

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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Elizabeth A. Brown
Clerk of Supreme Court

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' Opposition to
Joint Motion for Extension of
Time to File Answering Briefs**

and

THE LEGISLATURE OF THE STATE OF
NEVADA,

Respondent-Intervenors.

INSTITUTE FOR JUSTICE

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Respondents’ joint motion for a 45-day extension not only violates the rules, it would also delay this case and, therefore, delay urgently needed financial assistance for low-income Nevada families. Respondents’ motion—made without first conferring with Appellants—should be denied for three reasons: (1) The request is untimely under the Nevada Rules of Appellate Procedure, (2) an extension would unfairly prejudice Appellants, and (3) a delay well into the new school year will worsen the economic insecurity already experienced by low-income families dependent on Nevada’s Educational Choice Scholarship Program.

I. Respondents’ Motion Is Either Untimely or an Improperly Filed Emergency Motion.

Respondents’ motion is too late. Appellants filed their brief on July 10, more than three weeks ago. Now, just 7 days before the answering brief is due, Respondents ask this court for a 45-day extension. This last-minute request should be denied.

Although a motion for extension may be filed up to the brief’s due date, NRAP 31(b)(3), under NRAP 27(e) a motion requesting relief “needed in less than 14 days” is an emergency motion that must satisfy additional requirements.

“Before filing the motion, the movant shall make every practicable effort to notify the clerk of the Supreme Court, opposing counsel, and any opposing parties proceeding without counsel and to serve the motion at the earliest possible time.”

NRAP 27(e)(1). Furthermore, an emergency motion must be titled “Emergency

Motion” and must include an “NRAP 27(e)” certificate of compliance. NRAP 27(e)(2)–(3).

Here, Respondents seek relief from a deadline that is a mere seven days away. If their motion is not granted and they do not timely file a brief, Respondents will not be able to participate in oral argument and this Court may consider failure to file a confession of error. NRAP 31(d)(2). Thus, for all intents and purposes, Respondents’ is an emergency motion, no matter how it is labeled. *Cf. Nev. Power Co. v. Eighth Judicial Dist. Court*, 120 Nev. 948, 960, 102 P.3d 578, 586 (2004) (stating that to determine jurisdiction this Court “must look at the substance of the claims, not just the labels used”).

Yet, despite filing an emergency motion, Respondents did not follow the emergency-motion rules in NRAP 27(e). They did not, to Appellants’ knowledge, inform the clerk of this Court of an impending motion. Declaration of Joshua House (House Decl.) ¶ 4. They did not inform opposing counsel so that Appellants might begin preparing a response. House Decl. ¶ 5. And they did not file this motion “at the earliest possible time.” NRAP 27(e)(1).

This motion, to the extent it is necessary, should have been filed earlier. None of Respondents’ justifications is new or urgent. They cite developments in cases that were decided on June 11—a month before Appellants’ July 10 filing. *See* Motion at 3–4. The application to the Supreme Court they cite was filed on

July 8 and was decided July 24. *Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070, 591 U.S. ___, 2020 WL 4251360 (July 24, 2020). The Ninth Circuit motion was decided on July 2, eight days before Appellants filed their opening brief. *Calvary Chapel Dayton Valley v. Sisolak*, No. 20-16169, 2020 WL 4274901 (9th Cir., July 2, 2020). And the Nevada Legislature’s special session was called by the Governor on July 7, three days before the opening brief.¹ Indeed, as detailed in Part II below, Respondents were aware of their caseload demands as early as June 11—when Appellants approached them to discuss a briefing schedule. House Decl. ¶ 3. Yet no motion was filed until August 3.

Respondents’ motion rather amounts to an argument this case should be delayed because both the State’s and Legislature’s counsel are busy. But counsel’s workload does not amount to “a clear showing of good cause” under NRAP 31(b)(3)(B). This Court has repeatedly stated that counsel’s workload is not good cause to delay filings. *E.g., Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 207 n.7, 322 P.3d 429, 436 n.7 (2014) (stating “preoccupation with other cases” was a “legally insignificant excuse[]” (citation omitted)); *State v. Second Judicial Dist. Court*, 116 Nev. 953, 966, 11 P.3d 1209, 1217 (2000) (affirming ruling “that the workload of the prosecutor . . . did not constitute good cause” to excuse late

¹ Proclamation by Gov’r Steve Sisolak to Convene Special Session of Nev. State Leg. (July 7, 2020), <https://www.leg.state.nv.us/Session/31st2020Special/Docs/Proclamation.pdf>

filings); *Varnum v. Grady*, 90 Nev. 374, 376, 528 P.2d 1027, 1028 (1974) (rejecting argument that “because [counsel] was involved in a subsequent trial and was working on other briefs, counsel should be excused for not complying with the rules”).

II. A 45-Day Extension Would Be Unfair to Appellants.

A 45-day extension would also be unfair. Appellants approached Respondents to discuss expedited briefing on June 11. House Decl. ¶ 3 & Ex. 1. Respondents indicated that they would not consent to such a schedule given the demands on their time. *Id.* As a professional courtesy, and considering that Respondents’ default deadline was just seven days longer than the expedited schedule, Appellants decided against filing a motion to expedite. House Decl. ¶ 6. Nevertheless, because time is of the essence for Nevada families, Appellants filed their brief as soon as they could.

Importantly, even though Respondents knew their caseloads were impacted, they never conferred with Appellants about the need for an extension. Even after Appellants broached the topic of briefing schedules, Respondents never attempted to reach an agreed briefing schedule, nor voiced any concerns with the standard NRAP briefing deadlines.

In other words, Respondents knew that Appellants wanted to expedite this case before Appellants filed their brief. Respondents knew they would have busy

caseloads. The parties could have agreed upon a briefing schedule that allowed all parties sufficient time as well as expedited the case's consideration. And after Appellants' brief was filed, Respondents knew that Appellants filed very early to expedite a decision. But Respondents did not object to the standard briefing schedule until August 3, demanding an extra 45 days to hone their arguments. Worse, they did so without having first conferred with Appellants or giving notice that a motion would be filed. Granting this motion would be unfair.

III. A 45-Day Delay Will Hurt Low-Income Nevada Families.

This case concerns Nevada's Educational Choice Scholarship Program, which provides low-income Nevada families with scholarships to attend private Nevada schools. Appellants are challenging the constitutionality of Assembly Bill 458 (2019), which removes some of the tax credits that support the Scholarship Program. A.B. 458 directly limited the number of scholarships the Program could provide to low-income families. *See* 2 JA 96 ¶¶ 25–27. This case concerns both an issue of first impression, NRAP 17(a)(11); 4 JA 543, and a question of statewide public importance, *see* NRAP 17(a)(12); 4 JA 543; *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).

As the 2020–21 school year kicks off, many low-income families are effectively in limbo. If A.B. 458 is struck down, scholarship organizations will be able to provide nearly \$1.4 million in additional scholarships in the 2020–21 school year. *See* AOB 27. Nevada families need to know their scholarship status as soon as possible; they need to know whether they can afford their chosen schools.

CONCLUSION

As a matter of professional courtesy, Appellants would happily extend Respondents an extra week to finish their briefs. But Respondents did not bother conferring with Appellants. They did not bother moving for an extension in a reasonably timely manner. And they did not bother following the NRAP rules for emergency motions. For all the above reasons, Appellants respectfully request that Respondents’ motion for a 45-day extension be denied.

Dated this 4th day of August, 2020.

By /s/ Joshua A. House

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Institute for Justice, and that on the 4th day of August, 2020, I caused to be served, via the Court's electronic filing service, a true and correct copy of the foregoing *Appellants' Opposition to Joint Motion for Extension of Time to File Answering Briefs* to the following parties:

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/s/ Claire Purple

An Employee of INSTITUTE FOR JUSTICE

IN THE SUPREME COURT OF THE STATE OF NEVADA

FLOR MORENCY; KEYSHA
NEWELL; BONNIE YBARRA; AAA
SCHOLARSHIP FOUNDATION,
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STATE OF NEVADA *ex rel.* the
DEPARTMENT OF EDUCATION;
JHONE EBERT, in her official
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JAMES DEVOLLD, in his official
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BERSI, in her official capacity as a
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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

Case No. 81281

District Court Case No. A-19-
800267-C
Dept. No. 32

**Declaration of Joshua House in
Support of Appellants'
Opposition to Joint Motion for
Extension of Time to File
Answering Briefs**

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,

Defendants-Respondents,

and

The LEGISLATURE OF THE
STATE OF NEVADA,

Intervenor-Defendants-
Respondents.

Pursuant to 28 U.S.C. § 1746(2), I, Joshua House, declare the following:

1. I am a citizen of the United States and a resident of the Commonwealth of Virginia and I am an active member of the State Bar of Nevada. I am over eighteen years of age and fully competent to make this declaration. I knowingly and voluntarily submit this declaration in support of Appellants' Opposition to Joint Motion for Extension of Time to File Answering Briefs based on my personal knowledge of the following facts and would competently testify to them under oath if called upon to do so.

2. I am an attorney with the Institute for Justice, which represents the Appellants in the above-captioned action.

3. On June 11, I contacted counsel for Respondents regarding filing a motion for expedited briefing. Attached at Exhibit 1 is a true and correct copy of an email in response from Craig Newby, counsel for State Respondents, also sent on June 11, 2020.

4. To my knowledge, counsel for respondents did not inform the clerk of the Supreme Court of Nevada of their intent to file a motion for extension of time.

5. Respondents did not confer with counsel for Appellants regarding moving for an extension of time.

6. After receiving Mr. Newby's email on June 11, 2020, I decided not to proceed with a motion to expedite the briefing schedule. I did so as a matter of courtesy, allowing Respondents' counsel an extra seven days due to their busy schedules.

Executed this 4th day of August, 2020.

By: /s/ Joshua House

Joshua House

EXHIBIT 1

From: [Craig A. Newby](#)
To: [Joshua House](#); [Powers, Kevin](#)
Cc: [Tim Keller](#); [Claire Purple](#); [Matthew T. Dushoff](#)
Subject: Re: Morency v. State--Motion to Expedite Appeal
Date: Thursday, June 11, 2020 7:31:09 PM

Hello Josh:

I cannot agree to the request. Right now, I am the lead attorney defending the State's emergency response to COVID-19, including briefing and arguing multiple emergency motions challenging that response, leaving me unable to agree to expedited briefing in other matters.

I briefly spoke with Kevin, who faces similar work tied to the Legislature's potential response to the COVID-19 emergency.

Thank you,

Craig

Craig Newby
Deputy Solicitor General

From: Joshua House <jhouse@ij.org>
Sent: Thursday, June 11, 2020 10:19 AM
To: Craig A. Newby; Powers, Kevin
Cc: Tim Keller; Claire Purple; Matthew T. Dushoff
Subject: [] Morency v. State--Motion to Expedite Appeal

Craig and Kevin,

Plaintiffs plan to file, along with their docketing statement, a motion for an expedited briefing schedule. The grounds for the motion will be that many families, such as our clients, need to know the availability of scholarships as soon as possible with the new school year approaching.

The schedule I will propose is this: Plaintiffs-Appellants' brief will be due 21 days after the court grants the motion. Respondents' briefs will be due 21 days after. And Plaintiffs' Appellants' reply will be due 10 days after that.

Would Respondents like to join this motion? Alternatively, would Respondents consent to our motion? Please let me know at your earliest convenience.

Thanks,

Josh

Joshua A. House*

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