Case No. 81281

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,

Plaintiffs-Appellants,

v.

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; 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, 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,

Defendants-Respondents.

On Appeal from the Eighth Judicial
District court of the State of Nevada
Case No. A-19-800267-C

RESPONDENT STATE OF NEVADA'S ANSWERING BRIEF

AARON D. FORD
Attorney General,
Nevada Bar No. 7704
CRAIG A. NEWBY
Deputy Solicitor General,
Nevada Bar No. 8591
Attorneys for Respondents State of Nevada

RULE 26.1 DISCLOSURE

Undersigned counsel of record certifies that each individual Defendant has been named in his or her official governmental capacity, such that no further disclosure is required for purposes of evaluating possible disqualification or recusal.

AARON D. FORD
Attorney General
Nevada Bar No. 7704
CRAIG A. NEWBY
Deputy Solicitor General
Nevada Bar No. 8591
Office of the Nevada Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
(702) 486-9246
cnewby@ag.nv.gov

Attorneys for Respondents State of Nevada

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CONSTITUTIONAL PROVISIONS

JURISDICTIONAL STATEMENT

The Executive Defendants (all named Defendants other than the Legislature for the State of Nevada) challenge Appellants' standing to pursue this case against them because any purported harm associated with increasing scholarship funding is not fairly traceable to them. *See* Joint Appendix (JA) 52. The district court rejected this challenge. JA 49–55.

Subject to this standing argument, this Court has jurisdiction over this appeal as set forth in Plaintiffs-Appellants' jurisdictional statement.

ROUTING STATEMENT

Defendants-Respondents agree that this case involves a question of first impression involving Article 4, Section 18(2) of the Nevada Constitution and that this constitutional provision raises a question of statewide public importance, such that this case should be retained by the Supreme Court.

ISSUE PRESENTED

Does the Nevada Legislature's freeze of potential increases in future scholarship credit violate the Nevada Constitution's supermajority provision?

STATEMENT OF THE CASE

Appellants appeal from a decision of the district court awarding summary judgment in favor of all Defendants and against Plaintiffs.

In 2019, the Legislature enacted Assembly Bill 458, which froze the amount of tax credits available for the Nevada Educational Choice Scholarship Program (the Program), a private school voucher program. During the same session, the Legislature passed another bill increasing the total amount of Program tax credits by $7,426,950 for the current 2019–2021 biennium budget.

Pursuant to the plain language of the Nevada Constitution's supermajority provision, the district court's decision must be affirmed. NEV. CONST. art. 4, § 18(1). Assembly Bill 458 does not "create, generate, or increase . . . taxes, fees, assessments and rates"—circumstances that require a supermajority vote. *Id.* It simply freezes a certain category of Program tax credits between fiscal years. The Nevada Constitution thus does not require supermajority approval for AB 458's freezing of tax credits.

In addition, the record contains no evidence that any Plaintiff has been harmed in a manner fairly traceable to the passage of Assembly Bill 458.[1] On the contrary, as a result of AB 458, Individual Appellants Flor Morency, Keysha Newell, and Bonnie Ybarra (collectively, the Individual Appellants) have increased voucher funds to apply for this biennium and Business Appellants Sklar Williams PLLC and

[1] Whether the decisions of the private scholarship organizations tasked with implementing the Program harmed them is a separate question not relevant here.

Environmental Design Group, LLC (collectively, the Business Appellants) have increased tax credits to apply for this biennium on a first-come, first-serve basis.

To the extent this Court finds that the language of the Nevada Constitution is not sufficiently plain, the history, public policy, and reason for Nevada's supermajority provision further support affirmance. Like many states in the 1990s, Nevada adopted this provision in the anti-government backlash associated with President George H.W. Bush's violation of his "no new taxes" promise. As explained by Jim Gibbons (former Governor, and then Assemblyman) when spearheading this constitutional amendment, it was intended to prevent new or increased taxes. Eliminating tax credits that were not yet operative, while the underlying tax and tax rate remain the same, is not contemplated by the supermajority provision. In fact, no other state has similarly interpreted a supermajority provision as broadly as Appellants seek in this case. Instead, premised on the constitutional requirement that all states have a republican form of government, this exception to the majoritarian authority of the Legislature is interpreted narrowly.

Finally, this Court should defer to the Legislature's actions premised on the reasonable advice of its counsel. The Legislature's interpretation of the supermajority provision and its applicability to these circumstances is reasonable. Even if it would not be the preferred interpretation of this Court, it is reasonable to

defer to the Legislature, which is the branch of Nevada government most responsive and responsible to the State's citizens. The Legislature's decision on Assembly Bill 458 can be addressed at the ballot box.

STATEMENT OF THE FACTS

Appellants challenge the constitutionality of Assembly Bill 458, which froze a certain category of tax credits used by certain Appellants to attend private school from one year to the next.

I. The Nevada Supermajority Provision

Nevada is one of many states to have adopted a supermajority provision pertaining to new or increased taxes. Many of them arose from the following, infamous political promise:

> Read my lips: no new taxes!
>
> Vice President George H.W. Bush, at his August 18, 1988 speech accepting the Republican nomination for President.

When President Bush broke this promise, it provoked backlash throughout the United States. In response, governments attempted amending constitutions to require supermajority votes for new taxes. Nevada's supermajority provision for new taxes that arose from this backlash is the subject of this lawsuit.

Former Governor (then-Assemblyman) Jim Gibbons spearheaded the effort to adopt the supermajority provision, modeling it on similar provisions from other states, including Oklahoma. Gibbons first tried to add a supermajority provision to

the Nevada Constitution as an Assemblyman in the 1993 Legislature but failed. At that time, he conveyed that it "would not impair any existing revenues." *See* AJR 21 Legislative History (1993) at 747 (JA 129) (emphasis added). As part of the bill explanation, the provision was limited to efforts "to impose or increase" certain taxes. JA 136.

Subsequently, Gibbons successfully led the effort to pass the supermajority provision by initiative in the 1994 election (when he first ran unsuccessfully for Governor) and the 1996 election (when he successfully ran for Congress). The initiative materials provided to Nevada voters show that the provision was intended for "raising" or "increasing taxes," particularly from "new sources of revenue." *See* JA 143 (Nevada Ballot Questions 1994 at Question No. 11; State of Nevada Ballot Questions 1996 at Question No. 11).

As passed, the supermajority provision added to the Nevada Constitution reads as follows:

> 2. Except as otherwise provided in subsection 3, an 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.

NEV. CONST. art. 4, § 18(1).

Under significantly different circumstances, this Court had the opportunity to review the supermajority provision. There, the Court recognized that the supermajority provision "was intended to make it more difficult for the Legislature to pass new taxes" or to turn "to new sources of revenue."[2] *Guinn v. Legislature*, 119 Nev. 460, 471 (2003) (emphasis added); JA 140–148.

This Court does not face new or increased taxes here, much less a constitutional crisis threatening the education of Nevada's children. Instead, the Legislature froze certain aspects of the Program's tax expenditures while providing an overall increase. Nevada taxpayers will pay existing taxes at existing rates, with the sole difference being whether the taxes will be expended on private school vouchers or other state programs.

II. Appellants and the Program

Appellants are participants and proponents of the Program. To avoid constitutional problems with Nevada directly funding private sectarian schools, the Program relies on tax expenditures (rather than collected taxes) to fund the vouchers.

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[2] This Court previously considered the supermajority provision in the 2003 *Guinn v. Legislature* cases, specifically its relationship to constitutional provisions prioritizing public education where the executive and legislative branches were gridlocked as they related to funding almost immediately prior to the start of the school year. *Guinn v. Legislature*, 119 Nev. 277 (2003) (overturned as to "procedural" and "substantive" requirements analysis by *Nevadans for Nevada v. Beers*, 122 Nev. 930, 944 (2006)); *Guinn v. Legislature*, 119 Nev. 460 (2003). This case is not the expedited one faced by this Court in *Guinn*, both as to emergency timing and as a constitutional conflict between co-equal branches of government.

Businesses that would otherwise owe Nevada Modified Business Tax ("MBT") payments apply on a first-come, first-serve basis to transfer the tax amount they otherwise owe to Nevada to the Program. NRS 363A.139.

However, businesses do not apply directly with the Nevada Department of Taxation to divert tax money to school vouchers. Instead, the Program utilizes private scholarship organizations to serve as the middleman for transferring school voucher payments to private schools. Specifically, the private scholarship organizations apply on behalf of businesses for tax expenditures from the Nevada Department of Taxation and notify the businesses whether the Nevada Department of Taxation approved the tax expenditure. NRS 363A.139(2); JA 6 at ¶¶ 29–30. The private scholarship organizations provide reporting information on the Program to the Nevada Department of Education. NRS 388D.280. The private scholarship organizations manage the process of applying for and awarding school vouchers for students to use at a private school, not the Nevada Department of Education. NAC 385.6043; JA 6 at ¶ 26.

In this case, AAA Scholarship Foundation, Inc. ("AAA") is a private scholarship organization. JA 4–5 at ¶ 14. Flor Morency, Keysha Newell, and Bonnie Ybarra (collectively, the Individual Appellants) are parents of children who receive scholarships through the Program. JA 4 at ¶¶ 11–13. The Individual Appellants alleged that the 2019 Legislature "caused a loss of funding" from the prior school

year. *Id.* Sklar Williams PLLC and Environmental Design Group, LLC (collectively, the Business Appellants) are Nevada businesses who have previously made tax expenditures through the Program. JA 5 at ¶¶ 15–16.

NRS 363B.119(4) established the Program's initial tax expenditure limit for Fiscal Year 2015–2016, with subsequent proposed 10% annual increases. Hereinafter, these will be referred to as "subsection 4" tax expenditures. Beginning with the 2017 Legislature, NRS 363B.119(5) provided the Program with additional one-time tax expenditures. For convenience hereafter, these will be referred to as "subsection 5" tax expenditures. The 2017 Legislature provided the Program an additional one-time tax expenditure of $20 million. NRS 363B.119(5). The 2019 Legislature similarly provided the Program an additional one-time tax expenditure of $9.49 million. *See* Senate Bill 551 (2019) (JA 175–207). While the 2019 Legislature chose to freeze the "subsection 4" tax expenditures at the same $6,655,000 it had been the prior fiscal year, the 2019 Legislature increased the "subsection 5" tax expenditure amount, such that it exceeded Appellants' "expected" total tax expenditure by $7,426,950 for the Program over what NRS 363B.119(4) contemplated. See Assembly Bill 458 (2019) (JA 209–213).[3]

[3] Appellants' charts (OB 27) highlight the mistaken expectation they had that tax expenditures would continue to increase forever when labeling the chart "Credits available before A.B. 458." No fiscal year 2019 credits were available for the Business Appellants to apply for prior to July 2019, much any future year Program tax credits. As set forth in further detail, the credits were not operative and future

Prior to the passage of AB 458, the Nevada Legislature sought the opinion of the Legislative Counsel Bureau ("LCB") on whether the Nevada supermajority provision applies to a bill which extends, revises or eliminates a future decrease in or future expiration of existing state taxes when that future decrease or expiration is not legally operative and binding yet. Furthermore, the Nevada Legislature also sought an opinion of the LCB on whether the Nevada supermajority provision applies to a bill which reduces or eliminates available tax exemptions or tax credits applicable to existing state taxes. Per its May 8, 2019 memorandum, the LCB opined that the Nevada supermajority provision does not apply to a bill in either of such events. JA 150–73.

The Nevada Assembly passed AB 458 by a vote of two-thirds of all the members elected to the Assembly. Assembly Daily Journal, 80th Sess., at 90 (Nev. Apr. 16, 2019). However, although the Nevada Senate passed AB 458 by a vote of more than a majority of all the members elected to the Senate, the vote in the Senate was fewer than two-thirds of all the members elected to the Senate. Senate Daily Journal, 80th Sess., at 28 (Nev. May 23, 2019).

In total, the Program's appropriations significantly exceed what the 2015 Legislature contemplated for this biennium when originally passing NRS

Legislatures have the right and obligation to manage the fiscal years for which they are the elected representatives of the People.

363B.119(4). Appellants' challenge does not center on the total tax expenditures for the Program, which increased. Neither does Appellants' challenge center on "subsection 4" tax expenditures being reduced in actual dollars from the prior fiscal year, as there is no factual dispute that the 2019 Legislature froze that amount. Instead, Appellants contend that they were entitled to infinite 10% increases in "subsection 4" tax expenditures for the Program until or unless a future Legislature decided otherwise on a supermajority basis. No matter existing constitutional restrictions on prior Legislatures binding future ones. And no matter the fact that "subsection 4" tax expenditures are at the identical level as in the prior fiscal years.

Stated differently, the same employer business who pays the same amount in employee compensation will owe the identical MBT amount to Nevada. Many MBT taxpayers would have been unable to receive tax credits in the prior biennium by not being first-come, first-served; nothing has changed in this biennium. This is not a new tax relative to the Program.

III. Procedural History and the District Court's Order

Appellants challenge the constitutionality of Assembly Bill 458, which froze a certain category of tax credits used by certain Appellants to attend private school from one year to the next. The Individual Respondents filed a motion to dismiss Appellants' complaint on standing grounds, which the district court denied. JA 49–54.

Following the Legislature's unopposed intervention, all parties cross-moved for summary judgment. Following full briefing and argument, the district court rejected Appellants' challenge, granting the Individual Respondents' and Legislature's motions for summary judgment, entering final judgment in their favor. JA 557.

The district court made five primary findings when entering final judgment.

First, Appellants have the burden to demonstrate that Assembly Bill 458 is unconstitutional. JA 549.

Second, the Nevada Legislature is entitled to deference in its reasonable construction of the Nevada Supermajority Provision over Appellants' reasonable interpretation. Id.

Third, Assembly Bill 458's freeze of subsection 4 tax credits from one fiscal year to the next did not increase revenue because any future increase purportedly required by a prior Legislature was not yet legally operative and binding. JA 551.

Fourth, in the alternative, the opposing parties had reasonable, but inconsistent interpretations of the Nevada supermajority provision, such that the court was required to consider the "history, public policy, and reason" for the supermajority provision. JA 552.

Fifth, after reviewing the history, public policy, and reason for the supermajority provision, including how other states interpret similar provisions, the

intent of the supermajority provision is "to limit the Nevada Legislature in enacting bills raising new taxes or increasing the tax rate of existing taxes" and that the supermajority provision "does not apply to any bill that repeals, reduces or freezes existing tax credits, as is the case in Assembly Bill 458." JA 557.

Appellants timely appealed the district court's order.

STANDARD OF REVIEW

Rule 56 allows this Court to grant summary judgment upon showing "that there is no genuine dispute as to any material fact as a matter of law." In Nevada, the constitutionality of a statute is a question of law. "Statutes are presumed to be valid, and the burden is on the challenging party to demonstrate that a statute is unconstitutional." *Cornella v. Justice Court*, 132 Nev. ___, 377 P.3d 97, 100 (2016).

Here, Appellants bear this burden as a matter of law. "Statutes are presumed to be valid, and the burden is on the challenging party to demonstrate that a statute is unconstitutional." *Id*. (internal quotation marks omitted). The district court correctly concluded the same. JA 549. In interpreting an amendment to our Constitution, courts look to rules of statutory interpretation to determine the intent of both the drafters and the electorate that approved it. *Landreth v. Malik*, 127 Nev. 175, 180, 251 P.3d 163, 166 (2011); *Halverson v. Sec'y of State*, 124 Nev. 484, 488, 186 P.3d 893, 897 (2008). Nevada courts first examine the provision's language.

Landreth, 127 Nev. at 180, 251 P.3d at 166. If plain, a Nevada court looks no further, but if not, "we look to the history, public policy, and reason for the provision." Id.

Moreover, Nevada courts construe statutes, if reasonably possible, so as to be in harmony with the constitution." *Cornella*, 377 P.3d at 100 (2016) (internal quotation marks omitted). Stated differently, Nevada courts "adhere to the precedent that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 552 (2010) (internal quotation marks omitted). "[W]hen a statute is derived from a sister state, it is presumably adopted with the construction given it by the highest court of the sister state." *Clark v. Lubritz*, 113 Nev. 1089, 1096–97 n. 6, 944 P.2d 861, 865 n. 6 (1997) (citing *Craigo v. Circus–Circus Enterprises*, 106 Nev. 1, 3, 786 P.2d 22, 23 (1990)).

ARGUMENT

The Legislature's actions comply with the plain terms of the supermajority provision because neither "creates, generates, or increases" revenue from the public from one fiscal year to the next. Instead, the statutes maintain existing public revenue at the same level for taxpayers and Nevada state government between fiscal years. The identical amount of "subsection 4" tax credits are available as in the past fiscal year. In short, the Legislature's passage of Assembly Bill 458 complies with the supermajority provision.

To the extent this Court determines that a different interpretation is possible, it should look to "the history, public policy, and reason" for the supermajority provision. When reviewing this, back to its origins from former President Bush's lips, there is no reasonable doubt that the supermajority provision is intended to apply to new taxes relative to prior years, rather than continuing existing taxes at existing rates as the 2019 Legislature did. Other states with similar supermajority provisions have interpreted them the exact same way, rather than applying them to alleged reductions to tax expenditures.

This Court should defer to the Legislature's interpretation, which is consistent with the general legislative power and with how other states have similarly interpreted these provisions. Ultimately, the Legislature is accountable for its interpretation to the true sovereign, the People of Nevada, who will decide whether this interpretation is best for future Legislatures.

I. Appellants Lack Standing to Assert Their Complaint, Requiring Denial of this Appeal.

Whether a court lacks subject matter jurisdiction "can be raised by the parties at any time, or sua sponte by a court of review, and cannot be conferred by the parties." *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011) (quoting *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990)).

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A. Appellants' Asserted Harm Is Not Fairly Traced to the Individual Defendants.

In Nevada, a party must suffer harm fairly traced to the statute that invalidating it would redress. *Elley v. Stephens*, 104 Nev. 413, 416–17 (1988) (emphasis added). Here, private scholarship organizations, rather than the Department of Taxation, are tasked with operating the Program. For better or worse, the Program relies on private scholarship organizations to apply for tax credits or to award vouchers to eligible students. NRS 363A.139(2). Private scholarship organizations have the right to award scholarships as they see fit, consistent with Nevada statute. AAA's different decision—to provide a scholarship to Morency's son highlights the freedom of private scholarship organizations. There is no mandate that a private scholarship organization provide vouchers to any child, as the voucher program has always been limited in scope. Any harm suffered by the refusal to provide higher voucher amounts or an additional voucher to the youngest Ybarra child is traceable to the decisions made by private scholarship organizations, not the Individual Defendants. Harms associated with implementation of the tax credits is not "fairly traced" to them.

Similarly, in a free market society, none of the Defendants are responsible for private schools increasing their tuition or for the decisions of individuals to donate to charities of their choice. Similarly, none of the Defendants are responsible for decisions vested with private scholarship organizations, whether how best to bring

in donations or how to award vouchers. Further, the 2019 Legislature significantly increased "the number of tax credits available." As did the 2017 Legislature. Again, the private scholarship organization does not allege how this harm is "fairly traceable" to the State.

Appellants assert financial harms resulting from the decrease in voucher tax credits. JA 3–4, 9, 11–12 (Complaint (Comp.) at ¶¶ 3, 11–13, 55–56, 80–81, 91–92). However, these harms are not "fairly traced" to AB 481 because overall voucher tax credits greatly exceed what Appellants contend are mandated by Nevada statute.

Further, the Business Appellants do not allege how the State has caused harm associated with decreased chances to "qualify for a tax credit under the first-come, first-served distribution of tax credits." JA at 44–45 (Comp. at ¶¶ 113 119). Chances are decreased because, as acknowledged by Appellants, the voucher tax credits are available on a first-come, first-served basis. Stated differently, unlike other tax exemptions, no business has a guaranteed voucher tax credit.[4]

This ignores the significant overall increase in tax credit expenditures. In short, the 2019 Legislature increased chances for any business to qualify for a tax credit over the next two years--even the Business Appellants. Further, Appellants do

[4] The voluntary nature of the voucher tax credits distinguishes this case from *Worldcorp v. Dept. of Tax'n*, 113 Nev. 1032, 1036, 944 P.2d 824, 827 (1997), which was premised on the loss of mandatory tax credits.

not allege undertaking the key step associated with a "first-come, first-served" tax credit: applying for it. Nothing in the record indicates any such effort.

In short, because the harms actually asserted by Appellants are not "fairly traced" to the 2019 Legislature, they lack standing, warranting dismissal of the appeal for lack of subject matter jurisdiction.

B. The Program Does Not Qualify for Schwartz's Significant Public Importance Exception to Standing.

Only 2,330 students received vouchers as of March 15, 2018, relative to the approximately 500,000 Nevadans enrolled in the public school system.[5] While acknowledging the importance of education for all, the Program is not a matter of significant public importance in the same way as this Court's review of the program providing direct Nevada funding for school vouchers to any Nevada child. This is true regardless of financial circumstances and constitutional prohibitions on state funding for religious institutions. *Cf. Schwartz v. Lopez*, 382 P.3d at 894.

Because the Program has more money than originally intended, Appellants' dispute is with the type of funding provided, rather than its amount. Whether a small subset of Nevada's children can continue to receive school voucher funding through the annual appropriations process versus entitlement funding does not fit into

[5] *See* http://www.doe.nv.gov/uploadedFiles/ndedoenvgov/content/Private_Schools/Scholarship_Grants/January302017summary.pdf (last reviewed September 23, 2020).

Lopez's narrow exception. That exception from the injury requirement for standing is for matters of significant importance.

Because this exception does not apply and because Appellants cannot otherwise demonstrate standing, this appeal should be dismissed for lack of subject matter jurisdiction.

II. Assembly Bill 458 Complies with the Plain Language of the Supermajority Provision.

Here, the Legislature's actions comply with the plain terms of the supermajority provision because neither "creates, generates, or increases" revenue from the public from one fiscal year to the next.[6] From a taxpayer's perspective, they pay the same amount as a result of the MBT, no matter its relative distribution to the Program versus other tax-funded programs. The MBT and its rate structure are unaltered by the Legislature's actions. The amount of "subsection 4" tax credits was not decreased from the prior fiscal year, but instead frozen. In short, Assembly Bill 458 complies with the supermajority requirement. Under such circumstances, the plain language of the supermajority provision warrants summary judgment in favor of Defendants.

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[6] Nevada courts may not consider post-enactment statements, affidavits or testimony from sponsors regarding their intent. *See A-NLV Cab Co. v. State Taxicab Auth.*, 108 Nev. 92-95-96 (1992).

A. The Plain Meaning of Create, Generate, and Increase

This Court should consider the plain and ordinary meaning of "creates, generates, or increases" before considering Appellants' arguments against Assembly Bill 458's constitutionality.

"Create" means to "bring into existence" or to "produce." Merriam Webster's Collegiate Dictionary, 272." (10th ed. 1995). Similarly, "generate" also means to "bring into existence." *Id*. at 485. Here, Assembly Bill 458 continues existing taxes and fees at existing rates into future fiscal years. It also continues the identical amount of "subsection 4" tax credits. It does not "bring into existence" the challenged taxes or fees; they already existed in prior fiscal years. Instead, the terms "create" and "generate" apply to new taxes brought into existence by legislative action.

The Individual Defendants are left to assume that any argument Appellants have on the plain language of the supermajority provision necessarily relies on the term "increase," which means "to become progressively greater" or to "make greater." Id. at 589. Nothing within the supermajority provision defines how to measure an "increase" in "public revenue." Simple revenue increases resulting from Nevada's population and business growth do not require supermajority votes, as

demonstrated by prior Economic Forum projections.[7] For instance, the 2017 Economic Forum forecast shows a 7.6% increase in the total MBT before tax credits between FY 2016 and FY 2017.[8] As such increases have not required supermajority approval, Appellants' interpretation of "any" is overbroad and outside the understanding of Nevada's governmental system. Continuing existing taxes and fees at existing rates from one fiscal year to the next does not "make greater" "public

[7] Appellants' reliance on the term "any" (OB 35–36) is undermined by this basic fact, as this interpretation would render the Economic Forum projection process unconstitutional absent supermajority approval. Appellants' reliance on In re Opinion of the Justices, 575 A.2d 1186 (Del. 1990), in support of the "any" argument is also misplaced. There, the Delaware Supreme Court considered whether new or increased environmental impact fees violated Delaware's supermajority provisions, even though statutory authority to create or increase said fees predated the constitutional provision. Id. at 1188. Not surprisingly, based on the plain language of the supermajority provisions, the prior statutory authority to create or increase environmental impact fees now required supermajority approval. Id. at 1190. Delaware did not consider the applicability of freezing or repealing tax credits.

Instead, Nevada's supermajority provision, as interpreted here by the Individual Defendants, would not allow the creation or increase of environmental impact fees in a new fiscal year. Similarly, the supermajority provision, as intended, would require supermajority support for creating a new tax that did not previously exist, such as a wealth tax. The supermajority provision, as intended, would require supermajority support for increasing rates on existing taxes, such as the MBT tax or the Commerce tax.

[8] See General Fund Revenues – Economic Forum's Forecast for FY 2017, FY 2018, and FY 2019 Approved at the May 1, 2017, Meeting, Adjusted for Measures Approved by the 2017 Legislature (79th Session), available at: https://www.leg.state.nv.us/Division/fiscal/Economic%20Forum/EF%20May%202017%20Forecast%20with%20Legislative%20Adjustments%20(updated%2011-9-2017).pdf and JA 482-90.

revenue." At worst, the supermajority provision is ambiguous for failing to identify the appropriate baseline from which to measure an "increase."

Appellants' reliance on a fiscal note (Opening Brief (OB) 22–24) does not account for the continuity in the MBT's computational basis. And the total amounts of the existing "subsection 4" tax credits remained the same between fiscal years, subject to the identical first-come, first-served process under the Program. Assembly Bill 458 does not "create, generate, or increase" any public revenue in any form relative to the prior fiscal year. Because this complies with the plain language of the Nevada Constitution, the Court should enter judgment against Appellants and in favor of Respondents.

Further, there is no "carte blanche" provided to the Legislature by adopting the narrow interpretation, which does not render the supermajority provision a "nullity." OB 29–31. Instead, it narrowly interprets the Constitution as a limitation upon any legislative enactment that "creates, generates, or increases" tax rates or revenue from the baseline of one fiscal year to the next. If the supermajority provision had been intended to apply to enactments that maintain tax rates or revenue through the repeal of yet-inoperative provisions of law, it would have included a limitation upon the Legislature's ability to repeal prospective and still inoperative changes to tax rates, deductions, or exemptions. But there is no such language in the text of the Nevada Constitution.

Appellants' contention that this has no limitation because it would allow the Legislature to avoid the supermajority provision whenever it wished (OB 29–31) is simply untrue. If the Nevada Legislature wished to create a new tax for the upcoming biennial budget, such as the Warren "wealth tax," it would require supermajority approval. If the Nevada Legislature wished to increase the Commerce Tax rate for the upcoming biennial budget, it would require supermajority approval. Both address the reason for the supermajority provision: ensuring "no new taxes" is not a broken promise absent supermajority consensus.

However, Respondents' interpretation, as intended by the initiative, would not apply to continuing existing taxes at existing rates from one fiscal year to the next, absent a specific constitutional amendment requiring it. This interpretation is reasonable, based on the information before this Court.

B. Assembly Bill 458 Did Not Increase Revenue by Freezing Subsection 4 Tax Credits.

Assembly Bill 458 froze the amount of subsection 4 tax credits at $6,655,000. Maintaining the same amount of subsection 4 tax credits does not constitute an increase by its plain meaning.

The tax credits to which Appellants contend they are entitled never were operative and binding as a matter of Nevada law. Appellants merely presume an "existing tax structure" of decreased revenues from increased tax credits that had not yet become operative. Stated differently, no one could have applied for first-come,

first serve Program tax credits for the 2019 fiscal year until the 2019 fiscal year began.

Appellants' argument ignores the Nevada Constitution, which only allows a Legislature to commit public funds for each fiscal year it is in office, versus binding future Legislatures. See NEV. CONST., art. 9, § 2-3; *Employers Ins. Co. v. State Bd. of Exam'rs*., 117 Nev. 249, 254–58, 21 P.3d 628, 631–33 (2001). It is unlawful for any state officer or agency to attempt to bind the state government to any fiscal obligation in excess of the specific amount provided by law for each fiscal year by the Legislature. NRS 353.260(2).

Assembly Bill 458 did not change the amount of subsection 4 credits ($6,655,000) that the Department of Taxation was authorized to approve for fiscal year 2018. Instead, that amount remained the same for fiscal year 2019 (beginning July 1, 2019) and each fiscal year thereafter, unless a future Legislature changes that amount. Because the increased "subsection 4" tax credits were never in effect at the increased amounts as a matter of law, as set forth by the Legislature's counsel in its May 8, 2019 memorandum, Assembly Bill 458 maintains the existing "subsection 4" tax credit amount and accompanying revenue structure. JA 217–219; JA 150–173. This Court should affirm the district court's determination that Assembly Bill 458 did not decrease tax credits on this basis. JA 551.

III. Per Appellants, Decreasing Tax Credits Decreases State Revenue.

According to its supporters, including Appellants' counsel, decreasing tax expenditures on the Program results in a net decrease in Nevada revenue. Specifically, a senior policy analyst for the Nevada Policy Research Institute ("NPRI") testified in opposition to Assembly Bill 458. One argument NPRI made in support of the Program is that it "generate[s] a fiscal savings to the state in the long run." Assembly Committee on Taxation (4/2/2019) at 8 (JA 333). The same policy analyst submitted written testimony with the identical argument to that committee. See Ex. E to Assembly Committee on Taxation (4/4/2019) (JA 354). By the analyst's rationale, tax credits tend to generate a revenue surplus because of the overall cost savings associated with the Program drawing students out of public schools. If true, reducing available tax credits would tend to generate a revenue deficit. In short, reducing the tax credits would tend to decrease revenue, not increase it, relative to costs.

This theoretical relationship between tax credits and revenue surplus is also reflected in the "Description of Fiscal Effect" provided to the 2015 Legislature when creating the Program. There, the Department of Taxation was unable "to determine the impacts of revenue," including "the increase in tax revenue this bill may cause." JA 356. Ultimately, this demonstrates that there may be a positive correlation

between tax credits and surplus revenue, such that eliminating tax credits would tend to decrease revenue from a fiscal standpoint.

NPRI is not alone in making this argument. The United States Supreme Court considered the same issue in *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011). There, Appellants' counsel (Institute of Justice) represented successful parties. Specifically, IOJ argued that Arizona's Program "ultimately saves the state money." JA 364-365 (IOJ Br. (10/15/2010) at 13–14) (emphasis added). It does so by providing "savings the state realizes from being relieved of the duty to pay for participating children's educations." JA 364. Perhaps based on IOJ's arguments, the Supreme Court similarly stated that such tax credits "may not cause the State to incur any financial loss." 563 U.S. at 137.

The Program increased Nevada revenues by relieving Nevada of the duty to pay for children's educations now occurring at private schools. From a budgetary standpoint, the converse would also be true. By the logic of NPRI and IOJ, Assembly Bill 458's purported reduction in size would reduce Nevada revenue by returning the obligation to pay for children's education to the State. If its counsel's analysis is true, Appellants' asserted supermajority violation does not exist, making the supermajority issue moot for consideration in this case. This additionally supports the district court's conclusion that Assembly Bill 458 complied with the plain language of the supermajority provision.

IV. Collectively, the 2019 Nevada Legislature Significantly Increased Tax Credits for the Program.

Related statutes should be interpreted together, as though they were one law. See ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 252-55 (2012). Had the 2019 Legislature passed Senate Bill 551 and Assembly Bill 458 as one bill, rather than two, Appellants would have no constitutional argument premised on the increase of revenue from reducing Program tax credits. Simply put, there would be no "increase" as alleged. See JA 3, 8, 13 (Comp. at ¶¶ 4, 41, 123). Interpreting the two statutes separately makes no sense and is not required. This Court should reject Appellants' claim, which ignores the 2019 Legislature's overall treatment of the Opportunity Scholarship voucher program, which significantly increased tax expenditures for the voucher program, significantly decreasing Modified Business Tax revenues.

When the Legislature's intent is clear from the plain language, a court will give effect to such intention and construe the statute's language to effectuate, rather than nullify its manifest purpose. *Sheriff v. Luqman*, 101 Nev. 149, 155, 697 P.2d 107, 111 (1985). Nevada courts "construe statutes, if reasonably possible, so as to be in harmony with the constitution." *Thomas v. Nev. Yellow Cab Corp.*, 327 P.3d 518, 521 (Nev. 2014) (internal quotations omitted). Nevada courts "adhere to the precedent that every reasonable construction must be resorted to, in order to save a

statute from unconstitutionality." *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 552 (2010) (internal quotation marks omitted).

The 2019 Legislature's intension for Opportunity Scholarship voucher tax credits is clear. It increased their amount by more than $7 million as a matter of public record. But for the Legislature choosing to do in two contemporaneous bills what it undoubtedly could have done in one bill, Appellants have no claim. This Court should accordingly affirm the district court's conclusion that Assembly Bill 458 did not require supermajority approval.

Assembly Bill 458's freeze of subsection 4 tax credits from one fiscal year to the next did not increase revenue because any future increase purportedly required by a prior Legislature was not yet legally operative and binding. JA 551.

V. The Legislature's Interpretation Is Reasonable and Entitled to Deference.

A. The History, Public Policy, and Reason Behind the Supermajority Provision Supports the Legislature's Narrow Interpretation.

Appellants do not seriously challenge the history, public policy, and reason behind the supermajority provision. Following President Bush's broken promise of "no new taxes," supermajority provisions (including Nevada's) proliferated throughout the United States. As set forth above, the supermajority provision arose from anti-tax fervor associated with President Bush's broken promise of "no new taxes." Gibbons led the Nevada charge for the supermajority provision, emphasizing

its effect on new or additional taxes, noting it did not apply to existing taxes. See JA 129, 136. The initiative information provided to Nevada voters similarly made it clear that they intended the provision for "raising" or "increasing taxes," particularly from "new sources of revenue." JA 141–148. The clear purpose and public policy behind the supermajority provision was to prevent "new taxes," not to prevent reductions in tax expenditures on private school education vouchers.

This Court should not ignore this clear history, because it contends that it is difficult to ascertain the intent of voters and because the supermajority provision's textual meaning is clear. OB 39–40. The State agrees that if this Court determines that the plain language is clear and unambiguous that there is no need to consider the historical record. However, if the plain language is not clear and subject to multiple reasonable, yet conflicting interpretations, this Court is tasked with this consideration to determine whether the Legislature's interpretation is reasonable, such that it is entitled to deference.

Instead of remaining faithful to the undisputed historical record, Appellants attempt to broaden the public policy and reason behind the supermajority provision to account for their desire that it apply to the elimination of tax credits by arguing that the explanation for AJR 21 stated that it was proposed to apply to "increase[s in] certain existing taxes." OB 41. However, as already noted, this case does not concern tax increases. All MBT taxpayers are subject to the identical rate as the last

fiscal year, with the same right to apply for "subsection 4" tax credits on a first-come, first-served basis. Simply put, AJR 21 did not address potential future changes in tax credits.

The State's interpretation of the supermajority provision is the most reasonable.

B. Other States' Interpretation of Similar Supermajority Provisions Supports the Legislature's Narrow Interpretation.

1. No Other State Has Interpreted a Supermajority Provision as Broadly as Appellants Absent Specific Language for Tax Credits.

Nevada is not alone when attempting to interpret similar supermajority provisions, just as it was not alone when adopting such provisions in the 1990s. Other states have consistently interpreted these provisions narrowly as a limited exception to majoritarian rule. Appellants have not identified any state interpreting a supermajority provision in a contrary fashion for continuing existing tax credits into future fiscal years or from elimination of tax credits. Review of the applicable plain language highlights why.

As addressed earlier, "increase" is Appellants' sole possible plain language argument for their reading of the supermajority provision applying to the freeze of "subsection 4" tax credits. In this context, there is no meaningful distinction between "raising revenue" and "increase public revenue." Seeing how other states interpret

"raising revenue" may be instructive for a court when attempting to analyze Nevada's similar supermajority provision. Neither Oklahoma nor Oregon limit the term "raising," similar to how Nevada does not limit the term "increase." There is no conflict amongst these supermajority provisions.

Under such circumstances, Oklahoma's analysis that deleting the "expiration date of [a] specified tax rate levy" was not subject to its supermajority provision is persuasive authority for a court to consider when interpreting Nevada's supermajority provision. *Fent v. Fallin*, 345 P.3d 1113, 1114-17 n.6 (Okla. 2014). Oklahoma's analysis that eliminating exemptions from taxation (akin to eliminating Program tax credits) was not subject to its supermajority requirement is also persuasive authority supporting narrow interpretation of Nevada's supermajority provision. *Okla. Auto Dealers Ass'n. v. Okla. Tax Comm'n.*, 401 P.3d 1152, 1155 (Okla. 2017). While Appellants argue that Oklahoma's decisions are premised on a narrower supermajority provision (OB 42–44), Oklahoma's supermajority provision states that "[a]ny revenue bill . . . may become law . . . if such bill receives [supermajority] approval." OKLA. CONST. art. 5, § 33. For purposes of raising revenue, there is no textual difference between Nevada and Oklahoma's supermajority provision. There is no textual reason why Nevada should not recognize the same distinction between revenue bills and tax exemptions for purposes of its supermajority provision. The district court correctly held that

"Oklahoma's supermajority provision is at least as equally as broad as the Nevada Supermajority Provision" and that Appellants' interpretation "is inconsistent with the interpretation by the Oklahoma Supreme Court." JA 559.

Oklahoma was not alone in its interpretation either. Similarly, Oregon's conclusion that eliminating a tax exemption for out-of-state electric utility facilities was not subject to its constitutional supermajority provision is persuasive authority supporting narrow interpretation of Nevada's supermajority provision. *City of Seattle v. Or. Dep't of Revenue*, 357 P.3d 979, 980 (Or. 2015). While Appellants argued to the district court that Oregon's precedent is premised on a narrower supermajority provision (see JA 297), Oregon's supermajority provision simply states that "Three-fifths of all members elected to each House shall be necessary to pass bills for raising revenue." OR. CONST. art. IV, Sec. 25(2). For purposes of raising revenue, there is no textual difference between Nevada and Oregon's supermajority provision. This further supports the district court's order and justifies affirmance by this Court.

2. Appellants' Reliance on Other States' Supermajority Provisions that Specifically Address Tax Credits is Misplaced.

Appellants' citations to other states' supermajority provisions do not undermine the Individual Respondents' reading of Nevada's provision – they reinforce it. As Appellants point out, Arizona, Florida and Louisiana all have

constitutional provisions that explicitly refer to reductions in tax credits or exemptions. OB 45–47.[9] Nevada's supermajority provision could have done the same thing. That the drafters of Nevada's provision chose a different course by not explicitly referring to tax credits or exemptions shows that the provision does not apply to reductions in tax credits or exemptions. *See Comm'r v. Beck's Estate*, 129 F.2d 243, 245 (2d Cir. 1942) (rejecting an interpretation that violated "[t]he familiar 'easy-to-say-so-if-that-is-what-was-meant' rule of statutory interpretation").

Furthermore, the Individual Respondents do not understand Appellants' arguments pertaining to Florida, as it does not indicate what the purpose of Nevada's supermajority provision might have been when adopted in the 1990s. OB 46. Florida's supermajority provision was adopted in 2018, twenty-two years after Nevada adopted its supermajority provision. With due respect to Nevada's "founding father" of the supermajority provision, now-former Governor Gibbons

[9] Specifically, Appellants cite article 9, section 22 of the Arizona Constitution; article 7, section 19 of the Florida Constitution; and article 7, section 2 of the Louisiana Constitution. *Id*. The Arizona provision explicitly applies to the "reduction or elimination of a tax deduction, exemption, exclusion, credit or other tax exemption feature." ARIZ. CONST. art. 9, § 22(B)(3). The Florida provision explicitly applies to laws "decreas[ing] or eliminate[ing] a state tax or fee exemption or credit." FLA. CONST. art. 7, § 19(d)(2)(c). And the Louisiana provision explicitly applies to the "repeal of an existing tax exemption." LA. CONST. art. 7, § 2. There is no analogous language in Nevada's supermajority provision. See NEV. CONST. art. 4, § 18(2).

could not have contemplated Florida's 2018 supermajority provision or "based" it on what Florida ultimately did in 2018.

In *Arpaio v. Maricopa County Bd. of Supervisors*, 238 P.3d 626, 632 (Ariz. 2010), the Arizona Supreme Court recognized that the intent of its supermajority provision "was to prevent the legislature from enacting without a super-majority vote any statute that increases the overall burden on the tax and fee paying public." Id. On that basis, the Arizona court rejected Sherriff Arpaio's challenge of funds already within the government's possession as a violation of the supermajority provision. *Id*. Similarly, where the overall burden on the tax- and fee-paying public is the same, with the sole difference being funds spent as tax expenditures versus state appropriations, the Arizona decision supports the Individual Respondents' interpretation of the Nevada supermajority provision.

Likewise, Louisiana courts have not applied the supermajority provision to suspension of tax exemptions. See *La. Chem. Ass'n v. State ex rel. La. Dep't of Revenue*, 217 So. 3d 455, 462–63 (La. Ct. App. 2017). The Individual Respondents' position is even stronger because here, the subsection 4 tax credits have not even been suspended by the Nevada Legislature. Instead, the subsection 4 tax credits have simply been frozen at the existing level from the prior biennial budget, with a significant increase in other Program tax credits by Senate Bill 551.

Appellants' failure to find contrary persuasive authority pertaining to the elimination of a tax exemption as subject to a supermajority provision highlights the reasonableness of the Legislature's interpretation, warranting affirmance by this Court.

C. The Legislature, Relying on the Specific Advice of its Counsel, is Entitled to Deference.

Nevada courts construe statutes, if reasonably possible, so as to be in harmony with the constitution." *Cornella v. Justice Court*, 132 Nev. ——, 377 P.3d 97, 100 (2016) (internal quotation marks omitted). Stated differently, Nevada courts "adhere to the precedent that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 552 (2010) (internal quotation marks omitted). The Nevada Constitution "must be strictly construed in favor of the power of the legislature to enact the legislation under it." *In re Platz*, 60 Nev. 296, 308 (1940). This is particularly true where the Legislature acts upon the opinion of its Legislative Counsel. *Nev. Mining Ass'n v. Erdoes*, 117 Nev. 531, 540 (2001). The district court agreed. While recognizing that this Court cautioned against "unqualified deference to the Legislature" in *Clean Water Coal. v. The M Resort, LLC*, 127 Nev. 301, 255 P.3d 247 (2011), the district court held that "if the Court finds both the Appellants' and the Defendants' interpretation are reasonable, but inconsistent or contradictory, the

Court must give deference to the Nevada Legislature's reasonable interpretation," citing to Nev. Mining. JA 549.

Appellants entirely ignore this aspect of the district court's order in their brief, refusing to consider why deference makes sense within Nevada's constitutional structure.

Specifically, Nevada courts do this because of the significant power vested in the Legislature under the Nevada Constitution, consistent with constitutional requirements for republican forms of government and majoritarian rule. The United States Constitution guarantees that each State shall have "a Republican Form of Government." U.S. CONST. art. IV, § 4. Nevada generally requires that "a majority of all the members elected to each house is necessary to pass every bill or joint resolution." NEV. CONST. art. 4, § 18(1). Prior to the 1990s, all bills required majority support.

As noted by James Madison in the Federalist Papers:

> In all cases where justice of the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule; the power would be transferred to the minority. Were the defensive privilege limited to particular cases, an interested minority might take advantage of it to screen themselves from equitable sacrifices to the general weal, or in particular circumstances to extort unreasonable indulgences.

THE FEDERALIST NO. 58, at 397 (James Madison).

Here, Appellants disagree with how the Legislature interpreted Nevada's Constitution. Because the Legislature's interpretation is reasonable and the Legislature relied upon the specific advice of its counsel, this Court should defer to the Legislature's interpretation. Even if it would not be this Court's preferred interpretation, deferring to the Legislature will allow Nevada's true sovereign, the People, to ultimately decide the wisdom of the 2019 Legislature's decisions.

Because the district court concluded, "at the very minimum, the Nevada Legislature's interpretation is reasonable, even if the Court does not agree with the wisdom of the Nevada Legislature," the interpretation is entitled to deference and provides further justification for this court to affirm the district court's order. JA 549.

CONCLUSION

This Court should affirm the district court's order granting summary judgment in favor of Respondents because the Legislature's acts comply with Article IV, Section 18(2) of the Nevada Constitution.

Dated this 24th day of September, 2020.

AARON D. FORD
Attorney General

By: /s/ Craig A. Newby
CRAIG A. NEWBY
Deputy Solicitor General
Office of the Nevada Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
(702) 486-9246, cnewby@ag.nv.gov
Attorneys for Respondents State of Nevada

CERTIFICATE OF COMPLIANCE

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Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 24th day of September, 2020.

AARON D. FORD
Attorney General

By: /s/ Craig A. Newby
CRAIG A. NEWBY
Deputy Solicitor General
Office of the Nevada Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
(702) 486-9246
cnewby@ag.nv.gov
Attorneys for Respondents
State of Nevada

CERTIFICATE OF SERVICE

Pursuant to NEV. R. APP. P. 25(5)(c), I certify that I am an employee of the Office of the Attorney General and that on this 24th day of September, 2020, I served a copy of the foregoing **RESPONDENT STATE OF NEVADA'S ANSWERING BRIEF**, by electronic service to all parties associated with this case who are registered with this Court's electronic service, and by U.S. mail, postage prepaid, to all other parties:

Kevin Powers
kpowers@lcb.state.nv.us

Matthew Dushoff
mdushoff@nvbusinesslaw.com

Joshua House
jhouse@ij.org

Timothy Keller (via U.S. Mail)
398 S. Mill Ave., Suite 301
Tempe, AZ 85281
tkeller@ij.org

/s/ *Renee Carreau*
An employee of the Office of the Nevada Attorney General