of the Legislative Counsel Bureau "reduces or eliminates" that amount of tax credits. 3 JA 277. Nevadans thus have higher tax liabilities now than they would before A.B. 458. In any case, what triggers the supermajority provision is not whether the raw number of tax credits offered changes from year to year. Rather, it is the passage of a bill that "increases any public revenue." The dispositive fact is that A.B. 458 increased Nevada's general fund revenues.

The July 1 argument further ignores the effects on taxpayers' and scholarship organizations' reliance interests. Before A.B. 458, Nevada businesses and scholarship organizations could use the guaranteed, statutory amounts to calculate how many tax credits and scholarships will be available in each year. This matters because, under Nevada law, a scholarship organization can provide a student with a scholarship only if the organization reasonably believes it can give out the same amount of scholarship every year until the student graduates from high school. NRS 388D.270(6). Thus, these scholarship organizations must

calculate scholarship amounts decades into the future. As far as they were concerned, the legislation was "effective" on April 13, 2015, and could only be changed by a proper, constitutional vote. By ruling that the tax credits were never actually "effective," despite being established by statute, the district court's ruling upsets the reliance interests of both Nevada scholarship recipients and Nevada taxpayers.

2. The Legislature's argument would allow it to circumvent the supermajority requirement and increase revenue by eliminating all manner of tax reductions.

Another problem with the Legislature's July 1 argument is that, if successful, it would effectively render the supermajority provision a nullity. Legislative majorities could easily circumvent the Constitution to eliminate tax reductions—and therefore increase taxes—even when they cannot obtain the required two-thirds supermajority in each chamber.

The Legislature argued below, and the district court held, that preset tax liabilities or benefits do not become "effective" until July 1 of a new fiscal year. 3 JA 230–31; 4 JA 551. This means that, if the Legislature changes tax liabilities for a given year, before July 1 of that year, it does not need a supermajority. It is as if the statutorily set tax liabilities never existed. So, the argument runs, no revenue is increased, because the statutory tax liabilities did not yet really exist.

The Legislature's argument gives it *carte blanche* to raise revenues while ignoring the Constitution. Under the July 1 argument, the Legislature could repeal tax reductions—in other words, raise taxes—without a supermajority, so long as it passed a bill before the beginning of the fiscal year in which it takes effect. For example, say current tax statutes set a sales tax decrease for the 2021–22 fiscal year. Then on June 30, 2021, the Legislature passed a bill increasing the sales tax for 2021–22 by removing the tax-decrease statute. Under the July 1 argument, that bill would not be a bill increasing revenues, even though it directly increased sales taxes. (But if that very same bill were passed the next day, on July 1, 2021, it would suddenly become a tax increase.) Thus, to avoid Article 4, Section 18(2), the Legislature need only pass the bill before July 1.

Furthermore, because Nevada has a part-time legislature, meeting every other year, it is always passing bills that take effect only in future fiscal years. For instance, the 2019 session, which took place during the 2018–19 fiscal year, passed bills controlling fiscal policy for both the 2020–21 fiscal year and the 2021–22 fiscal year. If the supermajority requirement could be avoided by claiming that a particular bill affects only future fiscal years, the Legislature would be able to easily avoid the supermajority requirement.

This Court should reject any interpretation of the supermajority provision that renders it meaningless. Instead, "the Nevada Constitution should be read as a

whole, so as to give effect to . . . each provision." *We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008). Giving effect to each provision means "lean[ing] in favor of a construction that will render every word operative, rather than one which may make some words idle and nugatory." *Ex parte Shelor*, 33 Nev. 361, 111 P. 291, 293 (1910).

Instead of interpreting the Constitution in a way that gives the Legislature free reign, this Court should enforce the supermajority provision: A bill that increases revenue requires a supermajority, whether that bill increases revenue in the current fiscal year or in the next fiscal year.

3. The Nevada Constitution does not assign any special importance to the fiscal year or July 1.

Finally, the July 1 argument should be rejected because the text of Nevada's provision does not mention July 1 or the fiscal year. The text states simply that "a bill . . . which creates, generates, or increases any public revenue in any form" must receive a two-thirds supermajority. Nothing justifies the talismanic significance Defendants-Respondents or the district court attached to July 1.

Article 4, Section 18(2) does not limit its scope to revenues that are incoming before July 1, or whatever date is chosen to start the fiscal year. Its scope extends to "any public revenue in any form." A bill that "creates, generates, or increases" revenue ***now*** is on the same footing as a bill that does so in the ***future***. Anyway, all legislation is presumptively forward-looking. *See Nevada Power Co.*

v. Metro. Dev. Co., 104 Nev. 684, 686, 765 P.2d 1162, 1163 (1988) ("In the absence of clear legislative intent to make a statute retroactive, it will be interpreted to have only a prospective effect."). Neither Defendants-Respondents nor the district court provided any meaningful constitutional difference between a bill that changes expected revenues during the current fiscal year and a bill that changes expected revenues in future years. That is because there is none.

The legislative record shows that A.B. 458 raised revenues for this 2019–20 fiscal year, as well as for future years. "The department has reviewed the bill and determined it would increase general fund revenue by $665,500 in fiscal year 2019-20 and $1,397,550 in fiscal year 2020-21. . . . [And] in each subsequent fiscal year the delta of the introduced maximum and projection will be substantially higher." Dep't of Tax'n, Fiscal Note on A.B. 458 (Nev. Apr. 4, 2019), https://www.leg.state.nv.us/Session/80th2019/FiscalNotes/9327.pdf. This Court should therefore reject the July 1 argument and hold that A.B. 458 did in fact increase general fund revenues.

II. Nevada's Supermajority Requirement Applies to All Bills that Raise Public Revenues, Including Those Repealing Tax Credits.

The district court also concluded that, even if A.B. 458 raised revenue, Article 4, Section 18 does not apply to repeals of tax credits. It found that the provision applies only to "new taxes." This is wrong for three reasons. ***First***, the text of the provision applies to all bills that increase any revenue in any form—it is

not limited to new taxes. ***Second***, the supermajority provision's history shows it applies not just to new taxes but also increases in existing taxes. ***Third***, Nevada's provision—like Arizona's, Florida's and Louisiana's—applies to tax credits. That is because it is not limited to the technical term "revenue bills," but instead applies to any "bill . . . which creates, generates, or increases any public revenue in any form." Nev. Const. art. 4, § 18(2).

A. The supermajority requirement's text is not limited to new taxes.

The plain text of Article 4, Section 18(2) applies to tax-credit repeals like A.B. 458. That is so for three reasons: ***First***, Article 4, Section 18(2) requires a supermajority for any bill that "creates, generates, or increases any public revenue in any form." Nev. Const. art. 4, § 18(2). And A.B. 458, by the Tax Department's own admission, increases general fund revenue. ***Second***, the provision applies to any revenue increases, "in any form." This means it applies to tax-credit repeals, which are one form of revenue increase. ***Third***, the Article 4, Section 18(2) is expressly "not limited to" the examples of revenue increases that it provides.

1. Repealing tax credits "creates, generates, or increases" revenue.

As demonstrated in Part I, repealing tax credits increases revenues. Indeed, the entire point behind A.B. 458 was to boost Nevada revenues.

Dictionary definitions also suggest that a tax-credit repeal "creates, generates, or increases" revenue. When a commonly used term is undefined in

Nevada law, this Court gives it "ordinary dictionary definitions." *Ford v. State*, 127 Nev. 608, 622, 262 P.3d 1123, 1132 (2011); *see also Jones v. State Bd. of Med. Exam'rs*, 131 Nev. 24, 28–29, 342 P.3d 50, 52 (2015) (using dictionary definitions and analogous Nevada statutes where statutory term was undefined). Here, the dictionary definitions of "create," "generate," or "increase" say that repealing a tax credit does all those things:

- "Create" means "to bring into existence"; "to invest with a new form, office, or rank"; "to produce or bring about by a course of action or behavior"; to "cause" or "occasion"; "to produce through imaginative skill"; or to "design." *Create*, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/create (last visited July 9, 2020).

- "Generate" means "to bring into existence"; "to be the cause of"; or "to define or originate . . . by the application of one or more rules or operations." *Generate*, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/generate (last visited July 9, 2020).

- "Increase" means "to make greater." *Increase*, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/increase (last visited July 9, 2020).

Each of those definitions applies to A.B. 458. A.B. 458 created revenues because it brought additional revenue into existence. A.B. 458 generated revenue because it was what caused the state to collect additional revenue. And A.B. 458 increased revenue because it made the amount of revenue collected by the state greater. There is, therefore, no question that A.B. 458 "increase[d] general fund revenue."

Dep't of Tax'n, Fiscal Note on A.B. 458 (Nev. Apr. 4, 2019), https://www.leg.state.nv.us/Session/80th2019/FiscalNotes/9327.pdf.

2. The supermajority requirement applies to generation of "any public revenue in any form."

Article 4, Section 18(2) applies to bills that increased "***any*** public revenue," and that do so "in ***any*** form." Nev. Const. art. 4, § 18(2) (emphasis added). Nevada courts must therefore consider only whether A.B. 458 increased any public revenue. It does not matter what "form" the revenue increase takes because "any" form is included.[3]

Here, A.B. 458 increases a "public revenue" because it "increase[s] general fund revenue," as Defendant-Respondent the Department of Taxation has stated. Dep't of Tax'n, Fiscal Note on A.B. 458 (Nev. Apr. 4, 2019), https://www.leg.state.nv.us/Session/80th2019/FiscalNotes/9327.pdf. And the "form" it took was a bill repealing tax credits. Therefore, A.B. 458 should have received a supermajority.

Use of the word "any"—"***any*** public revenue in ***any*** form"—further suggests that the supermajority provision applies to all bills that increase revenue

[3] As if to emphasize that "any" kind of bill that increases revenue is included—including bills repealing tax credits—the Nevada Constitution uses "any" three more times in the following provision, which allows revenue increases to pass by a simple majority of the popular vote: "A majority of all of the members elected to each House may refer ***any measure*** which creates, generates, or increases ***any revenue*** in ***any form*** to the people of the State at the next general election, and shall become effective and enforced only if it has been approved by a majority of the votes cast on the measure at such election." Nev. Const. art 4, § 18(3) (emphasis added).

and that it is not limited to new taxes. "Any" means "one or some indiscriminately of whatever kind" or "whatever quantity." *Any*, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/any (last visited July 9, 2020). As the Delaware Supreme Court recognized when considering "a plain reading of" its own supermajority provision, "use of the word[] 'any' . . . evidences an inclusive intent." *In re Opinion of the Justices*, 575 A.2d 1186, 1189 (Del. 1990).

Moreover, Nevada's Constitution uses the phrase "any public revenue," not "any tax." "Revenue" is a broader term than "tax." A helpful explanation of the terms' difference can be found in a case from the Washington Supreme Court, *W. Petroleum Importers, Inc. v. Friedt*, 899 P.2d 792, 796 (Wash. 1995). In that case, although the state received more revenue from a bill, the Court found that no particular tax was increased. *See id.* ("Although this requirement has an effect of increasing the amount certain individual taxpayers will pay, it does not constitute a raise in the existing motor vehicle fuel tax . . . ."). Thus, the challenged law did not violate a statute applying only to "'raising existing taxes, imposing new taxes, or shifting taxes in a revenue-neutral manner.'" *Id.* at 799 n.1 (Durham, C.J., dissenting) (quoting statute). "Tax," therefore, is narrower than the term "revenue."

Here, Article 4, Section 18(2) is only concerned with whether a bill "increases any public revenue," ***not*** with whether it enacts a tax. Because A.B. 458

increases general fund revenue, in the form of a tax-credit repeal, Article 4, Section 18(2) demands that it receive a supermajority.

*3. The supermajority provision is "***not limited to** *taxes, fees, assessments and rates, or changes in . . . computation bases."*

As shown above, the provision's text is not limited to "new taxes." In fact, the district court's interpretation directly contradicts the text. The provision states it is "***not limited to taxes***." Nev. Const. art. 4, § 18(2) (emphasis added). Thus, there is no reason for the district court to have limited its inquiry to whether A.B. 458 "raise[s] new taxes." 4 JA 557.[4]

For similar reasons, the Legislative Counsel Bureau's legal opinion, released as A.B. 458 struggled to garner support in the Senate, wrongly focused on "computation bases." *See, e.g.*, 3 JA 266–67. But Article 4, Section 18(2) expressly states that it is "***not limited to*** . . . changes in the computation bases." (Emphasis added.) Changes in computation bases are but one form of revenue increase covered by Article 4, Section 18(2).

Finally, there is no support for the district court's reasoning that letting Article 4, Section 18(2) reach beyond "new taxes" would lead to absurd results.

[4] Although the district court mentioned "increasing the tax rate of existing taxes" it did not explain why increasing the 2019–20 tax liabilities of Nevada taxpayers, by removing a credit, does not count as "increasing the tax rate of existing taxes." 4 JA 557. Here, the tax liabilities of Nevada businesses have gone up: they no longer get a credit. That increases existing tax revenues, which, again, was the point of A.B. 458. *See* Part I.B., above.

The district court stated that if the provision "is given the broad interpretation suggested by the Plaintiffs, it would mean that any revenue increases resulting from Nevada's population and business growth would also require invoking the Nevada Supermajority Provision." 4 JA 557. But population and business growth are the results of natural occurrences—not the results of Legislative dictates. Crucially, they are not a "bill" triggering the application of Article 4, Section 18(2). The supermajority provision applies only to "a bill." Nev. Const. art. 4, § 18(2). To state the obvious, the Legislature does not vote on population or economic growth. Repealing tax credits, on the other hand, is a legislative action that forces taxpayers to give more money to the state. That increases revenue and, therefore, requires a supermajority vote.

B. The supermajority requirement's history does not support limiting its application to new taxes.

Not finding conclusive support in the text for the "new tax" construction, the district court turned to the supermajority requirement's history.[5] But the supermajority requirement's history does not show that it is limited to "new taxes or increasing the tax rate." 4 JA 556–57. First, as a ballot measure, the supermajority provision does not have a traditional legislative history, full of

[5] The District Court stated that, because both the Plaintiffs-Appellants' and the Legislature's "interpretations are reasonable, but inconsistent . . . the Court must consider the history, public policy, and reason behind the Nevada Supermajority Provision." 4 JA 552 (quotation omitted).

debates that shed additional light on the text. This Court has therefore held that Nevada courts should focus on the text of ballot provisions, not the supposed intent of voters. And second, the little history that does exist suggests the supermajority provision applies to both new revenues and changes to existing revenues.

1. *Because it was a ballot measure, Nevada law requires focus on the supermajority requirement's text, not the voters' supposed purposes.*

There is no direct legislative history for the enactment of Article 4, Section 18(2). The provision was a ballot measure. Nev. Sec'y of State, Nev. Ballot Questions 1994, Question 11, https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/1994.pdf. That means that the text is paramount: "The issue ought to be not what . . . the voting public meant to say, but what it succeeded in saying." *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. 484, 490, 327 P.3d 518, 522 (2014) (cleaned up). In the context of ballot measures, this Court has held it is especially difficult to gauge the intent of voters by going beyond the text: "It would be impossible, for instance, to identify and query every Nevadan who voted in favor of the provision." *Id.* Thus, this Court stated that "to attempt to aggregate the intentions of Nevada's voters into some abstract general purpose underlying the Amendment, contrary to the intent expressed by the provision's clear textual meaning, is not the proper way to perform constitutional interpretation." *Id.*

Here, this Court does not need to go beyond the clear text of this provision to discern its meaning. The issue turns not on statements by Nevada legislators or the ballot arguments presented to the voters. Instead, this case turns on whether A.B. 458 "creates, generates, or increases any public revenue in any form."

2. Historical evidence indicates that Article 4, Section 18(2) applies to both new taxes and changes that increase revenue.

As shown in Part II.A., this Court need not look beyond the text of Article 4, Section 18(2). But even if one considers the historical evidence for the meaning of Article 4, Section 18(2), that evidence indicates the supermajority provision is not limited to new taxes.

The little existing historical evidence for the supermajority provision's meaning can be found in Assembly Joint Resolution 21 (1993), which was proposed by then-Assemblyman Jim Gibbons. A.J.R. 21 was the Assembly's attempt at enacting a constitutional supermajority requirement. A.J.R. 21 was unsuccessful, but it served as the template for the eventual ballot measure that would become Article 4, Section 18(2). *See Guinn v. Legislature*, 119 Nev. 460, 465 & n.3, 76 P.3d 22, 25 & n.3 (2003) (citing Hearing on A.J.R. 21 Before the Assembly Comm. on Taxation, 67th Leg. (Nev., May 4, 1993)).

According to the history of A.J.R. 21, it was targeted at stemming both new taxes and changes in existing taxes that would increase government revenues. The "bill explanation" of AJR 21 stated that it "[p]roposes to amend Nevada

constitution [sic] to require two-thirds majority of each house of legislature ***to increase certain existing taxes*** or impose certain new taxes." Leg. History of A.J.R. 21, at *15, 67th Leg. (Nev. LCB Research Library 1993), https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1993/AJR21,1993.pdf (emphasis added). This history was echoed by the ballot question posed to voters, which stated that the provision applied to any measure that "generates or increases a tax, fee, assessment, rate, or any other form of public revenue." Nev. Sec'y of State, Nev. Ballot Questions 1994, Question 11, at *26, https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/1994.pdf.

Therefore, there is no support for the district court's limited reading of Article 4, Section 18(2). Both the provision's plain text and its contemporaneous history show that the provision applies both to new taxes ***and*** to other revenue increases. As show above, because A.B. 458 increases revenue, it should have received a two-thirds supermajority.

C. The district court erred by applying Oklahoma law to interpret Article 4, Section 18(2), and instead should have compared the provision to those in Arizona, Florida, and Louisiana.

Finally, the district court erred because, after surveying other states' supermajority provisions, the court applied Oklahoma law on "revenue bills." But in fact, comparing Nevada's provisions other states' provisions reinforces that tax-credit repeals, which increase revenue, are covered by Article 4, Section 18(2).

First, the district court erred because the technical definition of "revenue bill"—the term of art used by Oklahoma—is much narrower than the language in Article 4, Section 18(2). ***Second***, Nevada's provision is more comparable to states that do not use the term "revenue bill," like Arizona's, Florida's, and Louisiana's provisions.

1. Oklahoma's supermajority provision is distinguishable because it is limited to "revenue bills," which have a limited, centuries-old definition.

After reviewing other states' supermajority provisions, the district court found that "Oklahoma's supermajority provision is at least as equally as broad as the Nevada Supermajority provision since it requires supermajority passage for '[a]ny revenue bill.'" 4 JA 557 (quoting Okla. Const. art. 5, § 33(D)). Because the Oklahoma Supreme Court has held that "revenue bill" is limited to "measures levying new taxes," the district court concluded that Article 4, Section 18(2) also applies only to "new taxes." 4 JA 555 (quotation marks omitted). This was error.

Oklahoma's supermajority provision is limited to "revenue bill[s]." Okla. Const. Art. 5, § 33. A "revenue bill," sometimes also referred to as a "bill[] for raising revenue," *see* U.S. Const. art. 1, § 7, is a term of art. The U.S. Supreme Court has defined "revenue bills" as "those [bills] that levy taxes, in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." *Twin City Nat. Bank v. Nebecker*, 167 U.S. 196, 202 (1897).

For over 100 years, Oklahoma has applied this technical definition of "revenue bill." *See Okla. Auto. Dealers Ass'n v. State*, 401 P.3d 1152, 1153 (Okla. 2017) (noting Oklahoma's "century-old test for 'revenue bills'"). The narrow definition of "revenue bill" is why Oklahoma courts apply its supermajority provision only to bills that have "levied a new tax in the strict sense of the word." *Id.*[6]

Nevada's provision, on the other hand, applies to any "bill . . . which creates, generates, or increases any public revenue ***in any form***." (Emphasis added.) Indeed, Article 4, Section 18(2) provides examples of revenues that are covered but are not new taxes: "fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments, and rates." Nev. Const. art. 4, § 18(2). And Nevada's provision makes clear it "includ[es] but [is] not limited to" these examples. *Id*.

Nevada's supermajority provision therefore differs from Oklahoma's provision, which is limited to new taxes and therefore categorically excludes other

[6] Oregon's supermajority provision uses the "bills for raising revenue" language. *See* Or. Const. art. 4, § 25(2) ("Three-fifths of all members elected to each House shall be necessary to pass bills for raising revenue."). Like Oklahoma, Oregon courts have limited "bill[s] for raising revenue" to mean "bills [that] levy taxes in the strict sense of the words." *City of Seattle v. Dep't of Revenue*, 357 Or. 718, 732–33, 357 P.3d 979, 986 (2015) (cleaned up). Although *City of Seattle* concerned Oregon's origination clause, Oregon courts have applied that case's reasoning to Oregon's supermajority requirement. *See Boquist v. Dep't of Revenue*, No. TC 5332, 2019 WL 1314840, at *9 (Or. Tax Mar. 21, 2019).

bills, like those repealing tax exemptions, raising fees, or passing regulations that only incidentally raise revenue. *See Okla. Auto. Dealers*, 401 P.3d at 1160 (excluding "measures merely eliminating special exemptions" from definition of revenue bill); *Calvey v. Daxon*, 997 P.2d 164, 170 (Okla. 2000) (excluding "fees" from the definition of a revenue bill); *Anderson v. Ritterbusch*, 98 P. 1002, 1007, (Okla. 1908) (excluding bills that only "incidentally have th[e] effect" of "raising revenue").

This Court should therefore not apply law interpreting Oklahoma's supermajority provision. That law is applying a technical definition of "revenue bill" that does not accord with the text of Nevada's provision. Instead, it should look to other states, such as Arizona, Florida, and Louisiana, with provisions not limited to the definition of "revenue bill."

2. Article 4, Section 18(2) is more comparable to Arizona's, Florida's, and Louisiana's provisions, which consider tax-credit repeals to be one form of revenue increase.

The state with the provision most similar to Nevada's is Arizona. Arizona requires a two-thirds supermajority for "any act that provides for a net increase in state revenues in [eight] form[s]." Ariz. Const. art. 9, § 22 (B); *compare* Nev. Const. art. 4, § 18(2) (stating "two-thirds of the members elected to each house is necessary to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form"). The similarity makes sense because Arizona's

provision provided a model for Governor Gibbons' proposed supermajority provision. Leg. History of AJR 21, at *7, 67th Leg. (Nev. LCB Research Library 1993), https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1993/AJR21,1993.pdf ("Mr. Gibbons described the provisions in other states. In Arizona any bill that provided for a net increase in revenues had to be passed by a two-third majority vote of each house.").[7]

The main difference between Arizona's and Nevada's provisions is that, whereas Nevada's includes "any form" of public revenue, Arizona's is expressly limited to only eight "forms" of revenue. Those eight forms are (1) "any new tax," (2) "[a]n increase in a tax rate," (3) "[a] reduction or elimination of a tax deduction, exemption, exclusion, credit or other tax exemption feature in computing tax liability," (4) "[a]n increase in a statutorily prescribed state fee or assessment," (5) "any new state fee or assessment," (6) "elimination of an [fee or assessment] exemption," (7) "[a] change in the allocation [of taxes] among the state, counties or cities," (8) "[a]ny combination of . . . 1 through 7." Ariz. Const. art. 9, § 22(B). Yet, despite being limited to only eight forms, Arizona still considers "elimination of a tax . . . credit" as one "form" of revenue increase. *Id*.

[7] Although Governor Gibbons also discussed Oklahoma's provision, his comments as reported do not recognize "revenue bill" as a term of art. Leg. History of A.J.R. 21, at *8 ("In Oklahoma the constitution required revenue bills had to be approved by three-fourths of the members of each house."). In addition, Nevada ultimately did not adopt Oklahoma's three-fourths supermajority requirement, instead following Arizona's two-thirds requirement.

Nevada's provision, in contrast, does not create a list of specific forms of revenue increases. Instead, Nevada's provision applies to "any form" of revenue increase, and then provides a non-exclusive list of examples: "including but ***not limited to*** taxes, fees, assessments and rates, or changes in the computation bases". Nev. Const. art. 4, § 18(2). As Arizona's provision shows, reducing or eliminating tax credits are one ***form*** of revenue increase. And because Article 4, Section 18(2) applies to "any form," it applies to reducing or eliminating tax credits, which A.B. 458 does.

Thus, applying Nevada's provision to cover tax-credit repeals would not make it an outlier. Nor do Nevada and Arizona stand alone. For example, although Florida and Louisiana's supermajority provisions are narrower than Nevada's and Arizona's because they apply to "taxes" rather than "revenues" generally, they also apply to repeals of tax credits or exemptions.[8]

Florida's provision states that "[n]o state tax . . . may be raised by the legislature except through legislation approved by two-thirds of the membership of each house." Fla. Const. art. 7, § 19(b). In the "definitions" subsection, Florida's provision expressly defines "raise" as "to decrease or eliminate a state tax . . . credit."

[8] Florida's provision also includes "fees." Fla. Const. art. 7, § 19(b).

Louisiana's similarly includes repeals of tax exemptions. Louisiana's Constitution requires a supermajority only for increases in specific, tax-related revenues: "The levy of a new tax, an increase in an existing tax, or a repeal of an existing tax exemption shall require the enactment of a law by two-thirds of the elected members of each house of the legislature." La. Const art. 7, § 2. Nonetheless, it expressly includes "repeal of an existing tax exemption" as an exercise of the "power to tax." *See id.* (section entitled "Power to Tax; Limitation").

Thus, the district court should not have applied Oklahoma law on "revenue bills" to limit Article 4, Section 18(2) to "new taxes." Instead, it should have compared Nevada's provision to similarly broad supermajority provisions in other states. As shown above, those states' provisions do not restrict their coverage to "new taxes," and do apply when existing tax credits are repealed. The same is true for Article 4, Section 18(2), which means that A.B. 458's repeal of tax credits is unconstitutional because it did not receive a supermajority vote.

CONCLUSION

This case is not about A.B. 458's "merits, wisdom and public policy." 4 JA 415 (Leg.'s Opp'n to Pls.' MSJ) (citing *King v. Bd. of Regents*, 65 Nev. 533, 542, 200 P.2d 221, 225 (1948)). Rather, it is about whether "the principle of constitutional supremacy prevents the Nevada Legislature from creating exceptions

to . . . Nevada's Constitution." *Thomas*, 130 Nev. at 489, 327 P.3d at 522. As this Court has recognized, even when a "budget crisis presents exigent circumstances that must be addressed, those circumstances . . . cannot be addressed through legislation that does not comport with" the Nevada Constitution. *Clean Water Coal.*, 127 Nev. at 320, 255 P.3d at 260 (2011).

For the above reasons, Plaintiffs-Appellants respectfully request that this Court reverse the decision of the district court, declare A.B. 458 unconstitutional, and enjoin A.B. 458's further enforcement.

Dated this 10th day of July, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Institute for Justice, and that on the 10th day of July, 2020, I caused to be served, via the Court's electronic filing service, a true and correct copy of the foregoing **APPELLANTS' OPENING BRIEF** to the following parties:

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